

Merger Control

The international regulation of mergers and joint ventures in 64 jurisdictions worldwide

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Iceland

Helga M Óttarsdóttir

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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 well as merger notification rules No. 684/2008, issued in July 2008 (the Merger Rules).

The minister of business 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), 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 other 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 which 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 (approximately €16.4 million) 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 (approximately €1.64 million). 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 (approximately €8.18).

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 which 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. Fines of up to 1 million krona (approximately €8,170) have been imposed on an undertaking for violating the obligation to notify.

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.

There is no standstill period according to the Act. However, the Authority can extend the moratorium for an additional 20 working days if it deems that the gathering of additional data is necessary.

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

The Authority can annul the merger, impose fines and impose periodic penalty payments. As the Act was amended in June 2008 and completion prior to clearance first made illegal with those

amendments, we have no experience of whether or not fines will be imposed in practice.

12 What solutions (such as a local 'hold-separate' arrangement) 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 (English version 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.

In case 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.

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.

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 economical 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.

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 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 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 (approximately €404,000) 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 A/S (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.

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 which the public has free access too. 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 101 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.

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 four years (2003 to mid-2008), 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 four mergers were rejected, none of which were foreign-to-foreign.

34 What are the current enforcement concerns of the authorities?

There are no particular current and public enforcement concerns.

35 Are there current proposals to change the legislation?

No. The Act has recently been amended (June 2008). The Act is, however, likely to be amended in accordance with any future changes to EC Competition Law.

LOGOS
LEGAL SERVICES
SINCE 1907

Helga M Óttarsdóttir

helga@logos.is

Efstaleiti 5, IS-103
Reykjavik
Iceland

Tel: +354 540 0300
Fax: +354 540 0301
www.logos.is