



Translation of opinion no. 3/2008 *Decisions made by banks and government agencies regarding the future of companies in competitive markets* that was published in November 2008. Only original text is valid.

Wednesday, 12 November 2008

Opinion No. 3/2008

1.

As has been well reported, the financial market in Iceland has recently suffered great upheaval and the Icelandic Financial Supervisory Authority has, under the Act No. 125/2008 on authorisation for funding from the Treasury due to special circumstances in the financial market, taken over the operations of Kaupthing banki hf., Landsbanki Íslands hf., and Glitnir banki hf. Receivership committees have been appointed that will assume the powers of the banks' boards of directors. In the wake of this, new banks have been established for the domestic operations of the three commercial banks. The new banks are owned by the Icelandic state.

It is evident that many Icelandic undertakings are currently struggling with operational problems. Companies attempt to keep their operations going and to preserve their assets following the collapse of the Icelandic commercial banks and the resulting hardships. These are in addition to measures that have been taken because of a worsening operational environment for undertakings during recent months. A large number of these companies have had business relationships with the failed banks, and continued access to borrowed funds and credit facilities is necessary for their operations.

The directors of the new banks and, as the case may be, those who control the banks that the Icelandic Financial Supervisory Authority has decided to take over have extensive decision-making powers with respect to the direction of the economy. Under the present circumstances their decisions are more apt than ever before to have an impact on the future competitive environment and thus on the functionality of the economy in important markets. The Confederation of Icelandic Employers and others have emphasised that a professional and transparent procedure for such decisions should be formed.

Drafts for the principal rules that are set forth in this opinion have been presented to the new banks and various interest groups. In general, these parties think that there is a great need for rules of this kind. Some parties with vested interests have made reservations regarding specific provisions and these reservations have been addressed.

2.

Competition in business is essential for the Icelandic economy because it increases the public welfare and it is conducive to efficiency in business operations. Active competition creates jobs and promotes increased productivity and economic growth. The experience of other countries as well as academic research shows that during economic recessions or depressions, actions taken to enhance competition contribute to a more speedy recovery in the economy. The same sources demonstrate that measures which limit competition prolong and increase economic difficulties and therefore counteract any recovery.

In view of this it is very important that, along with the above decisions made by the banks, a competition assessment concerning the measures in question is made, without pushing aside the obvious interests of maximising value, safeguarding the interests of the banks in the long run, and working speedily. It is important in respect to decision making concerning the future of businesses working in key markets that consideration be given to the important long-term interests of the public and to economic life, so that active competition may continue to survive in the greatest number of markets in Iceland. It should, however, be mentioned that the competition assessment may be limited by the information that the relevant bank possesses.

3.

It is evident that a number of measures which the state banks will be initiating may undergo statutory inspection by the competition authorities, e.g. in the case of corporate mergers. However, due to the particular circumstances now prevailing in Iceland, the Icelandic Competition Authority considers it very important that public agencies and publicly owned corporate entities consider, from the outset, what impact their measures may have on the Icelandic economy and competition in the markets.

It should be pointed out that the internal measures taken by the relevant banks that are not in compliance with this opinion do not necessarily constitute an independent violation of the Competition Act, as it would under these circumstances only be in the power of the legislature to make the contents of the opinion legally binding.

This present opinion is aimed at the commercial banks that are owned by the state, and at those individuals who manage the affairs of the predecessors of the commercial banks. It is desirable that the principles laid down in the opinion will also be taken into consideration by public entities that might make decisions regarding the interests of companies in competitive markets.

Accordingly, pursuant to Article 3 of Rules No. 880/2005 (Rules of Procedure of the Icelandic Competition Authority), recommendations may therefore be directed

to undertakings, associations of companies and public entities for the purpose of promoting active competition. This present opinion is founded on the above; cf. also c-item, paragraph 1 of Article 8 of the Competition Act.

4.

Final Opinion:

The Icelandic Competition Authority advises commercial banks owned by the state that when making decisions that may have an impact on the future of businesses and on competition in Iceland the following principles will be taken into consideration. As the case may be, the same shall apply for the receivership committees that administer the affairs of the banks' predecessors.

1. **If two or more possible measures are being considered (e.g. measures relating to corporate reconstruction), then those measures should be selected that enhance competition or restrict competition the least.**
2. **If possible, measures should not result in increased oligopoly, and undesirable corporate cross-management and cross-ownership ties should not be established in the affected markets. This is particularly relevant in markets that are of key importance to the economy and/or where barriers to entry are significant.**
3. **The scope available to reduce oligopoly, barriers to entry, undesirable management ties and cross-ownership or market domination should be used to the extent possible. This will make it possible to observe in the long term whether it may be reasonable to split up companies rather than merge them.**
4. **Care should be taken that undertakings are not discriminated against in an unfair manner.**
5. **The operation or financial restructuring of two or more competitors who are customers of the same bank should not be undertaken by the same party on behalf of the banks. At the same time, the ownership role and the service role of banks must be kept separate. For example, different interests should be managed by the establishment of holding companies or operating companies.**
6. **If companies or their assets are offered for sale, it should be ensured that all prospective buyers have an equal opportunity to bid and that buyers are selected on the basis of objective criteria. Efforts should be made to the extent possible to keep the process open and transparent.**

7. **Opportunities should be created for new parties and, as the case may be, foreign investors, to enter markets, e.g. by purchasing companies or assets.**
8. **When rescuing undertakings, a decision should be taken in regard to the feasibility of creating room for the entry of new undertakings for the purpose of increasing competition. For example, when banks bring new share capital into companies, this could entail the share of the former owners being reduced or eliminated.**
9. **In connection with all major arrangements or measures that have an impact on the operation of a business concern in Iceland, there should be an assessment of the competitive impact of the arrangements or measures. In order to ensure the effectiveness of such an assessment, it is desirable that a person be appointed who is knowledgeable of competition issues to supervise and, as the case may be, take part in the decisions. It is preferable that this person is independent.**
10. **In order to ensure transparency and to preclude suspicion, the process involving corporate restructuring and other important measures should be recorded, e.g. by the party appointed pursuant to principle 9.**

The Icelandic Competition Authority recommends that prior to 1 December 2008 it should be informed of the processes and operating procedures that aim at the above. At the same time the above will be made publicly known.

The Competition Authority

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