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# The International Comparative Legal Guide to: Merger Control 2012

A practical cross-border insight  
into merger control issues

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#### Published by

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Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

#### GLG Cover Design

F&F Studio Design

#### GLG Cover Image Source

iStockphoto

#### Printed by

Ashford Colour Press Ltd  
November 2011

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ISBN 978-1-908070-12-8

ISSN 1745-347X



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## EDITORIAL

Welcome to the eighth edition of The International Comparative Legal Guide to: Merger Control.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control in 54 jurisdictions.

All chapters are written by leading merger control lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Nigel Parr and Catherine Hammon of Ashurst LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

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## 1 Relevant Authorities and Legislation

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

According to Act No. 44/2005 on Competition (hereinafter the “Competition Act”), the Minister of Economic Affairs is responsible for the implementation of the Act. The Minister entrusts day-to-day administration of matters within the scope of the Act, including merger control, to a separate agency, the Competition Authority. The Competition Authority is an independent agency with a separate Board of Directors appointed by the Minister for a term of four years at a time. The Competition Authority investigates mergers and issues administrative decisions prohibiting, conditioning or clearing the mergers. The decisions of the Competition Authority may be appealed to a separate committee, the Competition Appeals Committee. The Competition Appeals Committee is composed of three members with three alternates, appointed by the Minister following nomination by the Supreme Court.

### 1.2 What is the merger legislation?

The Competition Act governs mergers. Merger control is the subject matter of Articles 17 and 17(a) to 17(f). The Competition Authority has in addition issued rules of procedure No. 880/2005 that are relevant to merger control as well as rules on notifications of mergers No. 684/2008.

Iceland is a member of the European Economic Area and EU rules have always been the model for Icelandic competition legislation. Most of the provisions that have relevance to mergers in the Competition Act were adopted in Act No. 94/2008. The Council Regulation No. 139/2004 (hereinafter “EU Merger Regulation”) and the Commission Regulation No. 802/2004 were taken into account when the Competition Act was drafted. When interpreting the Icelandic merger legislation, due account is taken of the comparable EU rules and their interpretation by the EU courts and Commission.

### 1.3 Is there any other relevant legislation for foreign mergers?

According to Act No. 34/1991 on Investment by Non-residents in Business Enterprises, investment by non-residents in Iceland is subject to restrictions in the sector of fishing operations, energy exploitation and airline companies.

In order to conduct fishing operations within the Icelandic fisheries jurisdiction, Icelandic legal persons may not be under more than

25% ownership of foreign residents, calculated on the basis of share capital or initial capital. However, if the share of an Icelandic legal person in a legal person conducting fishing operations in the Icelandic fisheries jurisdiction or fish processing in Iceland is not above 5%, the share of the foreign resident may be up to 33%.

Investment in the sector of energy exploitation is also subject to restrictions. Only Icelandic persons, or persons of another EEA or EFTA country or of the Faroese Islands, are permitted to own energy exploitation rights as regards waterfalls and geothermal energy for other than domestic use. The same applies to enterprises which produce or distribute energy.

The combined share of non-residents in Icelandic airline companies may not at any time exceed 49%. Individuals and legal persons domiciled in another Member State of the European Economic Area and the Faroese Islands are exempted from this restriction.

Foreign exchange transactions have been subject to capital controls ever since the banking system collapsed in the autumn of 2008. The capital controls might possibly be relevant for foreign mergers. It must however be noted that “new domestic investments”, meaning any new investment based on new inflow of foreign currency that is converted to domestic currency at a financial undertaking in Iceland, is unrestricted pursuant to the Rules on Foreign Exchange No. 370/2010.

According to Act No. 19/1996, investment in real estates in Iceland is subject to restrictions. Only Icelandic persons or entities, or persons or entities of another EEA or EFTA country or of the Faroese Islands, are permitted to own any property rights or the rights of usage over real estates in Iceland, unless they have been granted an exemption from the Minister.

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

Yes, in addition to the sectors mentioned in question 1.3. Article 106 of the Act on Financial undertakings stipulates that mergers of financial undertakings are subject to the approval of the Financial Supervisory Authority. Pursuant to Article 40 of the said Act, 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% 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 the share capital, guarantee capital or voting rights in a financial undertaking exceeds 20%, 33% or 50%, or comprises such a large proportion that the financial undertaking can effectively be regarded as its subsidiary company.

## 2 Transactions Caught by Merger Control Legislation

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

Pursuant to Article 17 of the Competition Act, a merger is regarded as having taken place where a change of control on a lasting basis results from:

- a. the merger of two or more previously independent undertakings or parts of undertakings;
- b. an undertaking taking over another undertaking;
- c. the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more undertakings; and
- d. the creation of an undertaking for a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Control is constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by ownership or the right to use all or part of the assets of an undertaking or rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. Control is acquired by persons who are holders of rights or entitled to rights under the contracts concerned or while not being holders of such rights or entitled to rights under such contracts, have the option to exercise such rights, *cf.* Article 17(2) and 17(3) of the Companies Act. This is a very broad concept, and the same concept as provided for in Article 3(2) of the EU Merger Regulation.

The concept of control is predominantly an economic one. What must be examined is whether a party has *de facto* the possibility to exercise a decisive influence on the composition, voting or decisions of the organs of an undertaking, as prescribed in Article 17 of the Competition Act, and thus it is not a decisive factor whether the control is based on a formal legal instrument or on something else, provided that the control extends to commercial policy and is of a lasting nature. Therefore it is possible, in exceptional situations, that a legal or a natural person can be considered to have lasting control over an undertaking while not being a formal holder of a controlling interest.

### 2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The acquisition of a minority shareholding can amount to a "merger" if the conditions laid down in Article 17 of the Competition Act are met. The meaning of the term "control" is set out in the response to question 2.1.

### 2.3 Are joint ventures subject to merger control?

Only full-function joint ventures which meet the jurisdictional

thresholds are subject to merger controls. The creation of an undertaking for a joint venture, performing on a lasting basis all the functions of an autonomous economic entity, are caught *cf.* Article 17, paragraph 1 point-d of the Competition Act, if the jurisdictional thresholds are met. The same jurisdictional thresholds apply for joint ventures as for other mergers. The combined turnover of the undertakings in question must be ISK 2 billion or more in Iceland, and at least two of the undertakings participating in the merger have to have a minimum annual turnover of ISK 200 million respectively. The wording of paragraph 1 point-d of the Competition Act reflects point 4 of Article 3 of the EU Merger Regulation, which brought the creation of all "full-function" joint ventures within the concept merger. However the concept is narrower under Icelandic law, as the joint ventures caught by the merger control appear to require the creation of an undertaking, based on the wording of the term in the Competition Act.

A joint venture which would only supply goods and/or services to the parent business and would not have any presence on the wider market or dealings with third parties, would not be autonomous enough to be considered a full function joint venture.

A joint venture which would be a brand new start-up business that has not previously traded and would not be acquiring an existing business from its parents (or an independent vendor) could very well become a full functioning joint-venture given that it would be performing on a lasting basis all the functions of an autonomous economic entity.

A joint venture which is purely contractual with no creation of a new legal entity as the vehicle for the joint venture activities cannot be regarded as a merger under the Icelandic Competition Act, as it appears to require a creation of an undertaking for the joint venture.

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

The thresholds for notification are twofold and relate to domestic figures. Both of them must be met. Firstly, the combined turnover of the undertakings in question must be ISK 2 billion (roughly 17.5 million USD and 12.5 million EUR) or more in Iceland (cumulative threshold). Secondly, at least two of the undertakings participating in the merger have to have a minimum annual turnover of ISK 200 million (roughly 1.75 million USD and 1.25 million EUR) respectively in Iceland *cf.* Article 17(a) of the Competition Act. The turnover includes the turnover of parent undertakings and subsidiaries, undertakings within the same group of undertakings, and the turnover of undertakings directly or indirectly controlled by the parties to the merger. In the case of acquisition, the turnover of parent undertakings of the undertaking that is acquired is not included in the calculation.

The turnover is calculated with regard to the last financial year of the undertakings in question.

If the Competition Authority is of the opinion that there is a significant probability that a merger which has already taken place, while failing to meet the thresholds, may substantially reduce effective competition, the Authority may require the merging parties to submit a notification of the merger, provided that the combined annual turnover of the undertakings concerned exceeds ISK 1 billion, *cf.* paragraph 3 of Article 17(b).

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

Yes it does apply in this case.

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

The Competition Act applies to agreements, terms and actions with effect, or intended effect, in Iceland, *cf.* Article 3(1). As a consequence, the provisions on mergers apply to mergers that have effect, or intended effect in the geographic market encompassing the Icelandic territory. There is no history of any action taken by the Competition Authority in response to a foreign-to-foreign transaction, other than clearances.

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

The Competition Act does not provide for any such mechanisms, apart from the Competition Authority’s permission to require merging parties failing to meet the thresholds to submit a notification if it is of the opinion that there is a significant probability that a merger may substantially reduce effective competition, as noted above in the response to question 2.4.

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

It is likely that the Competition Authority would look to Article 5(2) of EC Merger Regulation for guidance when assessing whether the various stages of a merger constitute a single transaction or a series of transactions. However the Competition Act is silent on the issue and it has not been specifically addressed by the Competition Authority.

### 3 Notification and its Impact on the Transaction Timetable

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

Notification is required of all mergers meeting the relevant thresholds.

A notification must be made before a merger takes effect but after the conclusion of an agreement on the proposed merger, the public announcement of a takeover bid or the acquisition of a controlling interest in an undertaking, *cf.* paragraph 3 of Article 17(a). The Competition Authority can impose administrative fines on undertakings or groups of undertakings that fail to notify it of mergers, *cf.* Article 37 of the Companies Act.

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

There are no such exceptions.

**3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?**

The Competition Authority can impose administrative fines on undertakings or groups of undertakings that fail to notify it of mergers, *cf.* Article 37 of the Companies Act.

The Competition Authority imposes administrative fines on undertakings or groups of undertakings that violate the obligation to notify mergers, *cf.* Article 37 of the Competition Act. In deciding the amount of fines, account is taken of the nature, and extent of the violations, duration and whether repeated violations are involved. Fines may amount to up to 10% of the total turnover of the preceding business year of any undertaking or association of undertakings involved in a violation. A decision to impose a fine may be waived if a violation is regarded as insignificant, or for other reasons if no need is seen for such fines for the purpose of promoting and strengthening effective competition.

In practice, fines for failure to notify a merger have only been imposed on those responsible for the notification.

Fines have been imposed on undertakings for failing to notify transactions even though the transactions were not deemed to have anti-competitive effect. Foreign businesses with no subsidiaries or assets have never been fined by the Icelandic Competition Authority for failure to notify a merger so far, to our knowledge.

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

It would probably be possible to carve-out a completion of a merger in Iceland in order to avoid delaying a global completion. This would perhaps be possible by some sort of a contract or a company structure guaranteeing that that no change of control takes place. To our knowledge, there is no precedence for this in Iceland.

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

The notification can be filed after the conclusion of an agreement on the proposed merger, the public announcement of a takeover bid or the acquisition of a controlling interest in an undertaking, *cf.* paragraph 3 of Article 17(a).

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

There are two phases of investigation. The first phase of investigation begins after a notification of the merger has been submitted. If the notification submitted is not complete or insufficient, the Competition Authority will require the submission of a complete and satisfactory notification. The Competition Authority has 25 working days to notify a party that has submitted a notification of a merger, which meets the conditions set forth in the Competition Act and the merger notification rules No. 684/2008, if it sees reason for further investigation of the competitive impact of the merger. If there are reasons for further investigations, a notification is sent to the party that notified the merger before the end of the 25 working days period. Following that notification, phase two of the investigation begins in which the Competition Authority has 70 working days to complete the investigation. If it is necessary to obtain further information, the Competition Authority may extend this time limit by up to 20 additional working days.

In the event of the receipt of a notification in short form, the Competition Authority may, within 15 working days of receiving such a short form, require a longer form, if it deems that to be necessary.

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

Mergers that meet the thresholds described in the response to question 2.4, must be notified and cleared before they can be executed. If the Competition Authority does not notify a party that has submitted such a notification within 25 working days that it sees a reason for further investigation, the merger can be executed. During the investigation process, described in response to question 3.6 above, the transaction cannot be completed.

The Competition Authority imposes administrative fines on undertakings or groups of undertakings for implementing a transaction prior to receiving approval, *cf.* Article 37 of the Competition Act. The legal basis of the fines and how they are decided is the same as described in the answer to question 3.3.

The parties can request for permission 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, *cf.* paragraph 4 of Article 17(a).

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

A merger notification shall include information on the merger, the undertakings concerned, the relevant markets and other details necessary for assessing the competitive effects of the merger. The merger notification rules No. 684/2008 prescribe in detail the information that must be contained in a notification. The notification form is similar to Form CO, relating to the notification of a concentration pursuant to the EU Merger Regulation.

If the initial notification is not complete or insufficient, the Competition Authority will require the submission of a complete and satisfactory notification.

Pre-notification discussions are not customary but the notifying parties do normally have access to the personnel of the Competition Authority for consultation.

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

Paragraphs 6 and 7 of Article 17(a) of the Competition Act contain provisions on short form notification. The shorter form may be used for the purpose of notifying a merger where one of the following conditions is met:

- a. the markets affected by the merger are not related;
- b. two or more of the parties to the merger are engaged in business activities in the same product and geographic market (horizontal merger), provided that their combined market share is less than 20%;
- c. two or more of the parties to the merger are operating in product markets which are upstream or downstream of a product market in which either party to the merger is operating (vertical merger), provided that their individual or combined market share is less than 30%;
- d. the merger in question is an undertaking for a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which has a limited effect in Iceland; and
- e. a party acquires sole control of an undertaking over which it already had joint control.

In the event of the receipt of a notification in short form, the Competition Authority may, within 15 working days of receiving such a short form, require a longer form if the conditions for a short form are not met or if it is regarded as necessary for assessing the competitive impact of the merger.

The timetable for clearance cannot be speeded up by any other means than submitting the notification earlier than required and ensuring that the initial notification is complete. It can delay the process if the initial notification is not complete or insufficient as the Competition Authority will require the submission of a complete and satisfactory notification.

The parties can request for permission 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.

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

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 is responsible for the notification. Filing fees are ISK 250,000 for each merger.

## 4 Substantive Assessment of the Merger and Outcome of the Process

### 4.1 What is the substantive test against which a merger will be assessed? Are non-competition issues taken into account?

According to Article 17(c) of the Competition Act, the Competition Authority can annul or condition a merger if it deems that the 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 Competition Authority furthermore takes into account possible efficiencies that a merger can create, intended to reflect the “efficiency defence” in EU Competition Law. The Competition Authority takes into account international competition and whether the relevant market is open or closed as well.

The 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. Decisions will mainly be based on the effect on competition in Iceland and, if applicable, the EEA, and not on non-competition issues such as industrial policy.

The main focus of the Competition Authority and the Competition Appeals Committee, when assessing mergers, has been on whether the merger in question creates a dominant position, including joint dominance, or strengthens such a position. In addition, it is considered 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.

The definition of a dominant position used by the Competition Authority and the Competition Appeals Committee is in harmony with the definition applied by the EU Commission and the European Court of Justice. Article 4 of the Competition 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 Competition 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 Competition 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, it reviews in particular 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.

Pursuant to Article 17(c) of the Competition Act, the Competition 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 Competition Authority must also take into account whether the market is open or access to it is obstructed. Additionally, the future development of a given market must be given special attention when assessing joint dominance created or strengthened by mergers.

Mergers creating high market shares have also been cleared due to the failing firm defence.

It is also worth noting that special considerations apply, due to the circumstances in the Icelandic economy, to cases where financial institutions take over companies. Following the banking crisis that hit Iceland in 2008, many companies have fallen into the ownership of financial institutions. When the Competition Authority assesses takeovers by banks, perhaps combined with substantial debt write-off of certain companies, it is concerned with the potential disadvantageous position that others can be placed in and the potential conflicts of interests within the banks, bearing in mind the oligopolistic market for retail banking in Iceland. For instance, the bank could be a lender to a competitor of the company it has taken over. With so many companies burdened by debts, banks can, as lenders, exercise a large degree of control over them. The Competition Authority has established certain identical or similar conditions for takeovers of this kind in many decisions from 2010 and onwards, for example a requirement to ensure the relative independence of the target that is acquired, and most notably an obligation to sell the target within a specific timeframe.

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

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Merger notifications and the accompanying documents are not published and they are in general not accessible to third parties. During the investigation of a merger, the Competition Authority frequently conducts interviews and meetings with undertakings in the relevant market (e.g., the merging parties' competitors or customers or others who might have interests affected by the merger), irrespective of whether there were any complaints made

that prompted the investigation or not. Undertakings in the relevant market are also often given a chance to submit their comments regarding a merger and its impact. It is worth noting that everybody can submit complaints to the Competition Authority.

The Competition Act doesn't clearly lay down which parties can have a direct standing in a competition case. It is subject to an assessment based on accepted principals in competition law and administrative law. Third parties which have legally protected interests that are directly and specifically affected by the decision are considered to be parties 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. Article 13 of the rules of procedure No. 880/2005 provides that parties to the case shall be given a reasonable time-limit to submit their views and supporting documents, and Article 15 provides that parties to the case shall have the right to familiarise themselves with the documents of the case and shall receive and be notified of the documents submitted by the counterparty.

An example of legal standing of competitors is the Competition Appeals Committee decision in the case No. 1/2011, *Búvangur et al.* against the Competition Authority. A merger was deemed to create a dominant position in respect to pork farming. The merger was nevertheless cleared by the Competition Authority on the basis of the failing firm defence. The appellants appealed against the clearance decision. They were not considered to have a direct standing in the original case before the Competition Authority, but were nevertheless considered able to lodge the appeal against the decision as interested parties. The Competition Appeals Committee came to the conclusion that it had not been proven that the failing firm defence was applicable and annulled the clearance decision.

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

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The Competition Act, and rules that the Competition Authority has laid down with authorisation from the Competition Act, provide for a duty to submit information to the Competition Authority necessary to assess the competitive effects of a merger, cf. Article 17(a).

The Competition Authority may request any information regarded as necessary for the investigation of individual cases and require the surrender of documents for inspection. Information may be requested in oral or written form, and shall be provided within a reasonable time limit set by the Authority. The Competition Authority can also request information and documents from other administrative authorities, irrespective of their duty to maintain confidentiality, cf. Article 19. Administrative fines can be imposed on undertakings or groups of undertakings that violate the obligation to provide information or surrender documents pursuant to Article 19, cf. Article 37.

Any person who, in connection with the collection of information pursuant to Articles 19 and 20, destroys, falsifies, suppresses or otherwise renders unusable any documents which are significant for the investigation in question, or, in the course of providing information pursuant to Article 19, supplies to the Competition Authority with false, misleading or inadequate information, is subject to fines or imprisonment according Article 41(b).

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

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Pursuant to Article 19 of the Competition Act, the Competition Authority may request from individual undertakings or groups or

associations of undertakings covered by the Act any information regarded as necessary for the investigation of individual cases. No provisions exclude confidential commercial information from being provided.

In the Competition Act there are several provisions relating to the duty of confidentiality. Article 34 states the following:

Persons acting on behalf of administrative authorities in implementing this Act are prohibited from disclosing information on confidential matters obtained by them in the course of their functions. This confidentiality shall remain in force even if employment is terminated.

Furthermore, in Paragraph 2. of Article 36, it is stated that when the Competition Authority publishes certain information:

“... account shall be taken of the legitimate interests of undertakings in keeping their commercial and technological information secret.”

The merger notification and the accompanying documents are not published and they are generally not accessible to third parties, although requests can be made for access under the Information Act No. 50/1996. Prohibition and approval decisions of the Competition Authority and of the Competition Appeals Committee are published. When they are published the parties can request that sensitive business information is kept confidential.

The parties should submit a written and reasoned request for information to be kept confidential. Usually the request is submitted when the Competition Authority is given the information. If no such request is submitted, the Competition Authority can reasonably assume that the information in question does not need confidential treatment.

The risk of confidential commercial information being leaked in the merger control process is low.

It can be added that the Competition Authority is authorised to deliver to competition authorities of other states information and data as necessary for the enforcement of Icelandic or foreign competition law, in accordance with Iceland's obligations under international agreements on the condition that the recipients will treat the information and data as confidential, *cf.* Article 35, paragraph 2, point-a.

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

### 5.1 How does the regulatory process end?

If the Competition Authority does not act within the time limits described in the answer to question 3.6, the Competition Authority cannot annul the merger and the transaction can be implemented. Also, if the Competition Authority notifies the parties in question that it sees no reason for further investigation of the competitive impact of the merger, the regulatory process has ended and merger can be implemented.

At the completion of the investigation the Competition Authority issues an administrative decision, either clearing the merger, accepting it with conditions, or rejecting it. All the decisions of the Competition Authority are published.

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

If parties anticipate a negative merger decision, informal

negotiations are often conducted with the Competition Authority proposing acceptable remedies (conditions) to the merger. The Competition Authority has the power to impose conditions upon a merger, whether structural or behavioural, that must be met within a given time. The Competition Authority may accept any remedy that can reduce or eliminate the negative effects that are holding up the merger, whether divestment remedies or other structural remedies or behavioural remedies. If the Competition Authority decides to authorise a merger, subject to remedies reducing or eliminating negative effects, the remedies/conditions are included in the administrative decision authorising the merger.

### 5.3 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

There are no prescribed forms to complete or submission to make when parties are negotiating or offering remedies. The Competition Act does not provide for any time-limit or deadline for such negotiations. They would normally take place in the second phase of the investigation, usually after the Competition Authority has compiled a statement of objections, issued if the Competition Authority deems that the merger will obstruct effective competition.

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

Divestment remedies are rarely applied in Iceland, and there is no standard approach to them. In the Competition Authority's decision No. 8/2008, a divestment remedy was required. The case concerned the merger of book publishers. In a settlement between the merging parties and the Competition Authority, the merging parties committed to sell certain publishing rights. A monitoring trustee was appointed to monitor whether the parties would comply with the conditions and to ensure that the value of the rights sold would not decrease.

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

It depends on the administrative decision clearing the merger on conditions. In the decision there will be provisions on how the parties in question will have to comply with the remedies and any time-limits or deadlines in that respect.

### 5.6 How are any negotiated remedies enforced?

The Competition Authorities can enforce the remedies with periodic penalty payments, administrative fines that may amount up to 10% of the total turnover of the preceding business year of any undertaking participating in the violation, or the annulment of the merger. The Competition Authority rarely appoints monitoring trustees or other independent persons to monitor the parties' compliance with the terms of the remedies. In the event of enforcement procedures pursuant to decisions of the Competition Authority or Competition Appeals Committee, the proceedings shall be conducted in accordance with the Enforcement Act No. 90/1989.

### 5.7 Will a clearance decision cover ancillary restrictions?

If the parties to a merger agree on ancillary restraints in relation to

the merger that is necessary in order to execute the merger, the competitive effects of the restraints can be assessed in relation to the merger itself, *cf.* chapter 12 of the merger notification rules No. 684/2008. The merger notification must include the ancillary restraints that the parties request clearance for and they must explain how these restraints are directly related to the merger and necessary for its implementation. Consequently, if the merger would be cleared, the clearance would cover the ancillary restraints.

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#### 5.8 Can a decision on merger clearance be appealed?

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Appeals against merger decisions, in particular against negative merger decisions, are relatively common in Iceland. The decisions of the Competition Authority, approving or prohibiting transactions, can be appealed to the Competition Appeals Committee within four weeks from the time the party in question was informed of the decision, pursuant to Article 9 of the Competition Act. Furthermore, it is possible to instigate legal action for the annulment of the rulings of the Competition Appeals Committee before the Icelandic district courts. Such action shall be brought within six months after the party obtained knowledge of the Committee's ruling. The decisions of the district courts can be appealed to the Icelandic Supreme Court, which is the court of last resort. In case the courts annul a decision of the Competition Appeals Committee based on a procedural breach, in part or in whole, the Competition Authority may re-examine a merger taking into account the current market conditions and shall render its decision within 30 working days.

With regard to the standing of interested third parties, reference is made to the answer to question 4.2.

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

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Yes, reference is made to this in the answer to question 3.6.

If the parties do not notify the Competition Authority of a merger that meets the jurisdictional thresholds, the Competition Authority can intervene and enforce the merger control legislation at later stages. The Competition Act does not provide for any time-limit for the Competition Authority to intervene. The Competition Authority can intervene years after the merger has been implemented.

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## 6 Miscellaneous

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#### 6.1 To what extent does the merger authority in Iceland liaise with those in other jurisdictions?

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The Authority signed an agreement with the Scandinavian competition authorities on cooperation in competition matters on 16 March 2001 and the competition authorities of Iceland, Norway, Denmark, Sweden, Finland, the Faeroe Islands and Greenland are engaged in regular co-operation.

The Competition Authority participates in co-operation organised by the European Competition Network (ECN), and is a party to the International Competition Network (ICN).

In addition, the Icelandic Competition Authority is a member of the European Competition Authorities (ECA), founded in Amsterdam in April 2001.

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

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30 August 2011.



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