



## Tools for Change

Teleseminar / Webinar

Tuesday, April 13, 2010

# Introduction

- ICN Merger Working Group, Notification and Procedures Subgroup
- Introduction to speakers and topics
  1. Laying the groundwork for reform
  2. Role of international best practice in advocating for reform
  3. Internal agency reform to effect change
  4. Building support for change
- Q&A to follow
- For more information about N&P see [here](#).

# Participants

(in order of appearance)

- Dan Sjöblom, Director General of the Swedish Competition Authority
- Andreas Mundt, President of the Bundeskartellamt
- Olavo Chinaglia, Commissioner of Brazil's Economic Defense Administration Council (CADE)
- Jongbae Park, Senior Deputy Director, M&A Division, Korean Fair Trade Commission
- Ronald A. Stern, Vice President and Senior Competition Counsel, General Electric Company
- Eduardo Perez Motta, Chairman of the Mexican Federal Commission on Competition
- António Gomes, Director of Mergers, Portuguese Competition Authority
- Dave Poddar, Partner, Head of Competition Group, Mallesons Stephen Jaques
- Martha Licetti, Competition Specialist, World Bank
- Cynthia Lagdameo, Chair of Notification and Procedures Subgroup
- Toshiko Igarashi, Deputy Director of International Affairs, Japan Fair Trade Commission

# Laying the Groundwork for Reform: Sweden

- Sweden's experience setting merger notification thresholds
  - **Dan Sjöblom**, *Director General of the Swedish Competition Authority*
    - See Setting Notification Thresholds Report, [here](#). Case study “Reforms of the Swedish merger review thresholds” at Annex D, pages 24-31.

## Laying the Groundwork for Reform: Germany

- **Andreas Mundt**, President of the Bundeskartellamt
- Germany's 2009 amendments to the *Act against Restraints of Competition* incorporating a second national turnover threshold
  - Strongly influenced by Section I.C. of ICN N&P Recommended Practice (see [here](#)) “Determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory.”
  - Reform was part of a larger legislative package intended to reduce burdens for small and medium sized undertakings.
  - Explanatory note of legislative package cites ICN Recommended Practices.

# Role of International Best Practice in Advocating for Reform: Brazil

- Brazil's Merger Reforms
  - **Olavo Chinaglia**, Commissioner of Brazil's Economic Defense Administration Council (CADE)
  - Brazil's current proposed amendments to merger thresholds
    - Letters of support – ICN, peers
    - See ICN Recommended Practice I and II, [here](#).
  - Brazil's 2006 "Fast Track" procedure for merger review
    - See ICN Recommended Practice IV.X, [here](#). Reasonable time period (6 weeks or less for phase 1, capable of completion in 6 months or less for phase 2); determinable periods

# Role of International Best Practice in Advocating for Reform: Korea

- Korea's 2008 reform to merger thresholds
  - **Jongbae Park**, Senior Deputy Director, M&A Division, Korean Fair Trade Commission
  - Increase to turnover requirement for the merger notification thresholds, now requiring at least two parties to the transaction to have Korean turnover of KRW20 billion (€12.9 million).
  - *See* Recommended Practice I.B [here](#), stating that merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification.
  - *See also* Implementation of the ICN Recommended Practices, April 2005, [here](#).

## Role of International Best Practice in Advocating for Reform: Merger Streamlining Group (MSG) - Overview

- Formed in 2001 to address serious problems created by the proliferation of merger review regimes
- Current Members – Bombardier, Flextronics, General Electric, Goldman Sachs, Oracle, Philips, Rio Tinto, SAB Miller, United Technologies
- MSG Mission – Promote the development and implementation of international “best practices” for merger notification
- Focus – Implementation of ICN Recommended Practice (“RP”) I requiring material local nexus thresholds

## Role of International Best Practice in Advocating for Reform: Merger Streamlining Group- Key Actions

- Participation as Non-Governmental Advisors in the development of the ICN's Recommended Practices for Merger Notification Procedures
- Surveys (2003 & 2005) on compliance with the ICN Recommended Practices
- Several articles advocating merger reforms
- Numerous submissions to competition authorities
  - Brazil (3/07; 3/09)
  - Bulgaria (1/08)
  - European Commission (3/06; 11/02; 4/03; 3/04)
  - India (1/07; 6/07; 3/08; 4/09)
  - Ireland (3/08)
  - Japan (3/08; 8/08)
  - Korea (1/07; 8/07)
  - Spain (11/06)
  - U.S. (11/02; 2/06)
- MSG Work Product is available at [www.mcmillan.ca/PublicPolicy.html](http://www.mcmillan.ca/PublicPolicy.html)

# Effecting Change Through Internal Agency Reform: Mexico

- México's legal regime follow, **in general**, international best practices.
  - **Eduardo Perez Motta**, President of the Mexican Federal Competition Commission (CFC)
  - But there is room for improvement in areas such as:
    1. Conduct of investigations
    2. Third party rights
    3. Transparency
  - Nevertheless, the CFC has adopted policies to correct these problems, or to further improve the legal regime.
    1. Measures to improve procedural fairness
    2. Measures to improve predictability
    3. Measures to improve review periods
    4. Review of provisions

# Building Support for Change: Portugal Working with Stakeholders

1. Revision of the **Notification Form**
2. Implementation of the **Electronic Notification System (SNEOC)**

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Portuguese Competition Authority (PCA)  
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# 1. Revision of the Notification Form

- New Notification Form was adopted in March 2009
- Reflects the accumulated experience over the last 5 years in merger control
- Improved structure and organization of the notification form, also allowing for electronic submission of the notification
- Introduction of definitions of legal and economic concepts used in merger analysis
- Clarification regarding the mandatory nature of the information required on the notification form (discretionary waivers): adapt the information requested to the complexity of the case
- **ICN Recommended Practices** for Merger Notification Procedures and ICN's **Information Requirements for Merger Notification** are useful
  - initial notification should elicit the minimum amount of information necessary to initiate the merger review process
  - jurisdictions should adopt mechanisms that allow for flexibility in the content of the initial notification (e.g. *Discretionary waiver*)

# 1. Revision of the Notification Form

- **Public Consultation** Process (30 working days) conducted according to the requirements of the Portuguese Competition Act
- Comments from 9 law firms to the draft Notification Form
- Additional telephone contacts with lawyers who had submitted comments to better understand their points of view
- All comments were published in the PCA's website (previous confirmation there was no objection to publication)
- The PCA published an “Explanatory note of the changes made following the Public Consultation”
  - summarizing the comments received
  - explaining why certain suggestions were incorporated while others were not
- Final adoption of the New Notification Form in March 2009

# 1. Revision of the Notification Form

- **Engagement of the stakeholders** in the process was **of high importance**:
  - Involved the vast majority of law firms that most notify mergers
  - Helpful in bringing relevant issues to the attention of the PCA, such as their views on the design of an efficient and effective merger regime
  - Helpful in identifying areas particularly burdensome to business
  - Helpful in promoting the reform, increasing its acceptance by the business community and the private bar
  - Increases transparency
- **Feedback**:
  - Positive global assessment from the Public Consultation procedure
  - Substantial improvements were identified relative to previous notification form

## 2. Implementation of the Electronic Notification System (SNEOC)

- **Web-based platform** adopted in July 2009
- Allows parties to electronically submit a formal merger notification
- First step towards the reduction/elimination of physical workflow
- Linked to the PCA's Document Workflow System
- Other advantages
  - On-line access to the PCA's merger decision by the notifying party
  - Warnings (automatic notes/reminders) concerning the procedure phases
  - In a near future, it is expected that the SNEOC will allow on-line access to file
- Ensures the confidentiality of all the submitted documentation through a system of encryption, and the verification of registered user-login together with a digital certification
  - Safer than email and with greater capacity

## 2. Implementation of the Electronic Notification System (SNEOC)

### Informal Consultation Process

- **Development Phase** of the Platform:
  - Selection of law firms (less than 10) according to the number of past notifications - invitations sent by email
  - Couple of meetings with all the lawyers invited, during the development of the electronic platform: discuss the objectives of the project; best ways to achieve those objectives; and to test the platform
- **Trial Phase** of the Platform (experimental period of approx. 1 month)
  - included all lawyers invited for the Development Phase and plus other 20 lawyers
  - Possibility of creating and submitting a fictional notification
- The engagement of the law firms in the Consultation procedure enabled
  - building consensus over the objectives of the project and its development; fostering the use of the new notification tool, making its use friendlier; key element to a successful implementation of the new notification tool

## 2. Implementation of the Electronic Notification System (SNEOC)

- **Feedback**
  - Feedback from representatives and undertakings has been most positive enabling to speed up proceedings
  - Notifications via the new platform SNEOC
    - 41% of merger notifications (July 2009 – December 2009)
    - **73% of merger notifications** (January 2010 – March 2010)
- **Future objectives** for the development of the platform: on-line access to file by notifying parties and possibly by third-parties (non-confidential version of file); on-line information requests (e-questionnaires); almost complete elimination of the need for physical copies of documents (digital signature)

## Building Support for Change: Australia

- Portuguese changes to notification forms
  - **Dave Poddar**, Partner, Mallesons Stephen Jaques
  - Role of private bar in advocating and supporting change
  - Australia introduced specific time frames for formal review in 2007
    - See ICN Recommended Practice IV.X, [here](#)
  - ACCC created Merger Process Guidelines 2004-2006
    - See Recommended Practices VII and VIII on procedural fairness and transparency, [here](#)

## Building Support for Change: World Bank

- Role of international institutions in supporting change
  - **Martha Licetti**, Competition Specialist, the World Bank
  - Creating an enabling environment for change
  - ICN work as “international best practice”
  - Cooperation between World Bank and ICN
  - ICN’s “toolkit” to introduce consultants/Bank staff to ICN

# Relevant ICN Work Product

- Recommended Practices for Merger Notification and Review Procedures, [here](#)
- Implementation Report, [here](#) & Implementation Handbook, [here](#)
- Setting Notification Thresholds, [here](#)
- Defining Merger Transactions, [here](#)
- Notification Information Requests, [here](#)



# Advocacy and Implementation Network Support Program (AISUP)

- To promote the implementation of ICN recommendations and the use of ICN work products and experience in general, ICN launched the Advocacy and Implementation Network Support Program ([AISUP](#)) in 2008.
- AISUP complements the project-oriented nature of the network's activity.
  - Members request assistance through AISUP, and the Vice Chair for Advocacy and Implementation pairs the requesting agency with expert staff from other ICN member agencies.
  - The supporting agencies provide the requesting agency with a thorough explanation of relevant ICN work product and advice on implementation, as appropriate.

To participate in AISUP, click [here](#).



# Advocacy and Implementation Network Support Program (AISUP)

- The following programs have been implemented and proceeding;
  - JFTC - Vietnam Competition Authority (VCA)
  - German Bundeskartellamt - Zambia Competition Commission (ZCC)
  - Russian FAS - Mongolian Authority for Fair Competition and Consumer Protection (AFCCP)
- In addition, the following programs will be implemented during 2010-2011;
  - FAS – Kazakhstan, Kyrgyzstan and Moldova authorities