SAMKEPPNISEFTIRLITIÐ

FYLGISKJAL I

8. nóvember 2019

Bréf formanns samkeppnisdeildar OECD og fyrirspurn Samkeppniseftirlitsins

Í umræðu um samkeppnislögin undanfarið hefur verið látið í veðri vaka að samkeppnislögin feli í sér reglubyrði og að mikilvægt sé að breyta lögunum til þess að draga úr þeim.[1] Af þessu tilefni og í tilefni af tilteknum úrræðum samkeppnislaga sem nú eru til umræðu í tengslum við drög að frumvarpi til breytinga á samkeppnislögum (til umsagnar á Samráðsgátt stjórnvalda), leitaði Samkeppniseftirlitið upplýsinga frá formanni samkeppnisnefndar OECD. Fyrirspurn eftirlitsins og svar formanns nefndarinnar eru birt hér.

OECD (Efnahags- og framfarastofnunin) stendur fyrir öflugri umræðu og rannsóknum um samkeppnismál með starfrækslu sérstakrar nefndar aðildarríkja (Competition Committee). Markmið þessa starfs er að stuðla að framþróun samkeppnisréttar og samkeppnisstefnu, m.a. með því að setja fram viðmið um bestu framkvæmd (best practices) samkeppnisreglna. Á þessum vettvangi er rekin öflug upplýsingaveita um samkeppnismál.

Samkeppniseftirlitið tekur þátt í störfum nefndarinnar.

[1] Sjá t.d. samantekt Viðskiptaráðs Íslands, dags. 25. október sl: https://vi.is/malefnastarf/utgafa/stadreyndir/samkeppnislog-meira-ithyngjandi-a-Islandi/

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
Competition Committee

The Chairman

To Páll Gunnar Pálsson
Director General
Icelandic Competition Authority

31 October 2019

Dear Mr Pálsson,

Many thanks for your letter.

I, and the OECD, view positively, as a complement to strong competition law enforcement, regulatory reforms that that foster competition and level the playing field. Increased competition contributes to higher economic productivity and growth. Many laws, regulations or other government-imposed barriers unduly restrain market activities. Removing unnecessary regulatory barriers can contribute to improving market conditions for companies and consumers alike.

The importance of removing regulatory barriers for the OECD is reflected in a number of instruments that the OECD has adopted in this respect. The OECD Council adopted a Recommendation on Competition Assessment in 2009 that encourages governmental efforts to reduce unduly restrictive regulations and promote beneficial market activity by pursuing "competition assessments", i.e. the evaluation of policies to find and remove those that unnecessarily restrict competition in order to develop alternative policies that achieve the same objectives with lesser harm to competition. This Recommendation was reinforced with the adoption of a three-volume Competition Assessment Toolkit, designed to help governments eliminate barriers to competition and develop alternative, less restrictive measures. This toolkit has been used by many countries in partnership with the OECD – including Iceland, in the context of the ongoing joint OECD/Icelandic competition authority's competition assessment of its construction and tourism sectors.

An effective and comprehensive competition regime is a necessary complement to regulatory reform to enable authorities to eliminate private anticompetitive practices. Such a regime is essential for the good operation of markets and better conditions for consumers. Good competition laws on the books are meaningless without well-designed institutions to enforce them, even if such enforcement requires that companies suspected of having engaged in anticompetitive practices must be subjected to a fair and impartial investigation. The adoption of measures that reduce the effectiveness of a competition agency will not promote competition or the competitiveness

of Iceland's economy. Because they may benefit some incumbents with market power or some firms engaged in anticompetitive practices, such measures may impose a cost on Icelandic consumers.

In the light of this, and to answer your first question, it is evident that **the general competition rules and powers of competition authorities do not amount to regulatory burdens, and should not be removed on that basis**. On the contrary, such rules and powers are fundamental to promote competition and ensure that it occurs in a level playing field.

Similar considerations apply to the power of competition authorities to defend their decisions in court. The **OECD Competition Committee has in the past recommended that its members empower competition authorities to defend their decisions in court.** This is important not only to reinforce the independence and autonomy of competition agencies, but also to ensure that their decisions are subject only to the scrutiny of the courts – and not subject to political or business interference.

I am unaware of any system that limits a competition authority's power to defend its decisions before the courts, particularly when it grants such a right to the addressees of a competition authority's decisions. Such an approach would seem to go against the OECD Competition Committee's past recommendations on the matter – which recommend that **a competition authority be able to defend its decision before the courts at all relevant levels of appeal**. In addition, such a mechanisms has the potential to affect detrimentally the effectiveness of competition law and the principles of equality of arms and due process.

Turning to the increase in merger control thresholds and the simplification of merger procedures that you mention, the OECD Council adopted a Recommendation on Merger Control in 2005 that provides guidance on the principles that should govern such rules.

The actual level of notification thresholds is crucial to well-functioning merger control systems. If thresholds are set too high, a number of anticompetitive mergers may evade merger control scrutiny. If thresholds are set too low, though, there may be an excessive number of notifications, imposing unnecessary costs on both merger parties and authorities. As such, it is important that merger control thresholds are set in line with the experience of the competition authority, reflecting the size and structure of Iceland's economy and the type of transactions that are able to produce anticompetitive effects and reduce consumer welfare.

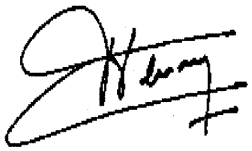
Regarding the simplification of merger control procedures, a merger control regime should set reasonable information requirements consistent with effective merger review, and provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance. In other words, while countries should seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties, this must be without prejudice to the effectiveness of merger review.

Addressing, finally, your question regarding the role of market studies as part of the work and powers of a competition authority, these are useful tools for competition authorities. Market studies usually involve an in-depth assessment of market structures or competitive conditions in a given sector; and aim to detect inefficiencies arising from weak competition, even if they do not identify behaviour violating competition laws. As a result**, an increasing number of competition agencies around the world are empowered to pursue market studies.**

However, there are significant differences across the OECD regarding the nature, methods and outcomes of market studies. In some countries, market studies are predominantly an advocacy tool to issue recommendations to change laws and regulations, or a pre-enforcement tool. However, in a number of jurisdictions – including Iceland – market studies can lead to the adoption of enforceable remedies in those instances where competition issues are identified. An advantage that such jurisdictions have is that competition agencies are able not only to identify but also to address competition failures beyond those created by narrowly defined anticompetitive conducts (such as consumer inertia which is a serious problem in particular in the financial sectors or in digital markets), unlike what occurs where a competition authority does not have the power to adopt remedies following a market study.

I hope these considerations will assist Iceland in reforming its competition law in line with OECD standards and international best practices. I look forward to seeing the outcome of the current reform, and expect that it will be used to reinforce the institutional framework for applying competition law Iceland. The OECD Secretariat remains available to assist you in any matter related to the competition regime and policy of Iceland.

Yours sincerely,



Frédéric Jenny
Chair
Competition Committee

SAMKEPPNISEFTIRLITIÐ

Dr. Frédéric Jenny, Chairman
OECD Competition Committee
2, rue André-Pascal
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Reykjavík, 29.10.2019
Case no.: 1802001

Proposed changes to competition law in Iceland

Dear Mr. Jenny,

I turn to you for advice in relation to a draft bill of law, recently published by the Ministry of Industries and Innovation in Iceland, where changes to the existing Icelandic Competition Law are being proposed. Interested parties are now invited to comment on the draft bill before 4 November, after which it will be finalised and subsequently introduced in Parliament.

The draft bill raises a number of serious concerns for competition enforcement in Iceland. According to the draft bill of law, the Icelandic Competition Authority (ICA) will no longer have the right to bring the decisions of the Competition Appeals Committee (CAC) before the Icelandic courts and thus ensure that issues of public interest and important precedents in competition enforcement will be heard in the courts.

For further clarification, according to existing Competition Law, the ICA takes decisions on infringements and other enforcement decisions at the administrative level. The concerned undertakings can subsequently appeal that decision to an administrative appeals body (CAC). The ICA is the defending party to the case before the CAC. According to the Competition Law, both parties to that case, the undertaking in question as well as the ICA, have the right to bring the ruling of the CAC before the Icelandic courts. In contrast, according to the draft bill, only the undertakings in question will retain that right, but the ICA will no longer be able to do the same.

Furthermore, it is proposed in the draft bill that the ICA will no longer have the power to introduce behavioral and structural remedies in circumstances where impediments to competition have been detected, even though competition law infringements have not been substantiated. Similar powers can be found in the UK´s Enterprise Act from 2002,

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as well as in other countries. This means that the current market investigation regime in Iceland will have to be abolished if the draft bill becomes law.

The draft bill also proposes other changes, such as higher turnover thresholds for merger notifications and simplification of merger notifications.

In this context it should be mentioned that the existing Competition Law is largely in conformity with competition rules within the European Union and the European Economic Area.

The last OECD Economic Survey for Iceland (2019) states that the regulatory burden in Iceland is high in comparison with other OECD countries. The OECD recommends that the Icelandic government *„should set up a comprehensive action plan for regulatory reform, prioritising reforms that foster competition, level the playing field between domestic and foreign firms and attract international investment.*" The amendments to the Competition Law are justified as forming part of a larger project aimed at lessening regulatory barriers. Supporters of the draft bill maintain that the powers of the ICA represent a regulatory burden and therefore the proposed changes are an important step to reduce the regulatory burden and increase the competitiveness of the Icelandic economy. The OECD Economic Survey 2019 is cited in support of this. They do not mention the importance of the enforcement of competition law in a small economy to support a competitive environment.

With all the above in mind, I seek your guidance on the following:

1) Do general competition rules and powers of competition authorities, such as those explained above, represent regulatory burden as defined by the OECD and would the proposed changes in the draft bill be in conformity with best practices in regulatory reform.
2) If an undertaking appeals a decision taken by a competition authority and if the appeals body in question (a court or an administrative appeals body) annuls (in whole or partly) that decision, is it an important part of a sound competition regime for the authority to have the possibility to appeal that verdict?
3) Are market studies/market investigations/sector inquiries an important part of the work of competition authorities and are powers to introduce remedies upon such investigations deemed to be a useful part of competition enforcement?

I would greatly appreciate if you could give guidance in relation to the questions above. As the deadline for comments on the draft bill is Monday 4 November, I would welcome an early response.

Yours sincerely,
The Icelandic Competition Authority

Páll Gunnar Pálsson
Director General