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Key points in Competition law enforcement in Iceland – Tools in the ICA toolbox. What are they for? How are they used?

Speech given by Páll Gunnar Pálsson, Director of the Competition Authority, at a conference on dominant positions and the application of competition legislation

Ladies and gentlemen,

I would like to begin by praising the organisers of this conference for the initiative they have shown in providing a platform for this discussion of competition issues. When a university, a business association and two of Iceland's largest law firms join hands and put their weight behind a discussion of this type, they underline the importance of competition issues in this day and age. For this the organisers deserve our praise.

It should be noted that competition authorities are not known to pay compliments to business associations or legal firms. So enjoy it while it lasts.

The conference organisers asked me to speak about enforcement of competition law. With that in mind, I will begin by discussing the importance of competition rules and the environment to which they are applied. Thereafter I will try to give you a glimpse of the tools in the Authority's toolbox and how they have been used. Lastly I would like to touch upon two items of debate, relating to enforcement of competition law. One of them being the interpretation and enforcement of the prohibition of an abuse of a dominant position, a subject already touched upon by my fellow speakers.

Let us begin.

When we discuss competition law and its applications, we must make sure that we do so within the context of their objective and their importance. We must also bear in mind the situation on the market and the general economic circumstances at the time. I would like to say a few words about this subject.

Competition law, its importance and its objectives are based on the fact that competition generally brings increased economic prosperity, underpins a dynamic commercial sector, boosts employment and improves conditions for the general public. Restraining competition has exactly the opposite effect – and it can severely damage the economy and the public. [Without competition rules, the

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likelihood of undesirable corporate behaviour increases, jobs are lost and consumer welfare is damaged. Without rules to combat competition-restrictive mergers, corporations could merge and create monopolies, which would lead to the elimination of competition and reduce the options facing the consumer on important markets. Without competition rules, undertakings with a dominant position would be able to drive smaller competitors from the markets and prevent new ventures from gaining a foothold. Then there are competition restraints that competitors achieve by collusion – such restrictive practices are especially damaging for the public and the business sector.]

When we enforce competition law here in Iceland, we must also take into account that most markets are highly concentrated. Competition authorities all around the world use an index named after the economists Herfindahl and Hirschman to assess concentration. [The HHI index is calculated by adding together the squares of the market shares of the companies in the respective market – that is, the sum of their market shares to the power of two.] The concentration on the market is considered low if the value of the Herfindahl Hirschman Index is under 1000. A value of more than 1800 indicates that the concentration is high. The calculated indices for several important consumer and transport markets show considerable concentration – above the danger level, so to speak.

This is one way of stating the obvious: Effective enforcement of competition rules is urgent in a small economy such as ours, where there is a high level of concentration and many markets are oligopolistic.

Competition rules are in fact important whatever the economic situation – and they are important for both small and large economies. But they are particularly important in an economic recession or depression. Currently there is a widespread international consensus that actions aimed at increasing competition help speed up economic recovery. The solution to an economic crisis is not to reduce or relax the enforcement of competition laws. These opinions have for example been expressed by the OECD and competition authorities on both sides of the Atlantic. And there seems to be an agreement not to repeat the mistakes of the U.S. authorities during the great depression of the 1920s when weakened competition law is said to have extended the depression by almost a decade, with the consequent damage for people and companies.

Here in Iceland, the three banks that were established on the ruins of the collapsed banks have decided the fates or fortunes of many companies in most markets during the last three years. These companies were in many cases over-leveraged, and many still are. And many companies have had to withstand considerable contraction in demand for their products and contraction in income. In circumstances such as these, there is great danger of increased concentration. These circumstances also bring home the danger that a company will be tempted to abuse its market dominant position or enter into illegal collusion with competitors in order to improve its situation. In such circumstances, the damage

is often transferred from the respective company to its clients, and frequently to the consumers.

The emphasis and actions of the Icelandic Competition Authority take into account the scenario that I have outlined. Currently, the Competition Authority lays strong emphasis on using the means at its disposal to help speed up the economic recovery.

It should come as no surprise that in the oligopolistic circumstances outlined above, a large proportion of the Authority's time is allocated to cases concerning the abuse of a dominant position – around 50% of the time at our disposal last year. It's also a well-known fact that the Competition Authority allocates most of its time to important consumer markets, such as the food, financial and telecommunications markets, and the transport sector.

With all this in mind, the Competition Authority has enforced competition law with the intention of sending a clear message along the following lines:

First, mergers that restrain competition will and must be counteracted in every possible way. Since 2005, the Competition Authority has annulled 8 mergers and imposed conditions on a further 46.

The largest proportion of mergers since the collapse has been bank takeovers of companies active in different markets. The Competition Authority has rendered 26 decisions of this kind, where conditions have been imposed to safeguard competition. More decisions are under way. The Competition Authority monitors the conditions it sets. Violations of those conditions can obviously upset competition in a serious manner, resulting possibly in high administrative fines.

Secondly, no tolerance will be shown for companies or associations of undertakings that enter into illegal collusion. The Competition Authority has dealt with many cases of this type in recent years. During the last 10 years, 29 companies have been fined a total of 4.5 billion kronur because of price fixing and other forms of collusion.

We should note here that the Competition Authority has consistently sent a clear message that associations of undertakings should avoid illegal collusion in any form. Fines have been levied on several occasions. Contact between competitors in an oligopoly is a highly dangerous sport.

Thirdly, abuse of a dominant position is not tolerated. Such abuses limit and decrease competition and cause harm to consumers. As I mentioned earlier, significant markets in many parts of the economy are of an oligopolistic nature. The Competition Authority has in recent years addressed many cases dealing with an abuse of a dominant position. During the last 10 years, 13 companies have been fined a total of over 1.7 billion kronur in this respect. Rulings by the competition appeals committee and the courts have led to this figure being

reduced to just over 1.2 billion kronur. Thereof, fines totalling 870 million kronur have been imposed in the last three years.

The fourth point that I want to make here is that it is intolerable if the authorities, the State or local government, limit competition unneccessarily through their actions or lack thereof. The measures taken by the authorities during an economic crisis can have a considerable effect on the speed of economic recovery. The Competition Authority has addressed various formal opinions to the authorities containing requests concerning a number of matters. An opinion that the Competition Authority addressed to the Prime Minister at the end of 2009 is one example. It contained a recommendation that the Prime Minister should promote that the authorities implement a standard competition assessment in connection with the drafting and passing of legislation and administrative rules and orders.

The fifth point that I would like to make here is that the legislator has now given the Competition Authority new powers. They allow the Competition Authority to take action against any situation or behaviour that restricts competition even though that behaviour does not violate the prohibition rules in the competition act by itself. The amendment gives the Competition Authority options similar to those found for instance in the UK and Norway.

This amendment demonstrates an important recognition of the fact that competition restraints do not always stem from violations of competition law. The changes and the reasoning behind them clearly show that the legislators are of the opinion that the encouragement of competition will promote a speedier economic recovery. The changes are intended to promote those improvements. More countries are considering similar changes based on the same reasoning. A legislative bill has been put forward in Germany which has the aim to give competition authorites similar powers as found in UK competition law.

The new provision therefore supports the prohibition rules in the competition act with the intention of creating a complete system which will apply any available means to ensure that the public and the commercial sector do not suffer because of conduct or circumstances on the market that limit competition. The fundamental concept is that no company in an important market should have an irreversible right to benefit from profits deriving from a monopolistic situation of that company.

The Competition Authority is currently preparing the general application of the new provision. That preparation includes careful scrutiny of the application of comparable provisions in other countries, especially in the United Kingdom. The Competition Authority will pass information about the main points of this work to the market at the appropriate time. It should however be stressed, that the same applies to this provision as to other provisions of competition legislation: Its effectiveness will be determined by its application. As with other interventions by

the Competition Authority, the application of this provision will be tested before the Competition Appeals Committee and before the courts.

Ladies and gentlemen,

I have now briefly outlined the enforcement of the competition act, and the messages we seek to send out to the commercial sector and to the authorities. This essential message is not subject heavy criticism at this day and age.

However, not everyone agrees on how extensive the interference of the Icelandic Competition Authority should be in each case, or how the competition law and the tools of the Competition Authority should be interpreted in any given situation. The Competition Authority and the competition law has recently been subject to criticisims on two essential points. I would like to address these issues briefly:

The first of them is criticism on the new powers for the Competition Authority which I mentioned earlier. This new provision has been criticised severely by several organisations, especially by interest groups in the commercial sector. The criticism is mainly directed at the possibility, based on the provision, of breaking up a company. The critics maintain that the provision is too unclear, that it goes against constitutional safeguards regarding property rights and the foundations of competition law, and that it scares away investors.

In this respect, it has to be pointed out that the provision is based on foreign models. The British equivalent is considered to be a success, and Norwegian authorities can also counteract competition-restrictive practices even though they are not the result of violations of competition rules. In these countries the respective provisions are phrased in general terms, as it is not possible to specify in advance all kinds circumstances that could have a negative effect on competition. The urgent necessity of protecting the public interest calls for evaluation-based legal provisions to combat unforeseeable damaging circumstances. The Parliament's Trade Committee was involved in detailed discussions about this point in connection with constitutional safeguards, and the conclusion was that the provision fulfilled the requirement for authorising intervention of this type.

Speculations that the provision would scare away investors are far-fetched. There are many things in Iceland's economic environment that should cause investors more concern than the possible use of a remedy that has its equivalent in countries we do business with. A remedy that has led, among other things, to changes in the ownership of airports in the United Kingdom.

That being said, one has to recognise that a new legal provision of this kind can to some extent lead to uncertainty about how it will be applied. The Competition Authority will do its utmost to limit that uncertainty.

The final point I would like to address this morning is directly related to the presentations of earlier speakers on interpretation on the ban on the abuse of a dominant position, and how to apply an economic assessment in implementing competition legislation. In recent years, discussions have taken place within the European Union, concerning amendments that embrace a more economics-oriented approach to the solution of cases of abuse. These discussions are addressed in guideance paper issued by the European Commission at the end of 2008 entitled *"Guidance on Commission enforcement priorities in applying Article 82 (102) to exclusionary conduct by dominant firms."*

That publication includes a description of how the Commission intends to prioritise tasks concerning abuses of a market dominating position. It states that the Commission intends to place more emphasis on using an effects-based approach when investigating the conduct of companies with a dominant position, and rely less on a form-based approach in its prioritisation.

Many dominant companies seem to have set their hopes on the possibility that the introduction of the guidelines would bring a change in the enforcement of competition law. The companies seem to believe that this change indicates that it is no longer sufficient for the competition authorities to demonstrate abuse of a market dominant position – from now on, they must dig even deeper and clearly show that the respective conduct has or will cause actual damage and has an excluding effect on competition.

This debate deals with the development of competition law. The deeply rooted view in European competition law, applied until now, is to build on the objectives of economic freedom, among other things, and to look at the conduct and its nature when deciding whether an abuse of a market dominant position has occurred. This approach has its roots for the most part in the theories put forward by German scholars associated with ordoliberalism and the Freiburg school. Scholarly discussion suggests that this policy underpinned the rapid rebuilding of the German economy after World War II, which was largely based on building up a society in which competition rules were intended to promote economic freedom.

The new approach, which has been discussed here, is based more on looking at the likely or actual effects on competition – on the effects that particular conduct has or will have on consumer welfare. The proponents of this approach believe that actions of this type will bring better results, as competition and the behaviour of dominant firms will be assessed according the benefits (or lack of) that it brings. Critics believe on the other hand that it is conceivably sacrificing greater benefits for less. Having to demonstrate the prospective effect of conduct rather than the method will often result in failing to show that a certain type of conduct is a violation, even though it is by nature damaging competition. Many critics maintain that this course is closely related to the *laissez-faire* movement of the Bush administration in the United States of America – its spiritual godfathers being the libertarians of the Chicago school of economics.

As we have touched on situation in the United States, it is interesting to reflect that at the about same time as the European Commission introduced the guidance paper I mentioned earlier, the Obama administration reversed the Bush administration's then recent interpretation of the prohibitions under Section 2 of the Sherman Act. (Section 2 Report). A speech given by Christine Varney, Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice, which she gave in May 2009, states that the Bush administration's interpretation included an incorrect assessment and was to lenient towards dominant firms. She said that the report *"went too far in evaluating the importance of preserving possible efficiencies and understated the importance of redressing exclusionary and predatory acts that result in harm to competition, distort markets, and increase barriers to entry."* She concluded that dominant undertakings can not be given a free pass to undertake predatory or unjustified exclusionary acts and that the prohibition in Section 2 will be enforced aggressively, as part of its response to the economic depression.

But what is the position of the Icelandic Competition Authority in all this? It is this: the Authority must apply competition law as it exists at the time, as it is laid down in domestic legislation and according to the guidance given by the Appeals Committee and the courts.

At the same time, the Competition Authority will, as before, keep a constant eye on the development of EEA competition law and apply the rules of the EEA agreement as appropriate. The way in which the European Commission and EFTA Surveillance Authority apply the prohibition of abuse of a market dominant position is of considerable significance. How future EFTA Court and ECJ case law turns out is even more important.

The indications we have at the moment do not indicate that there will be any immediate fundamental changes in enforcement of Article 102, if indeed there will be any change at all. It should be noted that the proposed changes in interpretation by the Commission have been issued in the form of guidance, which is not binding to the member countries in any way. In fact, the guidance is "*not intended to constitute a statement of the law.*"" It simply contains descriptions of how the Commission expects to prioritise tasks.

The judgements made in the General Court since the guidance paper was issued seem to be based for the most part on the prevailing/classical interpretation of Article 102 of The EU Treaty. The latest decisions by the Commission itself do not include any substantial changes in case law. Some scholars seem to be of the opinion that there will be no changes in enforcement of competition law in the member states until it becomes clear that the EU courts have adopted the interpretation expressed in the guidelines. It is noteworthy that ESA uses the classical interpretation, as can be seen from its decision from last July in the case of the Norway Post.

Ladies and gentlemen,

Setting aside this debate, the main emphasis in the Competition Authority's work remains clear: Competition and effective enforcement of competition rules should and will play an important role in the necessary economic recovery. To that end the Competition Authority welcomes discussions and viewpoints that can focus its work even further.

Thank you, the audience.