

Unclassified

DAF/COMP/WP3/WD(2016)60

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

24-Oct-2016

English - Or. English

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

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

#### **AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE**

-- Note by Estonia --

**28-29 November 2016**

*This document reproduces a written contribution from Estonia submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm](http://www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm)*

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: [despina.pachnou@oecd.org](mailto:despina.pachnou@oecd.org)].

**JT03403528**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/WP3/WD(2016)60  
Unclassified

English - Or. English

-- ESTONIA --

**1. Prohibited concentrations**

1. The Estonian Competition Authority has prohibited two concentrations during its history (merger control since 2001). The first prohibition decision was issued in 2008. The case concerned the acquisition by a pharmacy chain Terve Pere Apteek OÜ (that belonged to the largest wholesaler of pharmaceuticals in Estonia – AS Magnum Medical) of a small pharmacy (OÜ Saku Apteek).

2. The concentration was prohibited due to the anticompetitive tendency, although the target's market share on the market for retail sale of pharmaceuticals was below 1%. The tendency was that vertically integrated groups (one group owns both wholesale level and pharmacies) little by little are taking control over pharmacies. The result of such transactions was strengthening of the market power horizontally on the market for pharmacies services and vertically on the wholesale level because pharmacies that belong to the group will procure majority of the medicines from their own group.

3. In 2011, the Competition Authority prohibited a two-to-one concentration in the postal services market (*AS Eesti Post / AS Express Post*).

4. AS Eesti Post is a state-owned incumbent postal operator, providing universal service, express mail delivery service, direct mail delivery service, letter delivery service and other postal services (incl. home delivery of periodicals).

5. AS Express Post was jointly controlled by two leading media groups in Estonia and provided the service for the home delivery of periodicals, direct mail service and letter delivery service. AS Eesti Post proposed to acquire sole control of AS Express Post and if the concentration had been permitted, there would be only a monopoly undertaking in Estonia to provide postal services (apart from express mail services). The Competition Authority analysed the competitive situation in the area of postal services and it was proved that the competitive pressure of AS Express Post imposed on AS Eesti Post had been beneficial for the competition and customers.

6. During the Phase 2 proceedings and in response to the Statement of Objections by the Competition Authority, AS Eesti Post first submitted efficiency claims and thereafter proposed remedies. The efficiency claims were very general, mainly stating savings in the administrative costs and did not indicate how it would enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition. As the proposed behavioral remedies were also very general and did not indicate how the distortion of competition would be removed, the concentration was prohibited.

7. In 2013 almost prohibited a concentration in the cinemas market – the parties withdrew the notification a day before a prohibition decision would have been issued. There are two multiplex cinemas in Tallinn and Forum Cinemas AS proposed to acquire Solaris Kino OÜ, its only considerable competitor. In addition to the two multiplexes owned by the merging parties, there were also a couple of smaller players in the market for showing films at cinemas in Tallinn and its vicinity. As a result of the merger, Forum Cinemas AS would have gained a market share of over 90%. Solaris Kino OÜ entered the market at the end of 2009 and this has been a good example on the positive effect of competition consumers – the prices of cinema tickets dropped drastically and the number of visitors increased significantly.

8. The Competition Authority was of the opinion that the merger would significantly restrict competition despite the behavioural remedies proposed by the parties and the parties withdrew the merger notification.

9. Regarding cases where remedies have been accepted, in the history of the Competition Authority the current total number of decisions including remedies is eight, which is relatively small when comparing to NCAs in larger jurisdictions. In six cases the proposed remedies were behavioral and in two cases structural.

## **2. “Best practice” documents or guidelines**

10. At present there are no guidelines on prohibition and remedies. The Competition Authority relies to a large extent upon the relevant documents of the European Commission.

## **3. Challenges in the design of remedies**

11. In a small country, there may be difficulties with finding an acceptable purchaser in case of divestment (consolidated nature of certain industries excludes most incumbents from being considered as potential purchasers).

12. Also timing used to be a challenge in the proceedings of concentrations where remedies were submitted at a late stage of the proceedings. For example, when remedies were submitted two weeks before the final deadline (as it was in the case of prohibition in the postal services market), there was not sufficient time to market test the remedies. In this particular case the Competition Authority was able to assess the remedies and conclude their incompatibility even without market testing, but taking this practice into account the Competition Authority proposed to amend the Competition Act. Since July 2013, there is also a possibility to suspend the merger proceedings for the assessment and possible market testing of remedies. The proceedings can be suspended once for up to two months.

## **4. Decisions appealed to the court**

13. No decisions including remedies have been appealed and also the second prohibition decision (in the postal services market) was not appealed. The case that was appealed was the first prohibition decision of the ECA (pharmacies services market). The case is interesting in the sense that it was notified under Article 24(7) of the Competition Act (the so-called two-year rule), which is an additional criterion to control concentrations in such economic sectors, where the aggregate turnover of undertakings is relatively small or where there is a large number of undertakings with a small turnover.

14. According to Article 24(7) of the Competition Act, 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.

15. The reality is that if we did not have Article 24(7) and the two-year rule in the Competition Act, the concentration would not even have been notified and the ECA would not have had any possibilities to intervene. The case was appealed, but finally the main issue of the dispute was related to the interpretation of two-year rule and whether after the period of two years had passed the acquiring company could complete transaction without the approval of the Competition Authority. The case was pending in the court for several years and no court decision was finally issued regarding the substance.

## **5. Consideration of the opinion of third parties**

16. According the Competition Act, The Competition Authority shall publish a notice concerning receipt of a notice of concentration and the decisions made based in the publication *Ametlikud Teadaanded*. Interested parties have the right to submit opinions and objections to the Competition Authority within seven calendar days as of publication of a notice concerning receipt of a notice of concentration.

17. In case several objections are submitted (as was in the postal services case), it may be an indication that the transaction might be problematic.

18. Regarding market testing, as of July 2013, there is a possibility to suspend the merger proceedings for the assessment and possible market testing of remedies for up to two months, the Competition Authority has used this possibility and sent questionnaires to market participants. But our experience is still very limited and no final conclusions should be made yet.

## **6. Mechanism to minimize the risk of ineffective remedies**

19. The Estonian Competition Authority only has a limited experience with remedies and the experience with structural remedies is even more limited (eight cases with remedies, of which two were structural). As mentioned before, in a small country divestiture is often not an option because no acceptable purchasers exist. In case of behavioral remedies, one issue that should be taken into account is the possible burden of monitoring the remedies, which in case on more complex remedies might be a challenge to a small authority.