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ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES

-- Note by Iceland --

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ICELAND

1. Executive Summary¹

1. In Iceland, a modern Competition Law has been in force for little over two decades. During the first decade the Competition Authority was a multifunctional one as it was responsible not only for enforcement of competition rules but also consumer legislation, such as laws on unfair trade practices and market transparency.

2. In 2005 the legislator changed the institutional design to become a single functional one, with an authority which is solely responsible for competition. The goal of the changes was to strengthen the competition enforcement and enhance the effectiveness of the Competition Authority (ICA). (Chapter 2)

3. In the view of the ICA, the move from a multifunctional design towards a single functional one has made competition enforcement and advocacy more effective. The fact that the ICA is “solely” responsible for competition enforcement and advocacy, enables a very clear goal-orientation, which in return facilitates prioritisation and makes the Authority well equipped to tackle changes in the economic environment. The institutional design has enabled the ICA to put its weight on the most important tasks at any given time, and by that facilitate quality decisions and active advocacy and guidance. The prerequisite for quality decisions is the ability to attract and maintain high-level expertise. The current institutional design has served as a basis for success in this regard. The ICA has also been able to use its focus and goal orientation to prioritise cases with the aim to improve the length of procedures. (Chapter 3)

4. It is estimated that the ICA’s interventions after the changes, on the basis of the prohibition rules of the Competition Law, has brought economic benefits that amount to almost 650 m EUR, or 0,6% of GDP pr. year. Merger interventions and other work, such as advocacy, are not included. (Chapter 3.1)

5. It is of utmost importance to ensure the independence of competition authorities, in order to prevent undue political influence and influence by the business community. This is even more important in a small society. The institutional design of the ICA contributes to a certain level of independence. The level of independence has, however, its clear limits. Inevitably, the ICA is a part of a broader public system and therefore it cannot enjoy an absolute independence. (Chapter 4)

6. It has to be recognised that the institutional design has to take account of the general circumstances in each country. In the view of the ICA, the OECD plays a important role in safeguarding the independence of competition authorities and make sure that decisions on the institutional design of authorities are well grounded. Therefore, the ICA recommends that the OECD Competition Committee develops principles or best practices for reviewing the institutional design of competition authorities. These principles should include a definition of independence in this context and instructions on the minimum level of independence of competition authorities. Furthermore, the principles should include minimum standards on how to prepare decisions on institutional design of competition authorities, in order to ensure that such decisions are based on objective assessments. (Chapter 5)

¹ This paper reflects the views of the ICA.

2. Simplification of the Institutional Design of the Competition Authority in 2005

7. An amended Competition Law took effect on 1 July 2005, introducing a significant change in the institutional design of the Icelandic Competition Authority (ICA), with the aim of directing the focus towards competition and strengthens competition enforcement.

2.1 The nature of the changes

8. A holistic Competition Law was first introduced into Icelandic law in 1993, in conjunction with the adoption of the Agreement of the European Economic Area.² From there on until 2005, the Competition Authority was multifunctional as it was responsible not only for enforcement of competition rules but also consumer legislation, such as laws on unfair trade practices and market transparency.

9. In 2005 the legislator changed the institutional design to become a single functional one, with an authority which is solely responsible for competition matters. Furthermore, a one pillar institutional design was adopted, with a single administrative body, instead of a two pillar system, with an independent council and an authority at the first instance. The changes in 2005 are shown in the following table:

Before July 2005	After July 2005
<p>Multifunction responsibilities:</p> <ul style="list-style-type: none"> - Competition enforcement and advocacy. - Enforcement of consumer laws regarding unfair trade practices and market transparency 	<p>Single function responsibilities:</p> <ul style="list-style-type: none"> - Competition enforcement and advocacy.
<p>Two Pillar Institutional Design:</p> <p><i>Council</i> – Responsible for decision making.</p> <p><i>Authority</i> – Responsible for preparations of decisions.</p>	<p>One Pillar Institutional Design:</p> <p><i>Competition Authority</i> – Responsible for advocacy, investigations and decision making.</p>
<p>Governance of the bodies:</p> <p><i>Council</i> of 5 members appointed by the Minister of Commerce, for a period of 4 years. Decision making body.</p> <p><i>Director General</i> of the Authority appointed by the Minister for a period of 6 years.</p>	<p>Governance of the Authority:</p> <p><i>Board</i> of 3 members, appointed by a Minister, for a period of 4 years. The board establishes priorities and monitors activities. Major decisions are submitted to the Board for approval or rejection.</p> <p><i>Director General</i> hired by the Board. Decision making and day-to-day operations.</p>
<p>Appeal Mechanism:</p> <p><i>Appeals Committee</i> – Revision of competition and consumer cases. Appointed by a Minister following a nomination by the Supreme Court. Rulings referred to the general courts.</p>	<p>Appeal Mechanism:</p> <p><i>Competition Appeals Committee</i>. Appointed by a Minister following a nomination by the Supreme Court. Rulings referred to the general courts.</p>

10. At the same time a new Consumer Agency was established, responsible for enforcement of laws regarding consumer rights, such as unfair trade practices and transparency, and maintenance and organisation of Icelandic measurement standards (Metrology).

11. The aforementioned changes in 2005 did not affect the institutional design of sector regulators in Iceland. There are a few sector regulators operating in Iceland, such as The Post and Telecom

² The EEA Agreement brings together the EU Member States and three EEA EFTA States, incl. Iceland, in a single market. The agreement provides for the inclusion of EU legislation covering the four freedoms, the free movement of goods, persons and capital.

Administration, the Media Commission and The National Energy Authority, which is responsible for regulation in the electricity sector. These regulators are responsible for enforcement of EU/EEA-laws and domestic rules in the respective sectors. Some of the tasks concern competition issues in the sectors but the authorities are also responsible for many other issues, such as the maintenance of the respective infrastructures and various technical issues. Between 10 and 15% of ICA' time is allocated to the aforementioned sectors.

12. The ICA has a long-standing co-operation with sector regulators, with the aim to prevent duplication, enhance effectiveness and ensure transparency and legal certainty. The ICA and the Post and Telecom Administration co-operate in accordance with rules laid down in a specific co-operation agreement.

2.2 *The rationale for the changes*

13. The changes to the institutional design in 2005 were first proposed in a report issued in 2004, by a committee appointed by the Minister of Commerce. The Committee was given the task to lay down general strategies for the business environment in Iceland. One of the tasks was to look into the effectiveness of competition enforcement.

14. The Committee found that there was room for improvement and that competition enforcement should be strengthened. With that in mind the Committee proposed that responsibilities other than competition enforcement and advocacy should be moved elsewhere. The Committee explicitly stated that the aim of this proposal was to “*enable the Competition Authority to focus on competition tasks and by that enhances the effectiveness of competition enforcement.*”

15. The Committee also proposed that the administration should be simplified by implementing a one pillar system, with one authority, instead of a two-pillar system with a council and an authority, as shown in the table above.

16. The institutional structure stipulated in the Competition Law from 2005 is based on these proposals. In a bill of law, introducing the changes, it is stated that the changes are meant to strengthen the competition enforcement and enhance the effectiveness of the Competition Authority.

3. The Experience – Did the Changes Strengthen Competition Enforcement and Advocacy?

17. The ICA has now been operating under the aforementioned institutional design for almost a decade. It is worthwhile to examine the impact of the changes. This paper reflects the views of the authority itself, there among the views of employees of the authority that have gained experience from both worlds, before and after the changes.

18. The institutional design is currently being reconsidered at governmental level. That work is not concluded.

3.1 *The ICA and the economic impact of its work*

19. The ICA is a small authority with around 23 employees. During the 9 years that have passed since the institutional changes took place the ICA has increased its effectiveness, as compared to the period of 12 years before the changes (since the enactment of the Competition Law in 1993).

20. In the early days of the Competition Law the Competition Authority placed emphasis on advocacy, as major sectors were being liberalised. This is reflected through a number of reasoned opinions issued in the first years. After the institutional changes, the ICA's advocacy work is increasingly reflected

through a number of detailed reports that have been issued and discussed, often in large conferences organised by the ICA. Through this work, competition advocacy has become more effective.

21. Competition enforcement has also become more effective during the past decade. An indication of this is the level of direct enforcement. Since 2005 the ICA has fined a total of 54 companies for breaching the Competition Law, compared to 14 in the 12 years before the institutional changes. The estimated aggregate amount of fines from mid-year 2005 to year-end 2014 is 41.7 million EUR, compared to around 20 million EUR before the changes.³

22. The economic impact of the ICA's work is considerable. It is estimated that ICA's interventions after the changes, on the basis of the prohibition rules of the Competition Law, has brought economic benefits that amount to almost 650 m EUR, or 0.6% of GDP pr. year.⁴ This estimate is based on the *OECD Guide for helping competition authorities assess the expected impact of their activities (2014)*. Merger interventions and other work, such as advocacy, are not included.

3.2 Focus, flexibility and prioritisation

23. The fact that the ICA is "solely" responsible for competition enforcement and advocacy, enables a very clear goal-orientation. The objectives of the competition law ("*to promote effective competition and thereby increase the efficiency of the factors of production of society*") are at the forefront in the operations of the authority. Each and every task of the authority is related to these objectives, and is in that sense homogeneous.

24. This means also that experience gained in one task can easily be used in another task. As a result of this, the ICA is in a position to optimise the use of experience and knowledge, and thereby enhance efficiencies.

25. The goal-orientation that the clear focus on homogeneous tasks allows for, facilitates prioritisation in the operations of the authority. Prioritisation is inevitably much easier when the tasks are homogeneous and based on the same objectives, compared to prioritisation in authorities which are responsible for a range of dissimilar/diverse tasks, that must be solved on the basis of different laws and different objectives.

26. The flexibility in the prioritisation is reflected in the variation in time-deployment of the authority from year to year. To take an example, the ICA deployed 22% of its time in abuse cases in 2013, compared to 47% in 2010.

27. The clear goal-orientation and prioritisation skills, together with other advantages, earned the ICA an award as the exemplary public authority of the year 2008, following a contest organised by the Ministry of Finance in Iceland.

3.3 Ability to face changed circumstances

28. The current institutional design has proven to be well equipped to tackle changed circumstances in the economic and competition environment. Directly after the banking collapse in Iceland, in October 2008, the ICA managed to make swift changes in its priorities and emphasis in order to address unprecedented changes in significant markets.

³ Euros at time of decision.

⁴ Amounts for each year adjusted to price alterations.

29. A few weeks after the collapse, the ICA had given directions to the resurrected banks in order to safeguard competition in markets where significant business undertakings had entered into severe financial difficulties as a result of the crisis. Furthermore the ICA issued an extensive analysis concerning 15 significant markets where barriers to entry were identified and remedies proposed. Those actions were followed by several reports and recommendations on how to respond to the consequences of the crisis. There among are three reports where the financial condition and ownership of 120 business undertakings are monitored, and problems identified.

30. The ICA has in general been acknowledged for having reacted promptly and productively to the financial crisis.

3.4 *Quality of decisions*

31. The aforementioned focus, flexibility and ability to prioritise gives the ICA scope to put its weight on the most important tasks at any given time. This is the main reason why the ICA has been relatively successful in its operations over the past decade.

32. As in the case of most competition authorities, the decisions of the ICA are subject to a strong quality control. Undertakings under investigation are normally among the largest in each market and as such in a position to defend their interest, both during the investigation and before the Competition Appeals Committee and courts.

33. Around 13% of decisions, published on the ICA's website, are brought before the Appeals Committee, which reviews both procedural issues as well as the merits of each case brought before the Committee. In 68% of cases before the Appeals Committee, the Committee has upheld the decision in its entirety or dismissed the charge. In 16% of cases decisions were partly upheld and annulled in 15% of cases. The rulings of the Appeals Committee, where decisions of the ICA have been upheld, have also been upheld in the Supreme Court in absolute majority of cases.

3.5 *Clear advocacy role and ability to give distinct guidance*

34. In light of the economic environment in Iceland it has been helpful to be in a position to give distinct guidance to markets regarding competition. The focus on competition has therefore strengthened the ICA's advocacy, as market participants know that the ICA only advocates for competition and its message is not blurred by other interests. The downside, that the ICA has no other "more popular" issues to advocate for, is clearly secondary in the case of Iceland.

35. The ICA has during the last decade been quite active in the field of advocacy, especially during the financial crisis, as described in chapter 3.3. As a result of this, and because of the ICA's firm enforcement activities, markets participants and public authorities increasingly seek guidance from the ICA. The ICA is currently in the process of organising its guidance activities in order to make it more effective and to exclude the danger of regulatory capture.

3.6 *Capacity to build up human resources*

36. The success of a competition authority is largely dependent on its ability to attract, build up and maintain a sufficient level of expertise. This is of course a prerequisite for good decisions and effective enforcement. That is why HR-management has been at the forefront of the ICA's overall strategy.

37. In comparison with other public authorities, the ICA has been very successful in attracting and maintaining human resources for the past decade. The average period of employment of the current

employees is seven years. Around 80% of employees have worked at the authority for more than two years, compared with 50% in 2007.

38. This is the case, even though expertise of this kind is highly sought after in the current economic environment. Quite a few experts at the authority have considerable experience working in the private sector. According to annual surveys of trade unions, the ICA enjoys a high level of job satisfaction among employees.

39. There is reason to believe that success in HR-management can be credited to the institutional design of the Authority. The ICA is known to be a good destination for people with skills and ambitions in the field of competition.

3.7 Length of procedures

40. Like many competition authorities, the ICA is criticised for the long duration of its procedures. One of the reasons for the institutional changes in 2005 was to speed up investigations. From 2005 to 2008 the ICA managed to shorten procedures. In the beginning of 2008 30% of ongoing cases were one year old or older, compared to 50% in the beginning of 2007.

41. In the beginning of the financial crisis, the ICA indicated to the government that procedures would become slower as a result of increased work load, due to the crisis. Despite warnings and requests for an increased budget, the ICA's budget was reduced severely. As a result of that, the age of cases had increased again in 2012, with 50% of cases one year old or older, and a 70% increase in the number of pending cases.

42. Due to the ICA's clear focus and goal orientation, the ICA has since been able to prioritise cases with the aim to improve the length of procedures. Due to firm prioritisation the ICA has cut radically down the number of cases, down to a similar level as before the crisis.

4. Independence of the ICA and Accountability

43. It is of utmost importance to ensure the independence of competition authorities, in order to prevent undue political influence and influence by the business community. This is even more important in a small and close-knit society, such as the Icelandic one, where "everybody knows everyone".

44. The institutional design of the ICA contributes to a certain level of independence. There are mainly two ingredients that contribute to ICA's independence:

45. Firstly, the Competition Law ensures an arm's length approach in the relationship between the ICA and the ministry responsible for competition. The Minister of Industry and Innovation appoints the Board of the ICA with a four year term. The Board is responsible for hiring the Director General, not the Minister, as in the case of most other public authorities. With this setup the Director General, responsible for decisions and day-to-day operations, receives his mandate from the Board, not the Minister. This is important to safeguard the independence of the Authority.

46. Secondly, the existence of the Competition Appeals Committee is meant to exclude any political involvement in decisions. This entails that the Minister does not review decisions, as is the case in most public authorities. The Appeals Committee is appointed by the Minister following a nomination by the Supreme Court. Committee members are therefore not chosen on political grounds. The Appeals Committee has a very broad mandate, as it can review both procedural issues and the merits of a case. Decisions of the ICA not to take up a complaint can for example be reviewed by the Committee.

47. The level of independence has, however, its clear limits. Inevitably, the ICA is a part of a broader public system and therefore it cannot enjoy an absolute independence. The four most significant limits to the independence are the following:

48. Firstly, the Minister appoints the members of the Board of the ICA. The appointment can be used to facilitate changes in the operations and priorities of the Authority.

49. Secondly, the ICA is subject to the normal budgetary system, where the budget for each year is prepared by the Ministry of Finance, with the involvement of the Ministry responsible for competition, and decided upon in the Parliament. Budgetary decisions affect inevitably the mandate of the ICA and can be used to change priorities.

50. Thirdly, the Competition Law is decided upon in the Parliament and changes to the Law can of course affect the independence of the Authority.

51. Fourthly, the ICA is of course accountable for its operations. The accountability is ensured through reporting to the Minister and Parliament. Discussions related to the accountability can affect the independence of the Authority.

52. These limits are of course normal in a democratic society. However care should be taken that i.e. funding decisions are not used as a tool to protect special interest or hinder effective enforcement.

5. Conclusions and Recommendations

53. In the view of the ICA, the move from a multifunctional design towards a single functional one, nine years ago, has served to enhance the effectiveness of the Authority, as explained in chapter 3. Thus the design has fulfilled the main goals of the changes.

54. As described in chapter 2, the decision to take up a single functional approach was based on an evaluation of the circumstances in Iceland. It must be recognised that the institutional design has to take account of the general circumstances in each country. Therefore it is doubtful that a “one-design-fits-all-approach” can be recommended.

55. This does not mean that the OECD has no role in this context. In the view of the ICA, the OECD plays an important role in safeguarding the independence of competition authorities and make sure that decisions on the institutional design of authorities are well grounded and based on objective assessments.

56. Therefore, the ICA recommends that the OECD Competition Committee develops principles on how to review the institutional design of competition authorities. These principles should include a definition of independence in this context and instructions on the minimum level of independence of competition authorities. Furthermore, the principles should include minimum standards on how to prepare decisions on institutional design of competition authorities, in order to ensure that such decisions are based on objective assessments.