



PORT-NET

Establishing port operations in Estonia

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I General Business Environment in Estonia

- 1. Thorough and modern legal framework**
 - Modernized civil law regulations conforming to the needs of business
 - Based on Western-European regulations
 - Process of privatization and land reform generally complete
 - Majority of EU regulations transposed

2. Setting up a company in Estonia

2.1. Primary commercial entities

a) Private limited liability company (osaühing, OÜ) and public limited liability company (aktsiaselts, AS)

b) OÜ and AS provide limited liability for the shareholder

c) OÜ can be established with the minimum initial capital of 40 000 EEK (ca 2550 EUR), AS with the minimum initial capital of 400 000 EEK (ca 25 550 EUR)

Initial capital may consist of money or non-monetary assets – if the value of the non-monetary assets in the initial capital exceeds 50%, the non-monetary assets must be assessed by an auditor

- d) other shareholders pre-emptive right for OÜ shares, shares of AS tradable more easily
- e) OÜ`s decision-making process less formal than in AS. For instance, OÜ does not have obligatory council.

2.3. Company registration procedure

- a) traditional registration procedure
 - company foundation agreement and company bylaws to be certified by the notary
 - company to be registered in the company registry within 15-20 calendar days as of the time of submitting the respective application

- b) Registration with expedited procedure
 - electronic registration
 - set up a company within 2 hours
 - available since 2007 to Estonian residents holding the ID-card
- c) possibility to purchase a pre-registered company (s.c. shelf-company) instantly for around 6 000-10 000 EEK (ca 380-640 EUR)

2.4. Founding by a foreign person or company

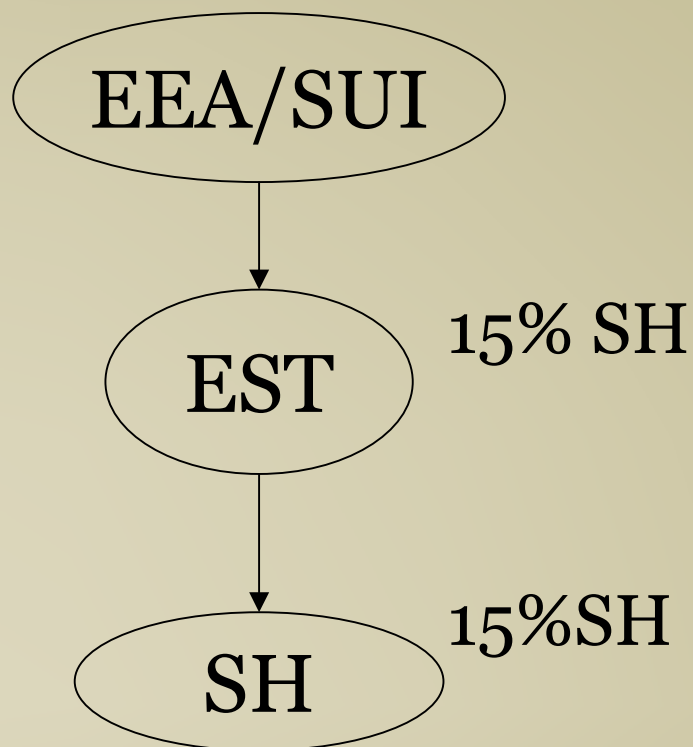
- a) Branch or a new independent company?
 - Branch is not a legal person
 - Parent company liable for the branch
 - At least one director must be resident in Estonia
- b) Official certificate of the founder to be notarised and legalised

2.5. Corporate tax system

2.5.1 The year 2000 tax reform

- a) corporate tax exemption for retained profits or profits used for business purposes
- b) tax is applied at the distributor`s level on payment of dividends and non-business related expenses

2.5.2 Beneficial dividends taxation



2.5.2.1 Taxation of the payer of dividends

- a) No tax on dividends at the level of payer if:
- profits are based on dividends received from an EEA State or Switzerland;
 - The subsidiary is a “taxable person” (NB! no need for actual taxation in the state of subsidiary);
 - the Estonian company holds at least 15% of the shares of EEA/ Swiss subsidiary.
- b) Same principles apply for profits of a branch located in EEA or Switzerland

2.5.2.2 Taxation of dividends at the the shareholder level

At the recipient level tax is not applied if the shareholder is a natural person or company holding more than 15% of the shares (except for “off-shore” company)

3. Operating rights – their legal basis and distribution

3.1. Types of operating rights

- a) Building rights (right of superficies)
- b) Rent agreements, other contractual arrangements
- c) Concessions

3.2. Building rights as basis for port operations – the example of the Tallinn Port

- a) *In rem* right to own buildings on the land belonging to another person
- b) Term up to 99 years
- c) Allows the operators themselves to build objects best suiting their needs
- d) Allows the port to concentrate on landlord activities and development

- e) More costly to establish, but more securities to both parties:
 - aa) port operator - rights of an owner to use and transfer the building rights and the building
 - bb) port - the right of payment for the building rights secured with real encumbrance
- f) additional options for financing to port operators (mortgage)

3.3. After the lapse of the term of building rights

- a) Prolong the term up to 99 years
- b) The operator removes the building
- c) Building becomes part of the land plot and ownership of the port, if not agreed otherwise

3.4. Selection of the operators

Three set of rules potentially involved:

- a) public procurement
- b) EC Treaty fundamental principles
- c) antitrust

3.4.1. Public Procurement

- a) PoT is a land-lord type port: PoT develops and rents out infrastructure.
- b) Super-structure is owned by the operators (except for passenger terminal).
- c) Public procurement rules do not apply for renting out infrastructure.

3.4.2. The EC treaty fundamental principles

- a) PoT could be qualified as a commercial monopoly or emanation of state.
- b) The EC Treaty fundamental rules: non-discrimination and freedom of establishment and services.
- c) Non-discriminatory and transparent procedure preferred by PoT: selection of most efficient and productive operators.

3.4.3. Antitrust

3.4.3.1 PoT as a dominant undertaking

- a) The Estonian Competition Act (ECA) limits behavior of a dominant undertaking. ECA is harmonized with EC Competition law.
- b) PoT infrastructure as essential facilities if no substitutes for a port operator (owner of super-structure).

- c) The status of being a dominant undertaking/ in control of essential facilities impacts the selecting port operators:
- reasonable and non-discriminatory conditions for access to an essential facility (article 18 of the ECA);
 - an open-ended list of other abuses, incl. unfair pricing and unjustified refusal to sell (article 16 of the ECA).

d)PoT dominance towards non-established operators is doubtful: according to the NCA competing transport corridors for East-West transit.

Discrimination against already existing operators still a breach of ECA.

3.4.4 Breach of selection rules

- a) Other operators might object discriminatory selection of facilities users
- b) Transactions concluded in breach of competition rules might be void
- c) ECJ (“*EcoSwissChina*”-case): competition rules (NB! ECJ was only ruling on article 81 of the EC Treaty) should be treated similarly to national *ordre public* provisions.

In Estonia, transactions in breach of *ordre public* are void

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