

Merger Control

The international regulation of mergers and joint ventures in 65 jurisdictions worldwide

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Iceland

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The Competition Act No. 44/2005 (the Act), in particular section 17, contains the principal provisions relating to merger control in Iceland.

The Competition Authority has in addition issued rules of procedure No. 880/2005 (the Procedural Rules) as amended by Rules No. 924/2007, as well as merger notification rules (the Merger Rules), as changed by Rules No. 854/2008, issued in August 2008.

The minister of economic affairs is in charge of the implementation and execution of the Act. However, day-to-day administration of matters within the sphere of the Act is performed on behalf of the minister by independent administrative authorities, the Competition Authority (the Authority), and the Competition Appeals Committee, according to sections 5 to 9 of the Act.

2 What kinds of mergers are caught?

According to section 17, paragraph 1 of the Act, a merger is considered to have taken place when:

- two or more previously independent undertakings merge;
- an undertaking takes over another undertaking;
- owners controlling one or more undertakings, or one or more undertakings, acquire direct or indirect control, partial or in full, of one or more undertakings by purchasing stock or assets, by an agreement or otherwise; or
- undertakings create a joint venture that performs on a lasting basis all the functions of an autonomous economic entity.

3 Are joint ventures caught?

Yes. See question 2.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The term 'control', which is referred to in section 17, paragraph 1 of the Act, is further defined in section 17, paragraph 2 of the Act. According to that provision, control is defined as a right, based on an agreement or any other method, which either separately or combined, taking into account relevant factual or legal issues, confers upon a party the possibility to exercise decisive influence on an undertaking, in particular by:

- rights or agreements that confer decisive influence on the coordination, voting or decision making of governing entities within the undertakings; or
- the right to use or dispose of an undertaking's assets, in part or in whole.

Control is conferred upon parties who are the holders of rights as described above, are entitled to such rights, or if neither, have the opportunity to exercise such rights.

5 What are the jurisdictional thresholds?

The thresholds for notification are twofold. A merger need only be notified if they are both met. First the total turnover in Iceland of the undertakings in question must be 2 billion krona or more. The turnover of parent undertakings and subsidiaries, undertakings within the same group of undertakings and undertakings that parties to the merger control directly or indirectly, shall be included in this calculation. Second, at least two of the undertakings that are parties to the merger must have an annual turnover in Iceland of at least 200 million krona each. The Authority is authorised to intervene in a merger falling below the thresholds if it believes that the merger can substantially reduce effective competition. This is, however, always subject to the combined turnover of the parties being at least 1 billion krona.

According to article 17.a of the Act and section 4 of the Merger Rules, the thresholds refer to the undertakings' turnover within Iceland. Further the turnover refers to the undertakings' turnover in the last accounting year or, in certain instances, to the undertakings' turnover in the 12 months prior to a merger.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The notifications of mergers that exceed the jurisdictional threshold described above are mandatory. The Authority can impose fines for a violation of the duty to notify mergers, according to section 37 of the Act. According to paragraph 6 of article 17.a of the Act, it is possible to notify a merger on a short form in certain circumstances, namely when one of the following conditions is satisfied:

- the relevant markets are not connected;
- the combined horizontal market share of the parties is less than 20 per cent;
- the combined vertical market share of the parties is less than 30 per cent;
- the merger is a full-function joint venture with limited effect in Iceland; or
- a party that previously had joint control over an undertaking gains full control.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

According to section 3 of the Act, the Act applies to agreements, terms and actions that are intended to have an effect in Iceland. Subject to the implementation of the provisions relating to competition in the EEA Agreement, and the provisions governing trade within the common market of the EEA area, the Act does not apply to agreements, terms or actions that are solely intended to have an effect outside Iceland. Furthermore, more than one party to the merger must have turnover in Iceland.

This means that mergers that have an effect in Iceland – even if the parties to the merger are foreign – have to be notified to the Authority, provided that more than one party has turnover in Iceland. The degree of effect required for the Act and the enforcement powers of the Authority to be applicable is not stated in the Act itself, but it is however clear that the merger in question must at least have some impact on the Icelandic market. Such effect on the Icelandic market can, for example, be established when the merging parties have some operations or offices, branches or subsidiaries in Iceland and the merging parties are to some extent operating within the same Icelandic market. If only one of the merging parties has turnover in Iceland the requirement of having at least two parties with turnover in Iceland is not fulfilled.

Notification and clearance timetable

8 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

According to section 17.a, paragraph 3 of the Act, the Authority must be notified of a merger before completion and after one of the following has taken place:

- the conclusion of an agreement;
- the announcement of a public bid; or
- the acquisition of a controlling interest in an undertaking.

The Authority can grant an exemption for a completion before clearance, see chapter 15.

Violation of provisions or orders issued in accordance with the Act is subject to a fine amounting up to 10 per cent of the total turnover of the preceding business year of any undertaking or association of undertakings involved in a violation. The highest fine the Competition Authority has imposed on an undertaking for violating the obligation to notify is 1.5 million krona. In that case the Competition Appeals Committee upheld the Authority's decision that the merging partners had violated the Act, but rescinded the fine.

9 Who is responsible for filing and are filing fees required?

According to section 17.b of the Act, if two or more previously independent undertakings merge or joint control is obtained, then the merging parties shall jointly give notice of the merger. If an undertaking takes over another undertaking, the acquiring undertaking shall notify. No filing fees are required.

10 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The Authority shall notify the relevant undertakings within 25 working days if any reasons occur for further investigations on the competitive effects of a merger. The deadline is counted from the time that the Authority receives a notification that meets the conditions of section 17.a, paragraph 6 of the Act and the Merger Rules.

If the Authority decides to investigate a merger further, and notifies the relevant parties within the prescribed time limit, its decision to take action against the merger must be taken within a further 70 working days. The moratorium commences when the Authority's notification has been sent to the relevant undertakings. This investigation is comparable to a phase II investigation by the European Commission.

The Authority can extend the moratorium for an additional 20 working days if it deems that the gathering of additional data is necessary.

According to the Act the Authority has to be notified prior to implementation but after an agreement has been prepared. The transaction has to be suspended until the final clearance has been given by the Authority and closing can thus not take place prior to that.

11 What are the possible sanctions involved in closing before clearance and are they applied in practice?

Sanctions were applied in practice for the first time in two cases in June 2009. The cases involved similar circumstances where two undertakings were considered to have closed mergers before clearance and therefore imposed by fines amounting to 15 million krona and 20 million krona. These cases are unique since for the first time sanctions were applied in practice due to closing before clearance. The Competition Appeals Committee upheld the decisions of the Competition Authority.

12 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

As with domestic mergers, the Authority may accept any arrangements that would alleviate the negative effect on competition.

13 Are there any special merger control rules applicable to public takeover bids?

No.

14 What is the level of detail required in the preparation of a filing?

A merger notification shall contain various and detailed information about the merger and the undertakings connected to it. The Merger Rules prescribe in detail what information must appear in a notification (an English version is available at <http://samkeppni.is/en/legislation>). The notification form is comparable to Form CO relating to the notification of a concentration pursuant to Regulation (EC) No. 139/2004.

15 What is the timetable for clearance and can it be speeded up?

The Authority shall notify the relevant undertakings within 25 working days of having received a complete notification if it has any reason to investigate further the competitive effects of a merger. If no notice is given by the Authority within this deadline, then the transaction may be considered to be cleared and the merger completed.

If the Authority does intervene within the 25-working-day limit, it must take action against the merger within 70 working days from giving notice (see question 10). The Authority can extend this by additional 20 working days, if it deems that the gathering of additional data is necessary.

The timetable for clearance cannot be speeded up other than by submitting the notification earlier than required and ensuring that the initial notification is complete. The parties can however submit for an exception allowing them to complete the merger prior to clearance. The Authority can grant this request, if the wait for clearance is liable to harm the parties or their business partners and competition in the market is threatened.

The authority's approach does not seem to have been affected by the current economic crisis, although it has stated it will speed up its process as far as possible if deemed necessary.

16 What are the typical steps and different phases of the investigation?

The Authority will verify that the notification is complete upon receipt. If that is not the case, it will call for additional information from the entity notifying the merger.

When the notification is deemed complete, the 25-working-day preliminary investigation period will start. If that investigation reveals reasons for concern, a full investigation will be lodged. From that point, the Authority has up to 70 working days to take a negative decision. If parties anticipate a negative decision, informal negotiations are often conducted with the Authority proposing acceptable remedies to the merger.

Substantive assessment

17 What is the substantive test for clearance?

According to section 17c of the Act, the Authority can annul or impose conditions to a merger if it deems that a merger obstructs effective competition by giving one or more undertakings a dominant position or that such a position is strengthened, or effective competition is otherwise substantially reduced. The Authority shall furthermore take into account possible efficiencies that a merger can create, as indicated by the statement ‘[f]urthermore account shall be taken of technological or economical progress when a merger is assessed, provided that such progress favours consumers and does not obstruct competition’, which was inserted in the Act in June 2008. This paragraph is intended to reflect the ‘efficiency defence’ in EC Competition Law. The Authority shall furthermore take into account international competition and whether the relevant market is open or closed.

The Icelandic competition authorities’ test for substantive appraisal of mergers can best be summed up as a twofold test, where the dominance test is first applied, and if no such situation exists, then an ‘obstruction of effective competition’ or a ‘substantial lessening of competition’ test is applied.

However, the main focus of the Icelandic competition authorities, when assessing mergers, has been whether the merger in question creates a dominant position, including joint dominance, or strengthens such a position. In addition, the authorities consider whether the merger leads to an oligopolistic dominance. That is, if the reduction of the number of competitors on the relevant market creates a concentrated market where tacit collusion can be expected. This can, however, be expected to change with the amendments to the Act in June 2008, when the sentence ‘or effective competition is otherwise substantially reduced’ was inserted in the Act.

The Icelandic competition authorities’ definition of a dominant position is in harmony with the definition applied by the European Commission and the European Court of Justice. Section 4 of the Act defines it as the position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and consumers.

If the Authority’s investigation reveals that the merger leads to or strengthens a dominant position the merger is, almost automatically, considered to obstruct effective competition. However, if a merger does not involve a dominant position of the merging parties the competition authorities often seem to review with greater scrutiny the merger’s possible obstruction of effective competition.

The Authority seems to place more emphasis on the possible obstruction of competition in vertical mergers.

When assessing horizontal mergers the Authority reviews whether the merger strengthens or creates a dominant position. In this respect they particularly review the market share of the new undertaking and concentration in the market, the market position of competitors and their economic strength, possible competition and barriers to entry, and buyer strength. Most of the same points are reviewed when assessing vertical mergers, but because such a merger rarely creates a dominant position, more emphasis is placed on the effects on the relevant market and on the merging parties’ market power.

Under section 17c of the Act the Authority shall, when assessing the legality of a merger, especially take into account to what extent international competition affects the competitive position of the merged undertaking. The Authority must also take into account whether the market is open or access to it is obstructed.

The future development of a given market must be given special attention when assessing joint dominance created or strengthened by mergers.

With respect to the current economic crisis, it cannot be maintained that as a direct result thereof the authorities have become more lenient in their assessment on the ‘failing firm defence’. Nevertheless,

it is interesting to review three recent merger decisions of the Authority based on the failing firm defence.

The Authority applies the Merger Guidelines from the European Union, even though not codified in the Icelandic legislation. According to the Guidelines the failing firm defence depends on the satisfaction of the following three conditions: that the firm being acquired would exit the market in the near future were it not for the merger; that the firm is unable to reorganise its operations; and that there is no less anti-competitive alternative purchase to the merger.

In September 2008 the Authority published two decisions on mergers; firstly on the merger of Kaupþing banki hf and Sparisjóður Reykjavíkur og nágrennis hf, and secondly on the merger of Kaupþing banki hf and Sparisjóður Mýrarsýslu. In both cases Kaupþing banki hf, which is one of three largest banks in Iceland, was seeking to take over two smaller savings banks. In the authority’s decisions the short reasoning was as follows:

The Competition Authority has, in terms of a generally accepted view in competition law, evaluated the banks financial situation, the possibility of another party buying the Savings Bank and the possible influence on competition in the market. With reference to data and information set forth, it is the assessment of the Competition Authority that the change in the market following the merger is unavoidable considering the financial situation of the Savings Bank, if not for the merger, the Company would exit the market in the near future as an independent competitor.

It seems as if the Authority is applying two of the three conditions but with limited clarification with each condition. Given that the Merger Rules are not codified into Icelandic legislation as previously stated, it would be preferable that a more detailed decision would be published regarding the failing firm defence.

In February 2009 the Authority dealt with the failing firm defence, where two of Iceland’s largest media companies were planning to merge. The Competition Authority considered that merger to be harmful to competition on all four relevant markets and that the merging parties had not established that the merger should be cleared due to the failing firm defence. The reasoning in that decision was much more detailed than the two previous decisions and the Authority went into each of the three previously mentioned conditions. Further, it went into the burden of proof and that it lies with the merging party to establish that the conditions are fulfilled.

The first condition, which is that the firm would exit the market if it were not for the merger, was not considered fulfilled given that the company had recently issued a press release stating that it was re-financing and new equity was expected. The second condition, which is that the firm is unable to reorganise its operations, was not considered fulfilled since no attempts had been made to reorganise and various parties had indeed showed interest in buying the company. Therefore, given the two previous conditions were not fulfilled, the Authority did not feel compelled to consider the third condition.

Generally whether the Authority gives long reasoning in their decisions varies. Consequently, it is hard to come to a concrete conclusion on the impact of the financial crisis based on these three decisions, such as whether the authorities are leaning towards a more lenient assessment in the failing firm defence. The Authority is maintaining that they are applying the Merger Rules in accordance with practice from the European Union in the strict sense, but the reasoning in its decisions is lacking. The first two decisions seem to be based on a more lenient approach, as opposed to the third decision, which shows no signs of any leniency in the application of the failing firm defence. Accordingly, it is hard to reach any conclusion as to whether the Authority is applying the failing firm defence differently than before the current economic crisis.

18 Is there a special substantive test for joint ventures?

No.

19 What are the 'theories of harm' that the authorities will investigate?

The decisions of the Authority over the past decade do not lead one to believe that the Authority is working on the basis of one specific theory of harm that the authority will investigate. There are examples of how the Authority investigates negative competition effects of mergers. The evaluation process of whether the Authority decides to clear a requested merger is mainly based on all criteria mentioned in the questions above (eg, market dominance, unilateral effects, coordinated effects, conglomerate effects, vertical foreclosure). Although all the above seems to count in the evaluation process, it seems that the Authority particularly emphasises market dominance. This can, however, be expected to change with the amendments to the Act in June 2008, when the sentence 'or effective competition is otherwise substantially reduced' was inserted in the Act.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Other than as described in question 17 relating to the efficiency defence, the Authority cannot base its decision in a merger case on non-competition issues such as industrial policy. Decisions will be based on the effect on competition in Iceland and, if applicable, the EEA.

21 To what extent does the authority take into account economic efficiencies in the review process?

With the amendments made to the Act in June 2008, the following sentence was inserted in section 17c of the Act: 'When assessing a merger, account shall be taken of technological and economic efficiencies, provided that it is in the best interest of consumers and competition is not hindered'. This sentence is intended to reflect the 'efficiency defence' under EC Competition Law.

Remedies and ancillary restraints**22** What powers do the authorities have to prohibit or otherwise interfere with a transaction?

According to section 17c of the Act the Authority can either prohibit the completion of a merger, annul it or make a merger subject to conditions, if it decides to interfere with the merger. The Authority's practice to date clearly indicates a preference for imposing conditions rather than annulling a merger, although merger control has become tighter in the past decade.

23 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes. Section 17 of the Act provides the Authority with the power to impose conditions upon a merger, whether structural or behavioural.

24 What are the basic conditions and timing issues applicable to a divestment or other remedy?

The only conditions imposed by the Act are that the divestment or other remedies must reduce or eliminate the negative effects on competition that have been holding up the merger. The Authority may impose a time limit on the implementation thereof. By a decision of 26 February 2009, the Competition Appeals Committee extended a previously set time limit given to Orkuveita Reykjavíkur (the Reykjavik Energy Company) to reduce its share in a competitor below 10 per cent, due to the economic crisis.

25 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

To date, the Authority has published a decision in at least four foreign-to-foreign mergers. In the merger of FL Group hf and Sterling Airlines AS, the main ruling criteria for the decision as to whether the merger had an effect in Iceland was that at least two of the undertakings that are parties to the merger must both have a minimum annual turnover of 50 million krona in Iceland, which was the limit at the time, for the merger rules of the Icelandic Competition Act to apply. By a ruling on 24 January 2006 the appeal committee for competition cases concluded that the merger of FL Group and Sterling did not fall under the scope of the Icelandic Competition Act, whereas the annual turnover of Sterling in Iceland did not pass the above-mentioned limit. In the merger of Carbone Savoie SAS (a French company) and Alcan Inc (an international aluminium conglomerate) the Authority concluded by a decision on 8 December 2006 that both undertakings had an annual turnover of at least 50 million krona and therefore the merger fell under the scope of the Icelandic Competition Act. However the merger was approved, as only a small proportion of the turnover of those companies was in Iceland; furthermore, the merger did not obstruct effective competition. The merger of OW Bunker & Trading AS (an international company) and Grupo ABC Atlantic Bunker SL (a Spanish company) also fell under the Icelandic Competition Act. By a decision on 30 November 2006 the Authority approved the merger on the same grounds as it applied in the merger of Carbone Savoie SAS and Alcan Inc.

By a decision on 7 December 2007, another clearance was granted on the same grounds in the merger of SPX Corporation (an American manufacturing company and APV (a department within Invensys, a British software company). From these cases it can be seen that no remedies have been required in foreign-to-foreign mergers.

26 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The merging entities must assess whether they want any or all related arrangements to be considered 'ancillary restraints', that is to say, restrictions on competition that are directly related to the concentration and that are necessary for its completion. The Authority will assess any related arrangement qualified as such by the parties and address them in its decision.

Involvement of other parties or authorities**27** Are customers and competitors involved in the review process and what rights do complainants have?

There are no specific provisions in the Act pertaining to the right of merging parties or interested third parties to be heard. However, informal meetings can usually be arranged with officials from the Authority. Indeed, some of the competition authorities' formal decisions concerning mergers are, at least in part, the result of negotiations between the merging parties and the Authority.

Presently the Authority makes public on its website merger notifications and decisions on the clearance of mergers.

In addition, the Authority frequently conducts interviews and meetings with undertakings in the relevant market (eg, the merging parties' competitors or customers). They are also often given a chance to submit their comments regarding a merger and its impact.

Regarding the right of interested third parties to be heard, attention must be paid to section 9 of the Procedural Rules. According to it, those who have a legitimate interest are considered a party to cases before the competition authorities. This status does have considerable impact on the right of interested third parties to receive information and to be heard, as stated in section 13 of the Procedural Rules.

In a recent ruling No. 18/2009, the Competition Appeals Committee ruled that a competitor of one of the merging parties can appeal a clearance decision by the Competition Authority. The Competition Authority argued before the committee that competitors did not have standing to appeal, but was unsuccessful.

28 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

All documents submitted to the Authority are subject to the Information Act No. 50/1996, which means that generally the documents shall be considered documents that the public has free access to. According to article 36 of the Act, the Authority can publish information on agreements, terms and acts that have prevented or are meant to prevent competition. The Authority can, however, limit access to documents submitted to the Authority, both to the public and also to parties to the case, especially if the documents contain important financial or commercial information of enterprises or other legal persons. A party asking for certain documents to be treated as confidential must indicate the reasons for the request for confidentiality.

29 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Authority signed an agreement with the Scandinavian competition authorities (ie, the Danish, Norwegian and Swedish authorities) on cooperation in competition matters on 16 March 2001.

According to section 2 of the cooperation agreement the competition authorities commit to providing each other with information in instances where one authority's actions could have an impact on important competition interests that fall under the jurisdiction of another authority. This includes mergers and acquisitions where one or more parties to the merger or acquisition is an undertaking listed, established or having an address in one or more of the countries. The information exchanged under the cooperation agreement covers both non-confidential and confidential information, according to sections 3 and 4 of the agreement.

In addition, the Icelandic Competition Authority is a member of the European Competition Authorities (ECA), founded in Amsterdam in April 2001. The ECA is a forum for discussion among the competition authorities in the European Economic Area. The ECA's main function is to improve the cooperation between the competition authorities and contribute to the efficient enforcement of the respective national as well as European competition laws. Cooperation is developed, inter alia, through the organisation of meetings, the establishment of working groups and the exchange of information and expertise. The ECA recently published a paper on mergers and alliances in civil aviation that was the result of discussions within the ECA Air Traffic Working Group based on the enforcement experience of the ECA members.

30 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Act, or rules set according to it, does not contain special rules governing mergers and acquisitions in specific sectors. However, several sector-specific laws contain rules regarding mergers and acquisitions that fall within their scope.

The Act on Investment by Non-residents in Business Enterprises No. 34/1991 applies to any kind of investment by a non-resident in a business enterprise in Iceland unless overridden by other acts or regulations issued under such acts. Therefore due note must be given to its restrictions when non-residents consider mergers and acquisitions involving Icelandic companies. According to section 4 of the Act investment by non-residents in Iceland is subject to restrictions in the following sectors:

- fishing operations within the Icelandic fisheries jurisdiction and enterprises engaged in fish processing; and

- energy exploitation rights as regards waterfalls and geothermal energy for non-domestic use.

The same applies to enterprises that produce or distribute energy. However, individuals and legal persons domiciled in another member state of the European Economic Area can invest in energy companies.

The combined share of non-residents in Icelandic airline companies may not at any time exceed 49 per cent. Individuals and legal persons domiciled in another member state of the European Economic Area are exempted from this restriction.

Iceland may apply restrictions to the above-mentioned sectors according to the Agreement on the European Economic Area (Annex XII).

The Act on Financial Undertakings, No. 161/2002, prescribes rules regarding mergers and acquisitions of financial undertakings. In section 1, a financial undertaking is defined, for the purposes of the Act, as an undertaking that has been granted an operating licence pursuant to section 6 (cf section 4 of the Competition Act). These include commercial and savings banks, a credit undertaking or investment bank, an electronic money undertaking, a securities company and brokerage, and a management company of undertakings for collective investment in transferable securities.

According to section 106 of the Act on Financial Undertakings, mergers of financial undertakings are subject to the approval of the Financial Supervisory Authority. In addition section 40 states that parties who propose to acquire a qualifying holding in a financial undertaking must seek the approval of the Financial Supervisory Authority in advance. A qualifying holding is defined as a direct or indirect holding in an undertaking that represents 10 per cent or more of its share capital, guarantee capital or voting rights, or other holding that enables the exercise of a significant influence on the management of the company concerned.

The approval of the Financial Supervisory Authority must, furthermore, be sought when an individual or legal entity increases its holding to such an extent that his direct or indirect share in its share capital, guarantee capital or voting rights exceeds 20 per cent, 33 per cent or 50 per cent, or comprises such a large proportion that the financial undertaking can effectively be regarded as its subsidiary company.

In October 2008 Emergency Act No. 125/2008 was passed on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances, etc. In section 1 the minister of finance, on behalf of the Treasury in unusual and extraordinary circumstances, was authorised to disburse funds to establish a new financial undertaking or take over a financial undertaking or its bankrupt estate, either wholly or in part.

'Unusual and extraordinary circumstances' (paragraph 1) refers to particular financial and operational difficulties experienced by a financial undertaking, including the probability that it will not be able to abide by its commitments. Unusual circumstances also, for instance, refers to the situation where a financial undertaking has requested or been granted a moratorium on payments or composition of creditors or applied for insolvency proceedings or been declared bankrupt.

The provisions of the Act on Financial Undertakings do not apply to the government's authorisation to acquire a qualifying holding in a financial undertaking in accordance with the act. The provisions of the Act on Securities Transactions pertaining to mandatory takeover bids and prospectuses do not apply to the acquisition and handling of government holdings in financial undertakings in accordance with this act.

In section 2 of the act the minister of finance, on behalf of the treasury, is, in unusual circumstances specified in section 1, authorised to contribute to a savings bank up to 20 per cent of the book value of its equity. In return, the Treasury shall receive guarantee capital certificates or shares in the savings bank, in accordance with the capital contribution.

The Emergency Act imposed dramatic changes on the Act on Financial Undertakings giving the Financial Supervisory Authority authorisation to intervene in dire financial situations. With the amendments made to the act in October 2008, section 100(a) was added relating to special measures in a financial crisis. According to that section the Financial Supervisory Authority is allowed to take special measures if it considers them necessary in view of unusual circumstances or events, for the purpose of limiting damage or the risk of damage in the financial market. The unusual circumstances are the same as referred to in the above-mentioned Emergency Act No. 125/2008. In such special circumstances the Financial Supervisory Authority is allowed to call a shareholders' meeting or a meeting of guarantee capital holders and the process is not dependent on the provisions of the Act on Public Limited Companies or the financial undertaking's articles of association regarding calls to meetings.

If the circumstances are dire, the Financial Supervisory Authority may assume the powers of the shareholders' meeting or meeting of guarantee capital holders for the purpose of taking decisions on necessary measures. This includes the authority of the Financial Supervisory Authority to decide to merge with another undertaking and if that decision is taken such measures shall not be subject to the provisions of the Act on Securities Transactions pertaining to mandatory bid obligations, nor shall they be subject to the provisions of the Act on Financial Undertakings pertaining to the advertisement of financial undertakings' mergers in the Official Gazette (Lögbirtingablaðið). The Financial Supervisory Authority is authorised to transfer all rights to the degree necessary in such instances.

Should the Financial Supervisory Authority conclude that the merger of the undertaking concerned with another undertaking is the best means of protecting the interests at stake, the provisions of the Competition Act and the merger provisions of the Act on Financial Undertakings shall not apply to the merger. A decision by the Financial Supervisory Authority to take over the operations of a financial undertaking shall be notified to the Board of the undertaking in question and shall be supported in writing. The Financial Supervisory Authority shall make the announcement public. If the financial undertaking operates branches or renders services in another country, such an announcement must be sent to the competent supervisory authorities in that country.

Over a month after the amendment to the Act on Financial Undertakings, in November 2008, a new amendment was passed to amend slightly the previous one, which was swiftly passed due to the economic crisis. In that amendment the main content of section 100(a) containing provisions relating to mergers was moved to temporary provision No. IV. Thereby, section 100(a) changed in the sense that not only was it in the Financial Supervisory Authority's power to react in a dire financial situation, but the financial undertakings themselves could ask the Supervisory Authority to take over direction of the undertaking.

With the Emergency Act and the amendments to the Act on Financial Undertakings, extensive changes have occurred on the Icelandic financial market. With this Act and amendments, the Financial Supervisory Authority is enabled to circumvent previously set merger rules giving them a more extensive authority to merge Financial Undertakings if it considers necessary without having to seek the permission of the board or the shareholders at stake.

One other relevant matter that should be mentioned is the effect of the financial crisis's on foreign exchange. In November 2008 an amendment was made to the Act on Foreign Exchange authorising the Central Bank of Iceland to adopt rules, which restrict or temporarily suspend any or all capital movement to and from the country. In December 2008 the Rules on Foreign Exchange No. 1130/2008 were adopted. According to the rules parties are not subject to any restrictions relating to direct investment. Direct investment refers to a capital contribution or other contribution to the equity of a commercial enterprise, or to the purchase of a holding with the aim of acquiring significant influence over its management. Significant

influence means that an investor's holding in an undertaking represents 10 per cent or more of its equity capital, guarantee capital, or voting rights, or another holding that enables the exercise of substantial influence on the management of the company concerned. Long-term loans from a company's owners to the company are also considered direct investment. It is prohibited to carry out movement of capital according to paragraph 1 of the Temporary Provision of the Foreign Exchange Act, with subsequent amendments, or to transfer or convey capital out of the country in connection with the sale of direct investments.

Judicial review

31. What are the opportunities for appeal or judicial review?

The Authority's decisions may be appealed in writing to an administrative committee, the Competition Appeals Committee, within four weeks of the party in question being informed of the decision. The ruling of the Competition Appeals Committee shall be rendered within six weeks from the date of appeal, according to section 9 of the Act. The Competition Appeals Committee is completely independent of the Authority and it is meant to ensure an objective administrative appeals process.

A party not willing to accept the ruling of the Competition Appeals Committee may bring legal action before the Icelandic courts, requesting its annulment. Such action must be brought within six months after the party had knowledge of the Committee's ruling, according to section 41 of the Act. Such action does not suspend the entry into force of the Committee's ruling, nor the possibility of enforcing the ruling by a magistrate's enforcement proceeding.

It must be noted that under section 40 of the Act the decision of the Authority cannot be referred to the courts until the decision of the Competition Appeals Committee has been rendered.

It must furthermore be noted that the Authority is authorised to institute new proceedings if its previous non-clearance of a merger is quashed by either the Competition Appeals Committee or the courts on grounds of a breach in procedure formalities.

The grounds for an appeal are not detailed in the Act. An appeal can therefore be brought on either substantive or procedural grounds. It should, however, be noted that the courts are inclined to accept the competition authority's substantive assessment.

32. What is the usual time frame for appeal or judicial review?

According to section 9 of the Act, the decisions of the Competition Authority may be appealed to a separate committee, the Competition Appeals Committee. A written appeal must be received within four weeks of the party in question being informed of the decision. The decision of the Competition Appeals Committee shall be rendered within six weeks from the date of appeal. Legal action to annul a final decision of the Competition Appeals Committee before Icelandic courts must be started within six months of the Competition Appeals Committee's decision.

Enforcement practice and future developments

33. What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

In the past seven years (2003 to mid-2010), the Authority has approved several mergers including two foreign-to-foreign mergers (see question 25), some of which were approved with conditions. Over this period at least six mergers were rejected, none of which were foreign-to-foreign.

Update and trends

With Decision 34/2009, issued in October 2009, the Competition Authority found that there was no reason to intervene in the merger of Teymi hf, which is a holding company in the telecommunications and information technology business, and Vestia ehf, which is a subsidiary of the Icelandic bank NBI hf.

The Competition Appeals committee reversed this decision in January 2010 with its Decision No. 18/2009, where it was found that when a company that is taken over by a bank is not in a dominant position, and the bank and the company are not competitors, a danger of distortion of competition can nevertheless be present. The financial strength of the bank as owner is a crucial factor in this regard, as well as the danger of conflicts of interests as banks often have access to information on competitors on the market and in some cases they may be creditors of, or otherwise linked to, competitors on the market. Therefore the Competition Appeals Committee found that the Competition Authority should interfere in such cases.

The Competition Authority issued a press release, dated 31 March 2010, mainly based on the Competition Appeals Committee Decision No. 18/2009. The extraordinary circumstances in the Icelandic economy are discussed, especially as concerns the frequent events of creditors, mainly banks, acquiring companies and the potential effect on competition. It states that due to the unusual

circumstances at hand, the Authority can and will intervene when banks are taking over companies, by imposing conditions. The main conditions are as follows:

- the banks should resell the companies within a certain time frame;
- the independent operation of the companies shall be secured, ie by making sure that the companies are run by an independent subsidiary of the bank;
- the companies should be run with normal profitability;
- the banks should not be able to interfere in any business transactions between the acquired company and other subsidiaries of the bank;
- annual and semi-annual accounts of the acquired companies should be published; and
- effective and thorough supervision on the implementation of the conditions, as well as regular status reports to the Competition Authority.

The Competition Authority has subsequently issued several decisions, where conditions are imposed in the case of banks acquiring businesses.

34 What are the current enforcement concerns of the authorities?

There are no particular current and public enforcement concerns. That approach does not seem to have been affected by the current economic crisis.

35 Are there current proposals to change the legislation?

Yes. A bill has been presented with several changes to the Competition Act.

A charge of 200,000 krona will be levied upon parties who wish to appeal to the Competition Appeals Committee.

Article 16 paragraph 1(a) will change from the following version:

'The Competition Authority may take measures against:

- a. *agreements, terms and any actions constituting infringement of Articles 10, 11 and 12[.]'*

to this version:

'The Competition Authority may take measures against:

- a. *agreements, terms and any actions constituting infringement of any and all provisions of this Act containing prohibitions and of settlements or decisions according to this act[.]'*

A new provision will be added to article 16 paragraph 1, as follows:

circumstances or conduct that suppress, restrict or otherwise impede competition. The word 'circumstances' refers to issues in connection with the characteristics of the market in question, including the setup and structure of the companies on the market. The word 'conduct' refers to all kinds of actions, including omissions that impede or distort competition, although the conduct does not conflict with the prohibitions of the Act.

Article 16 paragraph 2 (sentence 1 and 2) will change from the following version:

Action taken by the Competition Authority may include any measures needed to bring an end to violations of the provisions of this Act or to respond to actions of public entities which may be detrimental to competition. The Competition Authority may take action both to change behaviour and structure in proportion to the infringement committed and as necessary to bring such infringement effectively to an end.

to:

Action taken by the Competition Authority may include any measures needed to reinforce competition, stopping violations of the Competition Act, or to react to the actions of public parties that may have a distorting effect on competition.

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The Competition Authority may take the necessary action to change both conduct and structure due to circumstances according to paragraph 1.

Article 17(g) will be added to the Act:

Any undertaking notifying a merger shall pay a charge of ISK 250,000 for each undertaking participating in the merger. The charge is levied at the notification and is paid to the state treasury.

The Authority will be granted the right to instigate legal action for the annulment of a decision of the Competition Appeals Committee before the courts of law, according to article 41 of the Act.

It is highly probable that this bill will be passed in the coming months.



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