

**The new draft Estonian public commercial code and the services directive –
an attempt to create clear, unified and hassle free legal environment
for entrepreneurs offering goods or services**

Martin Hirvoja,
Deputy Secretary General on Legal Policy,
Ministry of Justice of Estonia

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The draft Estonian public commercial code is a codification project started in 2007. It was foreseen as an objective also in the government coalition treaties of 2007 and 2009.

The work was largely **funded within the European Union** better regulation project and performed mostly by a group of experts outside the Ministry of Justice. Within the same framework, also **codification of social security and public medical law, building and planning and environmental law** has been foretaken by the Ministry of Justice. The common aim of all those codification projects is to systemize regulation within an area of legal field, to come up with common definitions and procedures, thus avoiding unnecessary repetitions and differences – following the best traditions of the historical European grand concept of codification.

Public commercial law (in German known as *Gewerberecht*, part of *öffentliches Wirtschaftsrecht*, *Wirtschaftsverwaltungsrecht*; Finnish: *elinkeinolaki*) deals with public law restrictions on economic activity. Typically, the core of it is any administrative law requirement to register or gain a licence for a specific economic activity in offering goods or services. That must be differentiated from private commercial law regulation, which for example, deals with relationships between shareholders. In many countries, including Estonia, there is currently no single act of law which creates a unified system of acquiring registration or licence, procedure how it can be passed on when a company merges etc. In Estonia, there are over 100 separate acts on different areas of economic activity (eg. trading alcohol, medicals, construction, etc, etc) which all have different requirements on filing for a licence or any other authorization scheme, even though many definitions, forms and procedures could be concentrated in uniform and simpler legal framework, thereby avoiding a mass of unnecessary parallel and splattered regulation.

The European Union services directive, created particularly to enhance the activities of small and medium sized enterprises' operations beyond their national borders within the whole internal market, thus realizing the principle of free movement of services, was an important source for this codification. It would be here appropriate to cite Mr. Mario Monti's 2010 report, where the single market for services is seen as the powerhouse of European economy.

The services directive is currently harmonized via a special law and covers the minimum requirements of the directive. The draft code takes a number of further steps – among them it extends the application many of the services directive business friendly principles also to the providers of goods.

The draft creates a clear system, which requirements can a law pose on an entrepreneur: 1) personal (eq. qualifications, skills), 2) material (technical, equipment, financial) or 3) informational. Mostly depending on the nature of these requirements, authorization schemes are reduced to only two: notification or licence.

Currently, **registration** is subject to a fee and it has the characteristics of a licence – since it will be only valid after an official makes separate confirmation and it is valid only for one year only and has to be renewed each year. The draft code foresees **notification** instead of registration procedure and is effective immediately after the information has been filed by the entrepreneur, all information can be filed electronically using a standard form and through one portal (single point of contact), the fee will be abolished and no separate renewal of the registration will be required any more. Instead, the notification will be automatically renewed once the entrepreneur has electronically filed the anyway mandatory annual report. Instead of spending public sector workhours on reviewing the registration applications, the notification procedure frees public officials from this task and they can instead dedicate their time on materials supervision of fulfillment the requirements prescribed by law by entrepreneurs. Notification will be the standard procedure for most economic activities, except the minority, where a licence is required.

Licencing concerns only economic activities which presume special qualifications or premises of the entrepreneur and/or its employees due to the higher risks to public safety, technical security. The draft law also foresees **tacit approval** as a rule when no response to a licence application has been provided within 30 days. Licence will cover the whole jurisdiction of the country and shall have unlimited duration, unless the law specifically prescribes otherwise, that in turn can only be based on overriding public interest or when the number of licences is limited due to scarcity of technical or natural resources.

In some cases, it is important for an entrepreneur to gain legal certainty about some aspects of the licence acquiring procedure even before he has fulfilled all the necessary conditions and is ready to start operations. This is especially relevant when there are complicated material conditions prescribed by law, which leave some room for administrative discretion. For example, lets suppose a regulation provides that based on the location and neighbours of the specific economic facility, the walls of the facility must be between 10-15 cm thick, the backup generator must have adequate power, not specifying the exact number, or any other similar situation. Then there is a high degree of unpredictability for the entrepreneur to prognose how the rules will be actually applied by the public authority in its case. Instead of actually fulfilling the conditions by acquiring or building the facility, using shareholder capital or a loan money and only then finding out afterwards, that in the specific case, the walls should have been 1 cm thicker than they actually are, according to the draft code, an entrepreneur can ask for a **legally binding pre-decision or an administrative contract**, which stipulates the exact conditions in a specific case even before they will be fulfilled in reality, thereby giving a high legal certainty and a guarantee, that no resources will not be wasted.

The notification and licence forms will be standardized, with the possibility to add non-standard and sector specific additional requirements, if the law so provides.

Any notification or licence application will be possible to file and proceed **at a distance** and **electronically** through a portal, which will be the point of single contact in the meaning of the directive. This procedure will be another example, where excellent use of digital signature via the ID card can be made. Since it is already possible to establish a limited liability company in Estonia online, using an ID card and it takes as a rule as little time as a couple of hours, the same procedure to file a public law notification substantially reduces the bureaucratic costs of doing business and will again add a point to the attractiveness of our business environment, which also our Nordic neighbours are more than welcome to use. All this naturally requires some work in consolidating and developing the IT systems, but we have no doubt that at latest by 2014 under the direction of the Ministry of Economic Affairs those works will be completed timely and in high quality. Naturally, the possibility to present paper documents or have the whole authorization arranged by a notary, will also be an option. Another important principle is the prohibition to require presentation of any data or document, which is already present in the same or any other public authority or register.

Some changes are also made in penal law – currently performing economic activity without registration is punishable as a misdemeanor. In the future, only acting without a licence will be punishable via the penal law, while the noncompliance with the largely informative-purpose notification requirement will be dealt with effective and less costly administrative law measures.

Uniform and clear rules are also settled, how a licence can be passed on to another entrepreneur - for example, in cases of succession, merger, acquisition, division, bankruptcy. The deadlines for any authority for proceeding a licence application will also be standardized to a maximum 30 days, with the possibility to foresee in special regulation a different timeline, if sound reasons for that exist

Unlike the Austrian *Gewerbeordnung*, the Estonian draft code does not have a special part and separate sectoral special laws will remain. The draft code is a general part of all public commercial law and like any codification, it brings similar regulation “in front of the brackets” and standardizes anything, where there is no sound reason to have a diverting regulation. Therefore, the technical application part of the code is actually lengthier than the “core” code itself, mostly deleting the repeating parts of the sector specifying regulation. Secondly, screening the whole legislation to achieve compliance with the services directive proved to be a rather massive work and is also included in changes to the special area specific legal acts.

The draft public commercial code has been thoroughly reviewed and discussed during the past year together with the Ministry of Economic Affairs, who will be the main actor in enforcing the law, other ministries and specialists of most of the fields of economic activity – be it electricity, transport, tourism, agriculture, food etc, etc. The debates often dealt with the question, whether authorization in a specific field shall be in the form of a licence or notification in the future. Every time, a balance between the aim of cutting the red tape and still maintaining sufficient checks in public interest had to be found. Also, setting a common legal framework for all economic sectors required extensive consultations and explanations, which is also nothing unusual, since any change provokes questions and interferes with

comfortable previous practices. At the same time, a number of improvements were also made to the code itself.

On August 26th the Government ministers officially approved the whole package and it is now ready for its trials in parliamentary proceedings. In conclusion, it is our belief that the draft public commercial code is a major step towards much friendlier economic environment for entrepreneurs offering goods or services, be they national, from other EU member state or even from third countries. Since the EU internal market is in reality largely what entrepreneurs make of it, it is clear that the first and natural beneficiaries will be the ones from the Baltic sea region countries, since they are closest to enter their neighbour member states to export services.