

The International Comparative Legal Guide to: **Merger Control 2009**

A practical insight to cross-border merger control issues



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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority (ies)?

The Competition Council of the Republic of Lithuania (“CC”) (www.konkuren.lt) is the principal body supervising compliance of mergers with the competition control legislation of Lithuania. It is responsible for all stages of the decision-making process. The merger control legislation is also applied by the Vilnius Regional Administrative Court (the “Court”) while reviewing decisions of the CC.

1.2 What is the merger legislation?

The primary national legal act regulating merger control is the Law on Competition of the Republic of Lithuania (the “Law”). The current edition of the Law, drafted under the principles of the EU Competition legislation, came into force on 1 May 2004 as Lithuania joined the EU and no reforms to the legislation are expected in the near future. The Law is followed by secondary legislation adopted by the CC (CC Resolution on Approval of the Procedures for Submission and Examination of Notification of Concentration and Calculation of Aggregate Turnover (27/04/2000, No. 45, amended on 13/01/2005)).

1.3 Is there any other relevant legislation for foreign mergers?

No. All foreign mergers are subject to the Law (also see question 1.4).

1.4 Is there any other relevant legislation for mergers in particular sectors?

There are some legal acts indirectly regulating mergers in particular sectors such as electricity, gas, heat energy and water supply, banks, insurance, telecommunications, transportation, medical and pharmaceutical services, etc. The supplementary merger control in these sectors usually means the necessity to comply with registration requirements, to get the appropriate licence/approval/consent or just to notify a certain official supervisory institution.

Also the special legislation indicates the list of state enterprises, which have a strategic importance for national security and may therefore be reorganised only under special law adopted by the Parliament of the Republic of Lithuania.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of “control” defined?

The concentration meeting the thresholds defined by the Law (see question 2.4), is subject to concentration control. The following transactions shall fall within the scope of concentration:

- a) Mergers:
 - i) when one or more undertakings that terminate their activity *are joined* to one undertaking; or
 - ii) when a new undertaking is established out of two or more undertakings that terminate their activity.
- b) Acquisition of control.

Mainly, control is acquired when:

- a new undertaking is set up;
- when one or more of the undertakings concerned or one and the same natural person(s), already having the right of control in one or more undertakings subject to concentration, acquire another undertaking (whole enterprise or a part of it), all or a part of the assets of the undertaking or a part of its shares which, including previous acquisitions, constitute 1/4 or more of the authorised capital or confer 1/4 or more of all the voting rights; or
- when the undertakings pursuant to an agreement: (i) jointly set up a new undertaking; (ii) establish a common management body or any administrative subdivision; (iii) when due to the decisions taken, they will have a half or more of the same members in any management body; (iv) when they commit themselves to co-ordinate decisions concerning their economic activity or to transfer to each other the whole or a certain part of profit; (v) when they confer to each other the right to dispose of all or a part of their assets; or (vi) when they otherwise acquire control of another undertaking.

In general, “control” means any rights arising from laws or contracts that entitle a legal or natural person to exert a decisive influence on the activity of the undertaking, including ownership or the right to use all or part of the assets of the undertaking, as well as other rights which confer decisive influence on the decisions or the composition of the undertaking’s managing bodies.

2.2 Can the acquisition of a minority shareholding amount to a “merger”?

Yes. When person(s), already having the right of control in one or

more undertakings subject to concentration, acquire another undertaking, its assets or shares which, including previous acquisitions, constitute 1/4 or more of the shareholding, this transaction shall fall within the scope of concentration (see question 2.1).

2.3 Are joint ventures subject to merger control?

The Law is applied to all types of joint ventures (“full function” and “non-full function”) if their activities restrict competition in the domestic market of Lithuania. Therefore the notice to the CC should be submitted if the turnover of a joint venture meets the thresholds defined by the Law (see question 2.4).

2.4 What are the jurisdictional thresholds for application of merger control?

The intended concentration is subject to control and must be notified to the CC if BOTH conditions are satisfied: (i) the combined aggregate income of the undertakings participating exceed 30 million Lithuanian litas (app. €8.69 million; US\$13.67 million) for the financial year preceding concentration; AND (ii) the aggregate income of each of at least two undertakings concerned is more than 5 million Lithuanian litas (app. €1.45 million; US\$2.28 million) for the financial year preceding concentration. [The official exchange rate for LTL/EUR is fixed: LTL 1 = EUR 3.4528 (<http://www.lb.lt/exchange/default.asp?lang=e>). The exchange rate of June 2008 for LTL/US\$ is used: LTL 1 = US\$2.1938 (indicated by the Bank of Lithuania http://www.lb.lt/eng/statistics/exchange_last_daye.html).]

The participating undertakings are:

- in case of mergers - each merging undertaking;
- in case of acquisition or strengthening of control by buying the assets or the shares of the undertaking - the acquiring/strengthening control undertaking(s)/person(s) and the target; and
- in case of acquisition of control in other manner (see question 2.1) - all parties to the particular contract.

The turnover calculated must encompass all business activities of the undertaking concerned. The income of the Lithuanian undertaking shall be calculated covering the worldwide product markets. Yet the aggregate income of the undertaking of a foreign state shall be calculated as the total sum of income received on the product market of Lithuania. The turnover of the undertakings associated to the participating ones must also be covered.

In cases of acquisition of a part of the undertaking (enterprise) or of the assets thereof, also in cases of referral of the right to dispose of a part of its assets, the aggregate income shall be calculated proportionately to the part of the assets acquired/disposed.

The Law provides with a few special rules for the calculation of the aggregate turnover of undertakings engaging in insurance, collective investment or companies’ managing activities.

2.5 Does merger control apply in the absence of a substantive overlap?

Under the Law, the market share test is not applied as the criteria for concentration (merger) control. Therefore merger control applies even if the horizontal concentration in the market does not increase.

2.6 In what circumstances is it likely that transactions between parties outside Lithuanian jurisdiction (“foreign to foreign” transactions) would be caught by your merger control legislation?

Under the Law, merger control is equally applied both to the national undertakings and to the ones having no local presence in Lithuania if their activity restricts or may restrict competition in the domestic market of Lithuania.

In practice the notifications of “foreign-to-foreign” transactions are not common; nevertheless they are submitted to the CC. However, if the merger is not announced publicly and if there are no complaints from third parties about it, then the possibilities of the CC to identify the “foreign-to-foreign” transaction that ought to have been but was not notified, are, however, limited.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The CC may, on its own initiative, obligate the undertakings to submit notifications for a concentration even though the established gross income thresholds are not exceeded, where it becomes probable that the concentration will result in the creation or strengthening of the dominant position or a significant restriction of competition in the relevant market.

The EC merger control takes precedence over Lithuanian merger control where the thresholds established by the EC Merger Regulation are met.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Lithuanian legislation doesn’t provide any special provisions or principles - the provisions of the EC Merger Regulation should be applied.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

If a concentration meets the jurisdictional thresholds, notification is compulsory and must be notified prior to the actual implementation of it (see question 3.5).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

The exceptions where clearance is not required are the following:

- Mergers, where credit institutions, intermediaries of public trading in securities, collective investment undertakings or companies managing them, or insurance companies, acquire more than 1/4 of shares in another enterprise or insurance company with an intention to resell them, provided that they do not exercise voting rights in respect of those shares and that the resale takes place within one year. However, the information of such an acquisition must be submitted to the CC not later than one month thereafter.
- Mergers, where relevant public authorities take over the control of undertakings in case of bankruptcy or rehabilitation of enterprises.

- Mergers, where the composition of controlling shareholders and existing control does not change.
- Acquisition of an insignificantly larger shareholding than notified after the approval of concentration due to unforeseen circumstances. An insignificantly larger shareholding shall be considered as acquisition of such shareholding, which grants the shareholder no additional rights, including the right to appoint more members of the management bodies, and consequently does not change (strengthen) the existing control.

Besides, no clearance is required if the transaction restricts the competition in foreign markets only (except if the international agreements provides the contrary).

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

According to the Law, the implementation of concentration without the clearance of the CC is forbidden. Furthermore, all the transactions and actions of the undertakings/persons participating in the concentration shall be deemed null and void if they were finalised without the notification or prior to clearance from the CC being received.

In case the transaction subject to the concentration control is implemented without prior notification or is notified but the clearance has not been awaited, it shall be held as the infringement of the Law and shall lead to the investigation and imposition of penalties.

Upon establishing failure of a filing, the CC may:

- a) obligate the undertaking to end the illegal activity, to carry out actions restoring the previous situation or eliminating the consequences of concentration (to sell the enterprise, assets, shares or a part thereof, to reorganise the enterprise, to cancel or change contracts, etc.) during the set time limit and according to the conditions established by the CC; and/or
- b) impose fines upon the undertaking up to 10 per cent of its gross annual income in the preceding business year.

In case the undertaking fails to implement or does not implement in time the above mentioned orders of the CC, the CC may impose a fine of up to 5 per cent of the average gross daily income in the preceding business year for each day of commission (continuation) of infringement. Moreover, upon being issued an authorisation by the court, the CC may by its resolution suspend export-import operations, bank operations, the validity of the permit (licence) to engage in certain economic activity of the undertakings that fail to execute the sanctions imposed by the CC. The restrictions are cancelled after the implementation of the penalties imposed.

The Code of Administrative Offences of the Republic of Lithuania ("CAO") establishes a fine of 20,000-50,000 Lithuanian litas (app. €5,790-14,480; US\$9,117-22,792) to the manager of the undertaking for failing to submit the notification on concentration.

The undertakings violating the Law may also be sued in civil court for the compensation of damages caused to the third parties.

In fact, no penalties have been imposed by the CC on foreign-to-foreign mergers. Since 2000 only two Lithuanian undertakings have been fined for the failure of filing. The penalties were equal to LTL 3,000 (app. €869; US\$1,368) and LTL 70,000 (app. €20,273; US\$31,908).

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

No, it is not. According to the Law all mergers, including ones being part of global mergers that meet the thresholds must be granted a clearance prior to their implementation.

3.5 At what stage in the transaction timetable can the notification be filed?

Concentrations must be notified prior to the implementation of it. Thus, the notification could be made after the submission of the proposal to conclude the agreement, acquire the shares or assets, acquire ownership or the right to dispose of certain assets, etc. The notification may also be submitted in case of a good faith intention to conclude the agreement or announce a public bid to buy-up shares.

To save time, it is worth applying to the CC as soon as all the basic conditions of the merger are clear.

3.6 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Law establishes two phases of examination of the notification of the concentration. The initial examination period may not last more than one month after receipt of a proper notification. Within this period the CC either permits the concentration or adopts a decision for further examination, which may additionally last up to three months. The CC may upon a duly grounded request of the person notifying the concentration, extend the term for the further examination for one more month for the purpose of passing a decision to permit the implementation of concentration under the conditions and obligations for the notifying person.

In case the undertaking needs to proceed with particular actions, it may, upon justified request, apply to the CC for clearance to exercise individual actions of concentration (to transfer the shares, to vote by the shares acquired, to pay for the assets acquired, etc.). The CC must within 7 days examine the request and pass a resolution to comply with the request or deny it.

In fact, the examinations take 1 month on average.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

No concentration can be implemented before the clearance of the CC is received. The disobedience of the latter shall be deemed as an infringement of the Law and shall be subject to the sanctions (see question 3.3).

The CC may, upon justified request of a participating undertaking, permit them to proceed with particular actions of concentration prior to the general clearance for the concentration being issued. In practice, the permit to exercise individual actions is granted only if the conditions of the concentration are clear, the positive final decision on the concentration is strongly believable and the failure to perform such actions would have a strong negative impact on the undertaking concerned.

The persons who submitted notification on concentration must be informed in writing of the resolution to permit the concentration notified or to refuse to grant permission. As regards to the CC's right to obligate the undertakings to submit notifications on concentration not exceeding the established gross income thresholds (see question 2.4 above), the CC may pass an individual decision to apply the concentration control procedure only in cases where no more than 12 months have passed from the implementation of the concentration in question.

3.8 Where notification is required, is there a prescribed format?

The notification on concentration must be filed in the standard form, approved by the CC. The standard form in English is published on <http://www.konkuren.lt/english/merger/legislation.htm>.

The notification of concentration must cover:

- the true and complete registration data of the undertakings participating in the concentration;
- reasons and objectives of the concentration;
- description of the way of the concentration;
- data of the enterprises owned by each participating undertaking or the enterprises owned by controlling persons, as well as data on the enterprises of which they are shareholders;
- annual financial accounts and purchase and sale volumes for the preceding three years prior to concentration of each undertaking participating and evaluation of their market share in a relevant market; and
- the list of the major purchasers and suppliers as well as the main competitors in the relevant markets of each undertaking participating.

The notification should be accompanied by the documents related to the notified concentration (proposals, letters of intent, agreements, financial accountabilities, etc.) and with the documents confirming the payment of the established fee for the submission and examination of the notification (see question 3.9).

The supporting documents may be originals or copies thereof, which authenticity must be confirmed by the notifying party itself, and must be submitted in the language in which they are executed by attaching the translation into Lithuanian with the approval of its authenticity if the documents are executed in a language other than Lithuanian. The documents supplementing the notification of foreign undertakings (annual accounts, market research reports, etc.) may be submitted in English.

Although there is no possibility to submit the notification in draft, the CC offers pre-notification consultations on the rules for submission of notifications both in oral and in writing. The CC regards such consultations very seriously, since they facilitate and shorten the procedures for the review of concentrations.

3.9 Is there a short form or accelerated procedure for any types of mergers?

No, the Lithuanian legislation doesn't provide any short form or accelerated procedure. However, the parties interested in speeding up the official clearance procedure may enter into pre-notification consultations with the CC (see question 3.8).

3.10 Who is responsible for making the notification and are there any filing fees?

A notification on intended concentration must be submitted:

- personally by the controlling person participating in concentration in cases of acquisition of whole or parts of the enterprise, assets or shares; or
- jointly by all undertakings participating in concentration in cases of mergers and of acquisitions of another undertaking's control in other manners.

From 1st July 2008 the fee for clearance equals to 4,600 Lithuanian litas (app. €1,187; US\$2,097) and must be paid before the submission of the notification.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test indicated in the Law and applied to all the concentrations concerned, is similar to the EC Merger Regulation and is whether the concentration subject to notification will establish or strengthen a "dominant position" or whether it will result in a "substantial restriction" of competition in relevant market.

Unless proved otherwise, the undertaking with the market share of not less than 40 per cent shall be considered to have a dominant position in the relevant market. There is also a rebuttable presumption of dominance of each undertaking of a group of three or a smaller number of undertakings with the largest shares of the relevant market when these undertakings jointly hold 70 per cent or more of the relevant market.

The dominant position of the undertakings and substantial restriction of competition in relevant market shall be assessed according to the Explanations on the Determining of the Appropriate Market and Dominant Position approved by the CC and based on the EU legislation and appropriate Notices of the European Commission.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Having received notification of concentration, the CC publishes an announcement on it in the official newspaper "Valstybes žinios" (Official Gazette), indicating the nature of concentration and the parties concerned. Within two weeks from the public announcement of the notification all interested persons may submit to the CC their explanations and objections concerning the intended concentration. The persons that have submitted written objections on the concentration have a right to get acquainted with the case of the examination of a concentration except the information constituting the commercial secret, also to present explanations and to request participation in the procedural meeting of the CC and be heard.

Moreover, any third person whose interests were infringed by the concentration effected without notifying or without getting a clearance or in breach of the established conditions or obligations stated has the right to initiate investigation of restrictive practices.

At the stages of investigation and hearing of the case on restrictive practices the parties to the proceedings have the right to be heard and to give explanations both in writing and orally, to get acquainted with written findings of the investigating officer and the documents of the case, except the ones containing commercial secrets. Furthermore, the hearings of cases at the sessions of the CC are public usually; therefore all the interested persons may get acquainted with the essence of the concentration.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

When examining a merger, the CC is entitled to obtain from any undertakings/controlling persons, public and private authorities' documents, information and oral or written explanations related to the concentration concerned and necessary for adopting a final decision.

The officials of the CC also have the right to enter and check the premises, land and means of transport used by the undertaking, to inspect or take possession of any documents and articles having

evidential value in the investigation of the case, etc.

Instructions and orders given by the authorised officers of the CC are obligatory to the undertakings they are addressed to, as well as to their management and administrative staff, since the non-compliance with them may result in a fine of up to 1 per cent of the gross annual income of the undertaking in the preceding business year.

The CAO also establishes that the manager of the undertaking, interfering with the officials of the CC to exercise their functions of or failing to implement their instructions, may be fined 500-5,000 Lithuanian litas (app. €145-1,448; US\$ 228-2,279).

The undertaking participating in the concentration must present in time the complete and correct information to the CC. The undertakings failing to fulfil this obligation may, firstly, be fined up to 5 per cent of the average gross daily income in the preceding business year for each day of commission (continuation) of the infringement. Secondly, the undertakings presenting incomplete or misleading information may be fined up to 1 per cent of the gross annual income of the undertaking in the preceding business year. And finally, the CC may amend or revoke the resolution on clearance of concentration if such resolution has been adopted based on incorrect or incomplete information submitted by undertakings.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The CC has a right to obtain from any undertakings and persons any documents and information, including financial and/or constituting the trade secret.

The regulator obligates to respect the confidentiality of the commercially sensitive information identified as such. The participating parties can make an application to the CC, requesting protection of their trade secrets.

After the CC adopts the decision on the protection of commercially sensitive information, it cannot be disclosed in public or to other persons, except for the cases provided by laws or upon a written consent of the owner of information.

As both the announcement on the notification and the final resolution on concentration are published in the Official Gazette in summary format, the commercially sensitive information should not be spread. Notwithstanding, the comprehensive texts of resolutions on the infringement of Law are published (only in Lithuanian) on the CC's website (<http://www.konkuren.lt/koncentracija/poist.htm>).

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Upon completing the examination, the CC must take one of the following decisions:

- 1) to permit the concentration notified;
- 2) to permit the implementation of a concentration establishing conditions and obligations in order to prevent creation or strengthening of a dominant position; or
- 3) to refuse to grant a permission to implement a concentration by imposing certain obligations concerned to take actions restoring the previous situation.

The persons who submitted notifications on concentration are

informed in writing of the adopted resolutions. The decisive part of resolution on concentration is published in the Official Gazette.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The commitments, including the divestment remedies, may be negotiated. The appropriate commitments may be proposed by the notifying persons, the CC may itself also impose the commitments on the participating undertakings.

The proposed and negotiated commitments of the notifying undertaking/persons as well as other conditions to effect the concentration are approved by the decision of the CC and must be strictly followed.

5.3 At what stage in the process can the negotiation of remedies be commenced?

Considering that the commitments of the participating undertakings/persons may basically impact the final decision on clearance of concentration and therefore should be evaluated together with the concentration itself prior to the final decision being adopted, the negotiation of remedies should be started in as early stage of the process as possible.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The Lithuanian legislation doesn't indicate any standard approach to the terms and conditions to be applied to the divestment. However, the analysis of the CC's practice shows two important moments:

- the period for execution of divestment remedies is usually confidential and may be prolonged by the CC under the objective circumstances; and
- an independent trustee is not usually required.

5.5 Can the parties complete the merger before the remedies have been complied?

The undertakings or controlling persons shall have no right to implement concentration until the resolution of the CC regarding remedies has passed. However, after the passing of the resolution the other actions of a concentration are usually allowed before the remedies have been complied.

Moreover, upon justified request of the undertaking or controlling person, the CC may permit to exercise individual actions of concentration.

5.6 How are any negotiated remedies enforced?

The fulfilment of concentration conditions or mandatory obligations established by the CC is enforced through the fines established by the Law and imposed by the CC.

A fine of up to 10 per cent of the gross annual income in the preceding business year may be imposed upon undertakings for infringement of concentration conditions or mandatory obligations established by the CC. Furthermore, under the authorisation of the Court the CC may impose restrictions on economic activities for failure to comply with fines (see question 3.3).

In case the undertaking fails to pay the imposed fine within three months after the date of receipt of the resolution, the recovery of the

fine shall be executed by the bailiff according to the procedure established by the Code of Civil Procedure of the Republic of Lithuania.

Moreover, the CC has the right to amend or to revoke the clearance for a concentration if undertakings or controlling persons have violated the conditions and obligations of the implementation of a concentration and to demand that the initial position be restored.

5.7 Will a clearance decision cover ancillary restrictions?

The ancillary restrictions of the activity of the undertakings while being directly related and necessary to the implementation of the concentration are allowed. Such restrictions must be clearly indicated in the standard notification form as they must be assessed in conjunction with the concentration itself.

The ancillary restrictions may qualify for favourable treatment if they are necessary to successfully implement the concentration and if they do not contradict to the general concentration rules.

5.8 Can a decision on merger clearance be appealed?

Any undertakings/persons whose rights protected by the Law have been violated have the right to appeal to the Court against the resolutions of the CC.

A written complaint on the merits of resolution may be submitted not later than 20 days after the delivery of the resolution or publication of its decisive part in the Official Gazette. Unless the Court decides otherwise, the submitting of a complaint shall not suspend the implementation of the CC's resolutions.

The Court is entitled to make one of the following decisions: to leave the resolution as it stands and to reject the complaint; to revoke the resolution or its individual sections and to remand the case to the CC for supplementary investigation; to revoke the resolution or its individual sections; or to amend the resolution on concentration, application of penalties or interim measures.

5.9 Is there a time limit for enforcement of merger control legislation?

In case the CC does not adopt any decision on the concentration notified or if the concerned undertakings are not informed of the adopted resolution within 4 months after the day the notification was submitted to the CC, the undertakings/persons have the right to implement the concentration but only according to the conditions specified in the notification.

As regards to the CC's right to obligate the undertakings to submit notifications on the concentration in case the established gross income thresholds are not exceeded (see question 2.4 above), such obligation may be established only if not more than 12 months from the implementation of the concentration in question have passed.

6 Miscellaneous

6.1 To what extent do the regulatory authorities in Lithuania liaise with those in other jurisdictions?

The CC closely cooperates with the World Trade Organisation (WTO) and United Nations Conference on Trade and Development (UNCTAD). It is also part of the International Competition Network and the European Competition Network. After Lithuania joined the EU, the cooperation with the national competition institutions of member states significantly increased.

6.2 Please identify the date as at which your answers are up to date.

11th July 2008.



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