PAINEL II

O controle dos atos de concentração segundo as melhores práticas internacionais

M*erger control under the best international practices*

Mauro Grinberg (Chairman)
William Blumenthal - ***King & Spalding - Washington - USA***
William Rowley - ***Macmillan Binch - Toronto - Canada***
Michael Reynolds - ***Allen & Overy - Bruxelas - Bélgica***
Cláudio Considera - ***Secretário de Acompanhamento Econômico***
Ronaldo Porto Macedo - ***Conselheiro do CADE***

MAURO GRINBERG

Eu tenho muito orgulho e satisfação por presidir esta mesa, que nos traz astros de primeira grandeza do direito da concorrência no Brasil e no mundo.

O nosso tema é extremamente importante pois, cada vez mais - vou poupá-los das estatísticas - existe a tendência de, nas nossas atividades profissionais, encontrarmos operaçõies de âmbito geográfico maior do que o território brasileiro.

Isso leva à necessidade de compatibilizar o sistema brasileiro de controle de atos de concentração com outros sistemas do mundo.

Neste contexto é que surgem os nossos expositores. Muito do que os nossos expositores estrangeiros vão falar pode ser utilizado por nós, ainda que com adaptações. É certo que parte disso depende de lei, mas de qualquer forma a discussão é importantíssima. Há pontos em que se pode avançar, e o Dr, Cláiudio Considera, em conversa que tivemos previamente a este evento, enumerou alguns. É possível que alguns aqui achem que é pouco, mas é certamente um extraordinário avanço.

Lembro aqui que a Professora Eleanor Fox disse uma vez que o controle de atos de concentração está fora de controle. Os nossos expositores vão falar sobre isso.

Eu quero começar apresentando o primeiro expositor que é o advogado William Rowley. Ele é chefe do departamento de antitrust do escritório Macmillan Binch, com sede em Toronto, no Canadá; ele foi chefe da business

section da International Bar Association, também foi chefe do comitê antitrust da International Bar Association e atualmente é chefe do Global Competition Forum da International Bar Association. Ele desempenhou um papel importantíssimo na criação da International Competition Network, em que ele representou a International Bar Association. Além disso, eu peço permissão para colocar no meu currículo que é meu amigo e peço então ao Bill Rowley.

WILLIAM ROWLEY

Mauro, I must say, the words of your introduction have affected me positively were the last ones and I think I can speak on behalf of my college William Blumenthal to say how very pleased we are to be here on the occasion of the tenth anniversary of IBRAC and to be able to, with some considerable pride, to put on our curriculum vitae, after this, that we are friends of IBRAC and some many fine practitioners in international antitrust in Brazil.

The Internationalisation of Merger Review: Global Solutions Require Both Words and Actions

J William Rowley QC* [*]
McMillan Binch LLP

A problem acknowledged

The explosive growth of merger control regimes around the world and the attendant cost and complexity faced by parties to multijurisdictional mergers is now an acknowledged fact.[1] While the global surge of merger transactions

---

[*] Mr Rowley is chairman of McMillan Binch LLP, Toronto, and heads its competition law practice. He is also chairman of the IBA's Global Competition Forum. The assistance of Omar and Mark Opashinov of McMillan Binch LLP in the preparation of this piece is gratefully acknowledged.

[1] See Geting the Deal Through: Merger Control 2002: The international Regulation of Mergers and Joint Ventures, London: Law Business Research, 2002 [hereinafter "Getting the Deal Through 2002"] at 3 where it was noted that in the United States mergers reported under the Hart-Scott-Rodino Act rose from 1,529 in 1991 to 4,926 by 2000 which means that filings were growing during the global merger wave at a copound annual growth rate of the 12% In the European Union, notifications to the Merger Task Force of the European Commission increased from 63 in 1991 to 345 in 2000 (a compound annual growth rate of 35%). Similar growth rates in mergers have been encountered throughout the industrialised world.

has abated considerably since last year,[2] the fundamental problems associated with the proliferation of national and regional merger control laws have not. Those large transactions that are taking place continue to be burdened by filing requirements in dozens of jurisdictions, a myriad of notification thresholds, escalating filing fees, often the need to translate documents into multiple languages and a host of other unnecessary procedural differences.

Against this backdrop, the global community of competition authorities, practitioners and policy-makers has been faced, at least until very recently, with what political scientist Thomas Homer-Dixon has termed an "ingenuity gap"[3]. Although the phrase was coined to cover a different set of problems, the concept is an apt one here - *ie* an acknowledged problem with no foresceable solution. Over the last decade or so, and in response to diverse causes (trade liberalisation, a shift to market economies in eastern Europe and the developing world, a global merger wave), competition authorities, competition practitioners and their "customers" have built a complex global system of merger control regimes. This system, the parts of which may have constituted logical responses to national and regional demands, has become incoherent as a whole. But until about two years ago, those who wished to address the problem appeared to lack the requisite wisdom to bring order to a system that had become chaotic.

ICPAC and beyond: addressing the gap

In early 2000, with the publication of the Final Report of the International Competition Policy Advisory Committee to the US Attorney General and the Assistant Attorney General for Antitrust (ICPAC), this merger review "ingenuity gap" showed the first signs of becoming bridgeable. The ICPAC Report recommended an important step forward through the establishment of a "Global Competition Initiative" (GCI).

Then, as now, international co-operation amongst antitrust authorities occurred primarily through a series of bilateral co- operation agreements and arrangements, most notably between countries such as Australia, Canada,

---

[2] The rate of announced merger has since dropped precipitously in the wake of a global economic slowdown. While in part caused by the increase in the monetary thresholds under the *Hart-Scott-Rodino Act,* the U.S. for one, has seen merger notifications drop by 50% in 2002 from 2001 numbers according to Charles James, U.S Assistant Attorney General, Antitrust Division in a recent sppech to the American Bar Association on August 16, 2002.

[3] Thomas Homer-Dixon, *The Ingenuity Gap* (Toronto: Vintage Canada, 2001)

Israel, Japan. the US and the EU[4]. While it is true that a variety of institutions, such as Organisation for Economic Co-Operation and Development (OECD), the World Trade Organisation (WTO) and the United Nations Conference on Trade and Development (UNCTAD), had acted as multilateral for a for competition policy discussions, progress was minimal and the ICPAC concluded that existing institutions each had limitations that prevented them from being the ideal place to advance the cause of greater coherence in international competition policy[5].

In its report, the ICPAC recommended that "the United States explore the scope for collaborations among interested governments and international organisations to create a new venue where government officials, as well as private firms, non-governmental organisations (NGOs), and others can consult on matters of competition law and policy". [6] The recommended "new venue" was, of course, the GCI.

Eschewing the creation of a new institution (with the attendant bureaucracy, fixed processes and expenses that would inevitably follow), the ICPAC believed a "modest effort at creating a 'virtual organisation ' with minimal dedicated staff, support by participating institutions and governments, and regular meetings can make a strong contribution to the development of a competition culture and sound antitrust enforcement"[7]. Believing too that "countries may be prepared to co-operate in meaningful ways, but are not necessarily prepared to be legally bound under international law" [8] ,the ICPAC recommended that the GCI could usefully advance constructive dialogue among competition agencies to:

• multilateralise and deepen positive comity;

• consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world;

• agree upon best practices for merger control laws and develop consensus principies; and

• consider approaches to multinational merger control that aim to rationalise systems for antitrust merger notification and review[9].

---

[4] .See generally, ICPAC Report at 181.

[5] *Ibid* at 282-283.

[6] *Ibid* at 282.

[7] *Ibid.*

[8] *Ibid,* at 284.

[9] Ibid.

The first important public suppon for the GCI came from then US Assistant Attorney General for Antitrust Joel Klein[10] and European Commissioner for Competition Mario Monti[11] at the International Bar Association's 10 th Anniversary Conference on the European Commission's Merger Regulation in September 2000.

If Messrs Klein and Monti breathed life into ICPAC's recommendations in Brussels, the IBA's Ditchley Park meeting of international antitrust authorities, which followed in February 2001, can rightly be seen as midwifing the birth of their progeny. The Ditchley meeting also supplied some much needed ingenuity. The idea of bringing 40 or so of the world's senior competition law officials and professionals together in their individual capacities enabled a discussion of the concept, role and possible functions of the GCI without the institutiona1 biases and agendas such luminaries might otherwise, quite reasonably, have bem expected to bring to a discussion of this kind [12]. Happily, the effort succeeded, with consensus being achieved on:

• the reality of the problem created by multijurisdictional merger reviews with widely divergent procedures such as notification thresholds, timing, and filing requirements;

• the need for greater transparency of merger laws - knowing what laws are applied, when, where and how - given that an international merger faces possible scrutiny in dozens of jurisdictions; and

[10] Joel Klein, *Time for a Global Competition Initiative?* EC Merger Control, 10th Anniversary Conference, Brussels, September 14-15, 200.

[11] Mario Monti, *The Main Challenges for a New Decade of EC Merger Control,* EC Merger Control, 10th Anniversary Conference, Brussels, September 14-15, 2000: see also Mario Monti, *European Competition Policy for the 21st Century*, The Fordham Corporate Law Institute, 27th Annual Conference on International Antitrust Law na Policy, New York City, October 20, 2000.

[12] Convened and hosted by the International Bar Association (IBA), with support from Fordham University and the ABA's Antitrust Section, Ditchley drew participants from Australia, Belgium, Brazil, Canada, the European Union, Finland, France, Germany, Hungary, Israel, Japan, Italy, Mexico, the Netherlands, South Africa, Spain, Switzerland, the United Kingdom, the United States and Turkey.

• the utility of developing a set of "best practices" in merger review against which the world's merger review regimes could be measured and to which they could aspire [13].

In addition to endorsing the immediate formation of a GCI the *meeting struck an informal steering committee to oversee its* formal launch.

From Ditchley to the ICN

Despite the enthusiasm generated at Ditchley, concerns arose during the spring and summer of 2001 as to whether the momentum gained there had been jeopardised by the unusually lengthy change of leadership at the US Antitrust Division and the apparent insistence by leading antitrust agencies that they alone should manage the GCI's design and planning[14]. Notwithstanding these concerns, subsequent indications from Klein's successor at the us Department of Justice, Charles James,[15] and from Robert Pitofsky's successor at the US Federal Trade Commission, Timothy Muris [16] made it clear that the new US Administration intended to make good on the promise of the GCI envisioned by Ditchley and the ICPAC.

The cause of greater coherence in international merger review was further aided by the publication in September of a draft Report on "Best Practices for the Review of International Mergers" [17] (attached at Appendix A) prepared on

---

[13] This overwiew of the Ditchley Park meeting draws on the official report of the meeting, *The Initiative for a Global Competition Forum*, prepared by Merit E Janow and available through the International Bar Association's website, <http://www.ibanet.org>, See also J William Rowley QC and Omar K Wakil, *The Global Competition Forum: beyond Ditchley*, Global Competition Review (April 2001) at 32-34.

[14] See Getting the Deal Through 2002, supra, note 1 at 3.

[15] See Charles A James, Assistant Attorney General, Antitrust Division, US Department of Justice, International Antitrust in the Bush Administration, Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada, September 21, 2001.

[16] See Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word - Continuity, Annual Meeting of the ABA Antitrust Section*. Chicago, Illinois. August 7, 2001.

[17] First discussion Draft, September 21, 2001 published at the IBA's 5th Annual Competition Conference, Fiesole, Italy; subsequently re-published in refined format in *Global Competition Review*, October/November, 2001] and presented at the OECD's

behalf of a group of leading international companies concerned with fast multiplying and divergent approaches to merger review ("the Merger Streamlining Group" or "MSG").[18] The aim of the Best Practices proponents was to "promove laws, enforcement practices and actions by merging parties which improve merger review processes while recognising the legitimate interest of all jurisdictions in examining transactions that may have effects on competition within their borders pursuant to their own substantive rules" [19]. The MSG Best Practices Report was supplemented almost immediately by the publication of a similar and highly complimentary set of recommendations from the International Chamber of Commerce and the Business Advisory Committee to the OECD ("ICC/BIAC Best Practices") (attached at Appendix B)[20]. As events have made clear, both reports have proved enormously influential in work which has followed on merger review issues.

Subsequently, the vision of the GCI was given public shape and clarity in the statements of the leaders of the European and American competition authorities. In speeches at the first OECD Global Forum on Competition on October 17,2001, both Mario Monti and Charles James again endorsed and elaborated upon their visions of the GCI. Monti stated:

> We should work towards the creation of a global network of competition authorities members [of the GCI] should strive to achieve a maximum of convergence and consensus on fundamental issues such as the substance and economics of competition policy, and the enforcement priorities of competition authorities. Such consensus should result from a common understanding

---

Global Forum on Competition in Paris in October 17, 2001 [hereinafter *"Best Practices"* cited to *Global Competition Review*, October/November 2001].The report was prepared by a project team consisting of Janet McDavid (Hogan & Hartson). Phillip Proger (Jones Day), Michael Reynolds (Allen & Overy), and William Rowley QC and Neil Campbell (McMillan Binch), with assistance from Catriona Hatton and Lynda Marshall (Hogan & Hartson) and David Anderson (Allen & Overy).

[18] The merger Streamlining Group is a group of international businessess wich have broad experience with the merger review processes of many jurisdictions. The current membership of the group comprises, Alcan Inc., British Telecom, Charles River Associates, Compaq Computer Corporation, General Electric Company, Goldman Sachs International, My Travel plc, National Economic Research Associates (NERA), Rio tinto plc, South African Breweries and Vodafone Group plc.

[19] *Best Practices, supra*, note 17 at 27.

[20] Recommended *Framework for Best Practices in International Merger Control Procedures*, October 2001.

> about the best approach to solving the problems. This project would foster and develop a common worldwide "competition culture" and encourage developed and developing countries worldwide to introduce and enforce sound competition policies [21].

Emphasising the pragmatic thrust of the envisioned GCI. James suggested that the

...general approach to issues should be as practical and concrete as possible; it should avoid abstract discussions that are unlikely to lead to improvements in the practice of antitrust enforcement. ... [and its] meetings would provide structured dialogue by focusing on only two or three projects at a time. As indicated, I believe it would be appropriate to start with some merger process issues, among other things. These projects would be aimed at developing non-binding general guidelines or "best practices" recommendations. Where the [GCI] reaches consensus on particular recommendations, it would be left to governments to implement them voluntarily, through unilateral, bilateral, or multilateral arrangements, as appropriate[22].

Early work of the International Competition Network

Days later, the GCI newly incarnated as the "International Competition Network" (ICN), was born[23]. True to the spirit of the ICPAC's recommendations and the consensus reached at Ditchley Park, the ICN has been structured as a project - Oriented, informal network of antitrust agencies with opportunities for input from other antitrust stakeholders, and a mandate to address antitrust enforcement and policy issues of common interest in order to formulate proposals for procedural and substantive convergence.

---

[21] See Mario Monti, Opening Speech, OECD Global Forum on Competition, Paris, October 17, 2001.

[22] Charles James, International Antitrust in the 21st Century: Cooperation and Convergence, OECD Global Forum on Competition, Paris, October 17, 2001.

[23] On october 25, 2001 the ICN was launched formally in New York City at the Fordham Corporate law Institute conference by topo officials from antitrust authorities in Australia, Canada, the European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, United States and Zambia.

And while not all of the ICPAC and Ditchley Park recommendations have yet been taken up by the ICN, its early work on merger control reform is encouraging. A "Mergers Working Group", chaired by William Kolasky, Deputy Assistant Attorney Genera1 in the Antitrust Division of the US Department of Justice, has set itself an ambitious work plan - projects are being managed by subgroups in three areas:

(i) merger notification and review procedures:,

(ii) investigative techniques for reviewing mergers; and

(iii) the analytical framework for merger review.

Merger notification and review procedures

Guiding Principles

Taking its cue from the MSG and ICC/BIAC Best Practices documents, the Notification and Procedures Subgroup has developed eight Guiding Principies for Merger Notification and Review ("Guiding Principles") for merger notification and review that were adopted by the ICN membership at its inaugural conference in Naples, Italy, in September 2002. The Guiding Principles are non-binding, and it is left to governments and agencies to implement them as appropriate:[24]

• Sovereignty - Jurisdictions are sovereign with respect to the application of their own laws to merger.

• Transparency - In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker (s), the substantive standard of review, and the bases, of any adverse enforcement decisions on the merits.

• Non-discrimination on the basis of nationality - In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality .

• Procedural fairness - Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns

[24] See <http://www.internationalcompetitionnetwork.org/ICN%20NP%20Working%20Group%20-%Guiding%20Principles.pdf>

are based, and should have an opportunity to express their views in relation to those concerns.

Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body .Third parties that believe they would be harmed by potential anti-competitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process.

• Efficient, timely and effective review - The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time-frame.

• Co-ordination - Jurisdictions reviewing the same transaction should engage in such co-ordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectivness of the review process and reduce transaction costs.

• Convergence - Jurisdictions should seek convergence of merger review processes toward agreed best practices.

• Protection of confidential information - The merger review process should provide for the protection of confidential information.

Recommended Practices

More important is the Notification and Procedures Subgroup's development of an initial set of more detailed Recommended Practices for Merger Notification Procedures ("Recommended Practices").[25] These first recommendations address three areas identified as the most pressing by public and private sector representatives of the Working Group:

• sufficient nexus between the transaction' s effects and the reviewing jurisdiction;

• clear and objective notification thresholds; and .flexibility in the time of merger notification.

[25] See <http://www.internationalcompetitionnetwork.org/practices.pdf>

The format consists of a short statement of the practice, followed by the explanatory comment Disappointingly, these initial *Recommended Practices* were merely endorsed, but not adopted., at the ICN's inaugural meeting.

The ICN stopped short of outright adoption of the Recommended Practices in Naples because of concerns expressed by two members that the jurisdictional nexus requirement would not encompass a situation where a domestic firm acquires a foreign firm that otherwise likely would enter the domestic market and the acquisition would have material anti-competitive effects given the acquiror's current domestic market position. While such a transaction is a theoretical possibility, as a practical matter, these situations are so rare that it is very hard to justify burdening all outbound acquisitions with pre-merger notification requirements. Moreover, since *Recommended Practices* are not mandatory, the ICN should not be discouraged from adopting a best practice even when a small number of jurisdictions have a different view. Individual jurisdictions can depart from those practices with which they disagree. Thus it is to be hoped that this is and other best practices will be adopted at the next ICN meeting in June 2003.

Costs Studies

The Notification and Procedures Subgroup has also started to compile existing studies and materials relating to the costs, bundens and delays arising from multijurisdictional merger notification and review. To assist the process, private sector advisors have been requested to provide examples of unnecessarily costly, bundensome, or dilatory procedures [26].

A Global Merger Costs Survey co-sponsored by the International Bar Association and the American Bar Association, which is now under way, will also make a much-needed empirical contribution to the deliberations of the ICN and augment the largely anecdotal evidence that has existed to date. The goal of the IBA/ABA survey is to derive a reliable assessment of the costs of multi-jurisdictional merger control. The survey targets companies which have engaged in cross-border mergers and acquisitions over the last two years. The survey includes questions relating to:

[26] See *Report on Costs and Burdens of Multijurisdictional Merger Review*, ICN Notification and Procedures Subgroup of The Mergers Working Group (September 2002): <http://www.internationalcompetitionnetwork.org/costburd.doc>, wich surveys existing commentary and studies relating to the costs and burdens issue and plans to collect additional illustrative case studies from the Subgroup's private sector advisors.

• Jurisdictions (eg, number of required notifications);
• Duration (eg, start and end date of review);
• External costs (eg, legal advisory fees);
• Internal costs (eg, management and staff time); and
• Perceived complexity and efficiency.

To date, over 60 responses covering over 200 merger filings in 54 different jurisdictions have been analysed. Although statistical estimates have not been finalised, [27] it is clear that the number of jurisdictions reviewing a transaction significantly impacts both external costs and the duration of the review process. Moreover, although cost efficiencies in a multi-jurisdictional merger process exist, they do not appear to be very large (additional jurisdictions are only marginally cheaper).

Investigative techniques for reviewing mergers

The Investigative Techniques Subgroup is focused on the development of *best practices for investigating mergers*, including (i) methods for gathering reliable evidence; (ii) effective planning of a merger investigation; and (iii) use of economists/the evaluation of economic evidence. To develop its proposals, the Subgroup held a workshop in Washington DC in mid-November, for officials from ICN member competition authorities. The workshop's agenda was encouragingly pragmatic: the focus was on analysing the relationship between states' merger laws; the substantive competition standards such laws use; merger review procedures; the methods agencies can use to develop an effective merger review plan; and the function of international co-operation in merger review cases. Also on the agenda was the role of *economists and economic evidence in merger* investigations which, given the very real need in many jurisdictions for merger review to be conducted on a sounder economic basis. is a welcome step in the right direction.

Analytical framework for merger review

[27] The report by Pricewaterhouse Coopers' Economic Advisory Services is expected to be issued early in 2003.

Finally, the Analytical Framework Subgroup has developed a general analytical framework for merger review, including: (i) the substantive standards for prohibiting mergers; and (ii) the criteria for applying those standards. The Subgroup submitted a discussion paper to the ICN at Naples together with information on the substantive standard applied in each member jurisdiction. [28] Competing substantive standards for merger evaluation (ie. "substantial lessening of competition"(SLC) versus "creation or strengthening of a dominant position, versus "public interest") were considered in both the paper and by a panel at the Naples meeting. In light of the move by the UK to an SLC test earlier this month,[29] and the European Commission's consideration of the same question,[30] a more cogent approach to this key question for international substantive harmonisation is obviously timely.

The gulf between talk and action

While the birth of the ICN provides us with the first real opportunity to address today's troubled approach to multijurisdictional merger review, there remains an enormous gulf between talk and action. The challenge is whether necessary changes can be implemented. And here real leadership will be required from competition laws' bipolar leaders (the US federal agencies and the EC Competition Directorate), members of the ICN Steering Group, and important regional member states, such as Brazil, which has the largest economy and most extensive competition law infrastructure in Latin America. It will be particularly important for the EC and US to step up to the plate and provide a model for legislators and enforcers in other jurisdictions whose laws and policies have drawn so heavily from these sources.

The EC's leadership opportunity

The European Commission should be singled out for particular praise, having taken on much needed leadership in transforming talk into action. Philip Lowe's assumption of the Director General's office, and the decisions of the

---

[28] See <http://internationalcompetitionnetwork.org/afsguk.pdf>.

[29] The enterprise Act received Royal Assent on 7 November 2002. The Act and accompanying Explanatory Notes are due to be published shortly. For additional information, see <http://www.dti.gov.uk/enterpriseact/index.htm>.

[30] Commission of the European Communities, *Green Paper on the Review of Council Regulation* (EEC) Nº 4064/89, Brussels, 11.12.2001 COM (2001) 745/6 final.

Court of First Instance in *Airtours,*[31] *Schneider* [32] *and Tetra Laval* [33] were positive catalysts to this ald, and Commissioner Monti' s detailed proposals for reform of the European merger control regime at the recent EC/IBA conference in Brussels showed that there is high level commitment and real momentum for implementing positive changes[34]. Some key alignments with Best Practices are:

• Increased flexibility in timing of notification by removing the current deadline for notification of one week after the conclusion of a binding agreement;

• Enhancing transparency regarding the scope of the current test by clarifying the application of the notion of dominance to so-called "unilateral effects" in situations of oligopoly short of joint dominance;

• Publication of draft merger guidelines (covering efficiencies) as well as draft best practices guidelines for merger on investigations, which will be subject to full consultation;

• Explicit recognition of efficiencies in merger review analysis;

• Improved staffing and resources, including a chief economist and accelerated recruitmmt of industrial economists.

• Use "Devil's advocate panels" of peer review which will scrutinise a case team's preliminary conclusions with a "fresh pair of eyes" at key points of the investigation:

• Improved rights of defence, with merging parties having: early access to the file "against" them; an opportunity to confront, "complaining", third parties; and an opportunity to attend "state of play" meetings at which they will be updated on the progress of the investigation and able to discuss their case with senior Commission management:

---

[31] See Judgment of the Cort of First Instance, 6 June 2002, *Airtours plc v. European Commission*, Case T- 342/99.

[32] See Judgment of the Cort of First Instance, 22 October 2002, *Schneider Electric v. European Commission*, Case T- 310-01.

[33] See Judgment of the Cort of First Instance, 25 October 2002, *Tetra Laval v. European Commission*, Cases T-5/02 and T-80/02.

[34] Mario Monti, *Merger Control in the European Union: A Radical Reform*, European Commission/ IBA Conference on EU Merger Control (Brussels 7 November 2002)

• Increased flexibility of investigatory timeframe by providing, at the parties' request, an additional four weeks in "complex" cases and an additional three weeks triggered on the submission of a remedy offer,[35] and

• Consideration of methods of enhancing existing fast track judicial review, perhaps though specialised "judicial panels" or the creation of a specialised merger chamber within the Court of First Instance.

The us cannot be exempt from change

For a multilateral reform process to work, all key players must participate. In the case of the US system, despite its age and intellectual provenance, careful and dispassionate introspection, followed by action, is clearly needed. Once the paragon of non-regulatory antitrust, over the past two and a half decades (under Hart-Scott-Rodino) US merger law has become both bureaucratic and regulatory as well as being non-responsive to calls for corrective actions.

At a general level, public announcement of an intention to align the US system with ICN *Recommended Practices* at the earliest opportunity would be most helpful. More specifically, perhaps the most important reform would be to introduce a meaningful time limit on and reduce the unnecessarily burdensome scope of the second stage of review, which in practice can drag on for the better part of a year or more. Another priority should be the reduction of excessive filing fees to reasonable, merger-related, cost recovery levels. The following steps are respectfully suggested for the US's consideration:

• Both federal antitrust agencies should immediately undertake a study of the possible introduction of voluntarily assumed "Service Standards" (no legislative change would be required), the effect of which would be to introduce a two-phase, time-limited, merger review system.

• This should also help to address ongoing concerns with the current "second request" process. Such a system would be based on an "HSR Plus" notification '" form to be filed on a voluntary basis for mergers which may be expected to require substantial analysis.

"HSR Plus" forms would have somewhat similar information content requirements to the Form CO, but would be less comprehensive - and certainly less comprehensive than a standard second request The Canadian Long Form Notice could be looked at as a reference point. Where "HSR Plus" notices are

[35] The timing and extent of these extension may, in fact, only partially comply with Best Practice insofar as they may add inordinate time to the over-all review.

filed, federal agencies would commit to conclude investigative action within five months of receipt of a completed filing.

• Both federal antitrust agencies should voluntarily commit to undertaking on a periodic basis (say, every to three to five years) the type of "Merger Reform" process that is mandated and is now under way in Europe under the EC Merger Regulation.

A role for other jurisdictions and stakeholders

Other jurisdictions need not and should not wait for the EU or US to act. With *Guiding Principles* adopted and several *Recommended Practices* endorsed, members of the ICN now have the individual responsibility to act. Brazil, for instance, could critically review its own practices, determine the extent to which they measure up to ICN standards and where they do not, take steps towards reform.

From the perspective of an international practitioner, several elements of the Brazilian pre-merger notification system appear to be candidates for re-examination. To identify a few:

• The absence of a two-phare system (which would quickly clear non-controversial transactions);

• Notification thresholds based on world-wide turnover, which sweeps in mergers with limited impact in Brazil;

• Rigid notification deadlines (enforced by significant fines) that are based on unclear triggering events and in practice require parties to file unnecessarily early in the merger process; and

• The absence of realistic time limits for review (as limits can be extended every time one of the reviewing agencies requires additional information).

Because of the size of Brazil's economy, the importance of having a world class, best practices-aligned merger review system cannot be overstated. Not only would convergence to ICN *Guiding Principles* and *Recommended Practice* be reputationally beneficial, but leadership of this sort from one of the "newer" antitrust regimes would undoubtedly spur other similarly positioned member of the ICN into action.

Finally, both ICPAC and Ditchley also emphasised the importance of collaboration within a GCI (or ICN) of all interested antitrust stakeholders - including other international organisations and non-governmental organisations (such as business and consumer groups) as well as private firms and knowledgeable individuals. The validity of this recommendation can be seen in the contribu-

tions already made from these sources to getting us where we are today. But much remains to be done, and it will be vital for stakeholders such as the IBA, the ICC/BIAC, the ABA, the World Bank, OECD, UNCTAD and others to maintain and enhance their respective commitments. To these stakeholders it is respectfully suggested:

• making known their expectations of the ICN - *ie* that membership focus on practical and achievable projects and utilise all appropriate resources to convert their *Recommended Practice"* and other recommendations into actual reforms of national merger regimes;

• marshalling support from individual firms, interest groups, the competition bar and others to provide a positive policy context in which the ICN and others can seek to accomplish their various convergence goals.

Accountability after Naples

The momentum for reform has re-emerged with the official launch of the ICN and its first meeting in Naples. Its work to date has been very encouraging and planning is well underway for the next ICN Conference, to be held in Mérida. Mexico on June 23-25.2003. But there are a number of issues to be resolved before the ICN meets again. It will, for instance, be important to ensure that there is appropriate geographic representation on the ICN's Steering Group as well as a meaningful role for non-governmental advisors.

This all suggests the need for a pro-active, and ongoing dialogue amongst all antitrust stakeholders in a post-Naples environment to take account of where we stand, and to help map the pragmatic course for future implementation.

The global competition community cannot afford not to convert its talk into action. The ingenuity gap has not yet been closed Clear thinking, frank discussion and more co-ordinated efforts to ensure reform actually occurs are today's priorities.

Slide 1

Guiding Principles and Recommended Practices For Merger Control

IBRAC 8th International Seminar on Competition Law
November 29, 2002
Brasilia

Slide 2

ICN Guiding Principles

- Sovereignty
- Transparency
- Non-discrimination based on nationality
- Procedural fairness
- Efficient, timely, and effective review
- Coordination
- Convergence
- Protection of confidential information

2

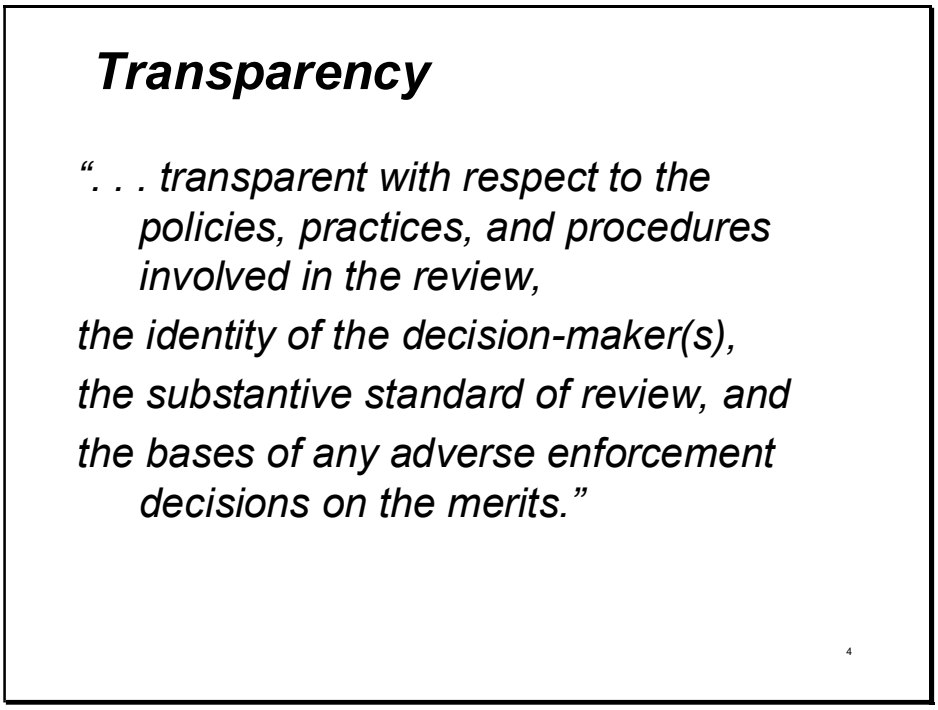
Slide 3

Sovereignty

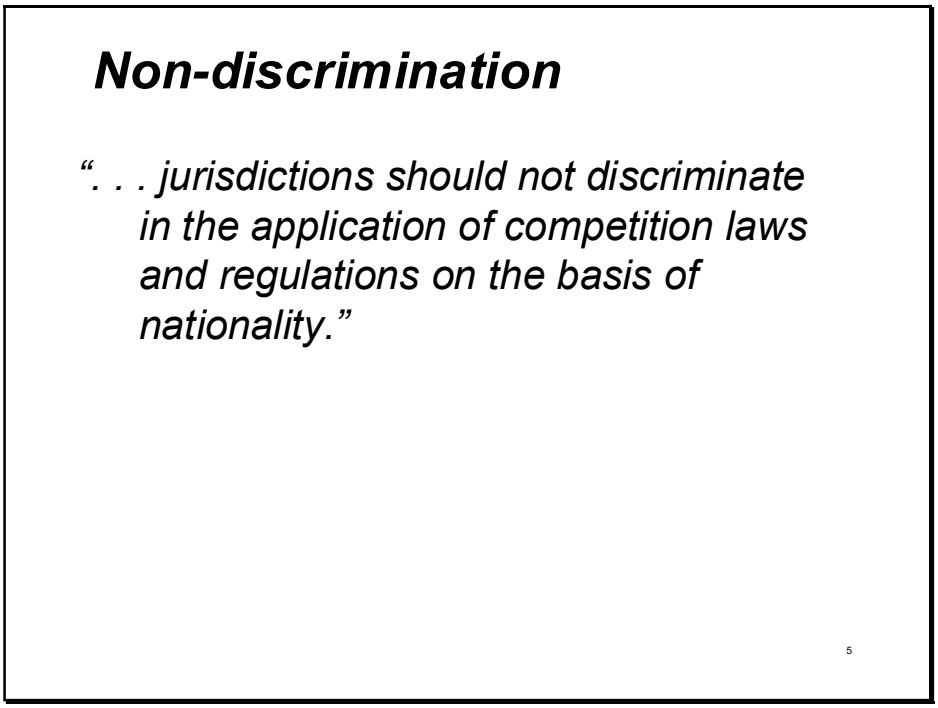
". . . sovereign with respect to the application of their own laws. . . ."

3

Slide 4



Slide 5



Slide 6

Procedural Fairness (1)

"Prior to final adverse decision. . . ,

merging parties should be informed of the competitive concerns that form the basis . . . and

the factual basis . . . ,

and should have an opportunity to express their views. . . ."

6

Slide 7

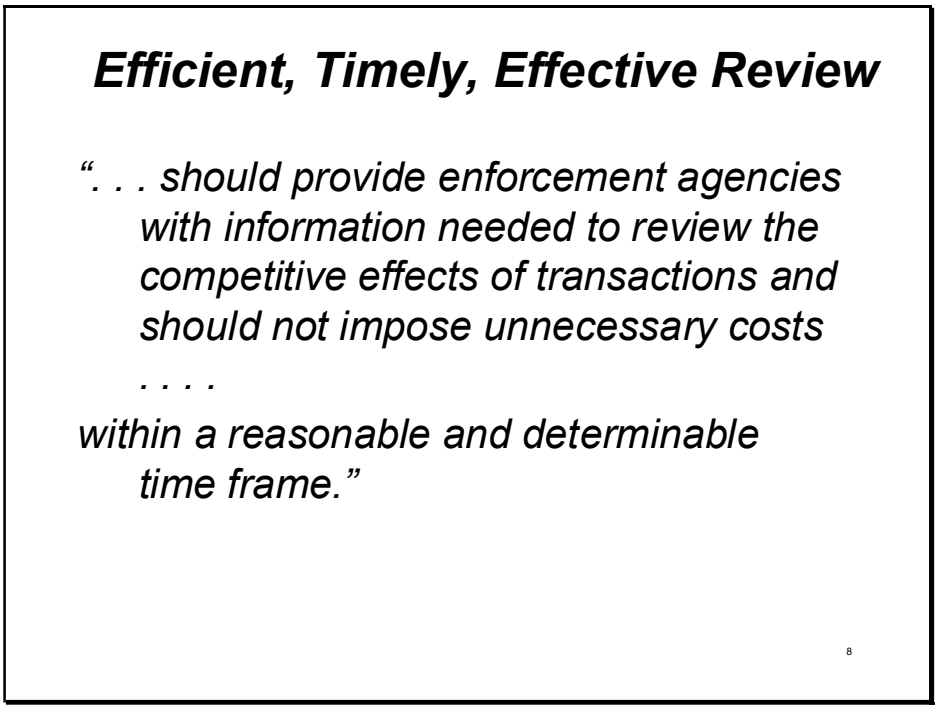
Procedural Fairness (2)

". . . opportunity for review of such decisions before a separate adjudicative body.

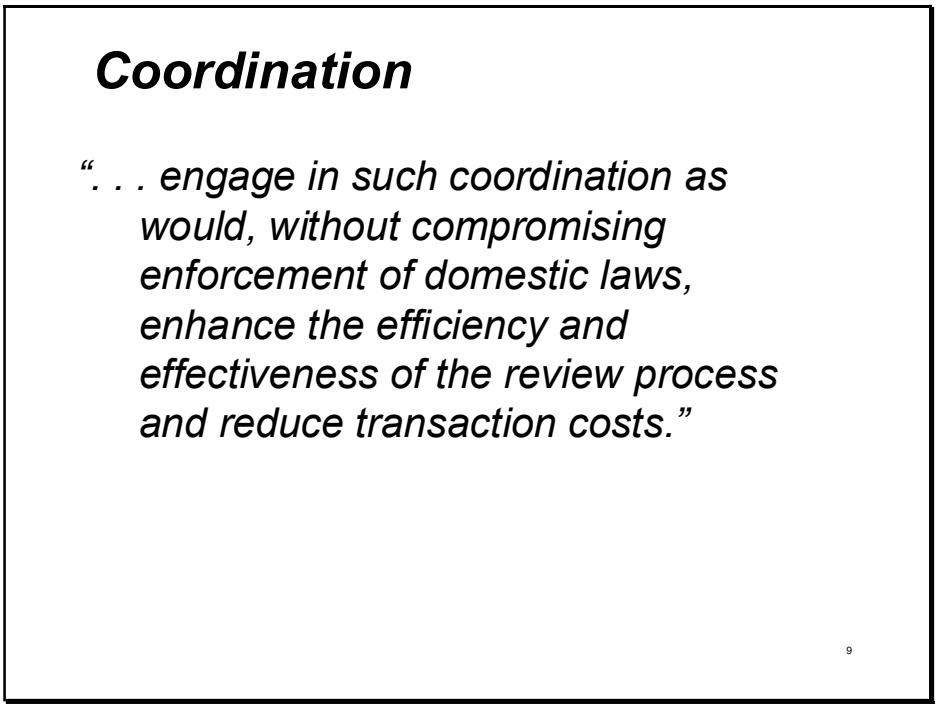
Third parties . . . should be allowed to express their views. . . ."

7

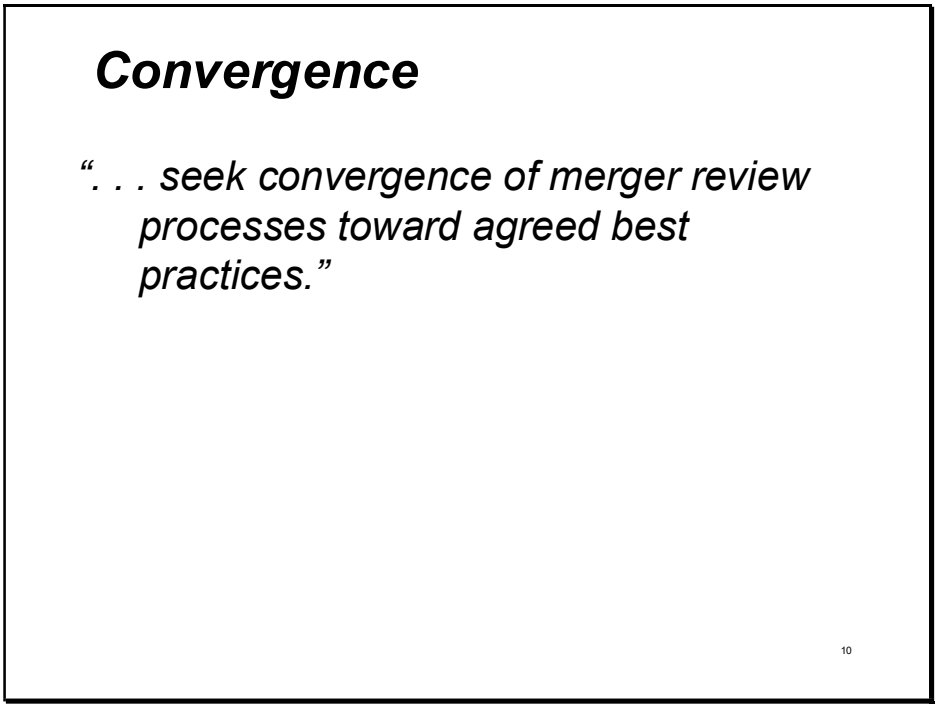
Slide 8



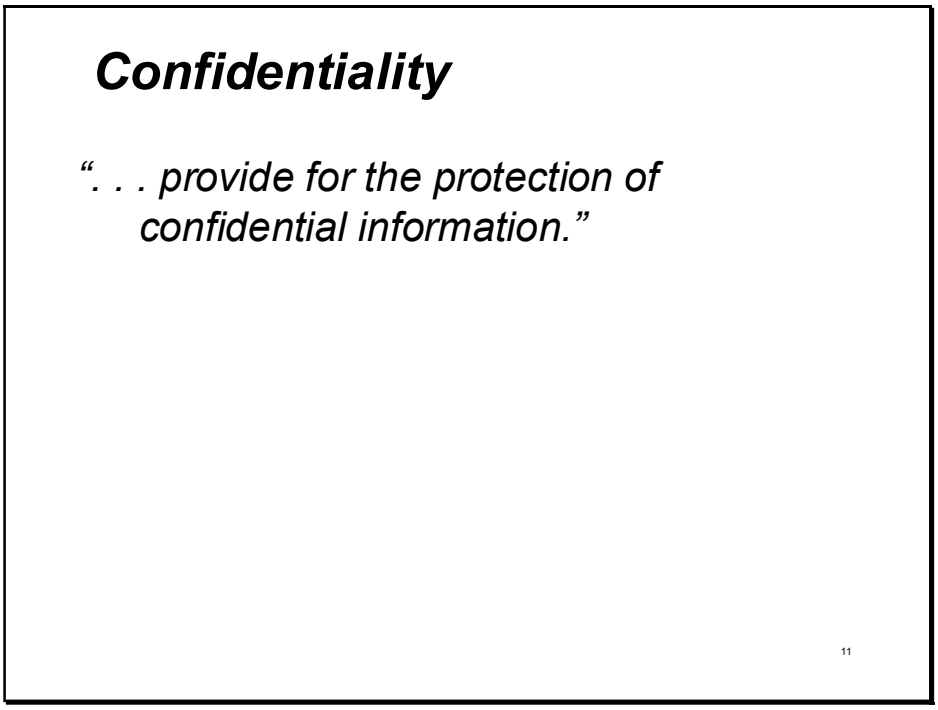
Slide 9



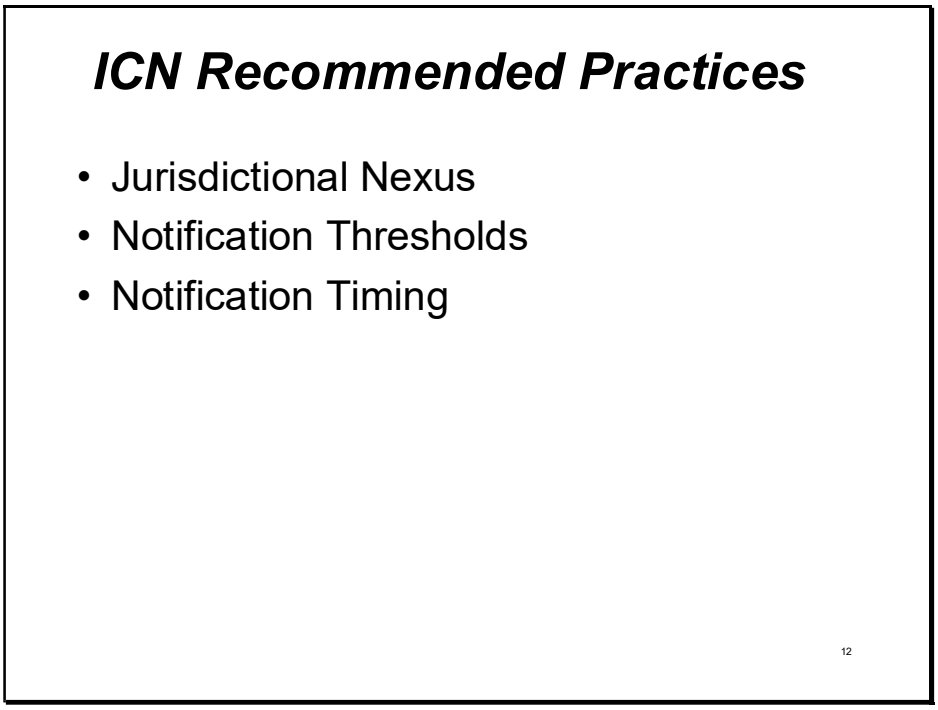
Slide 10



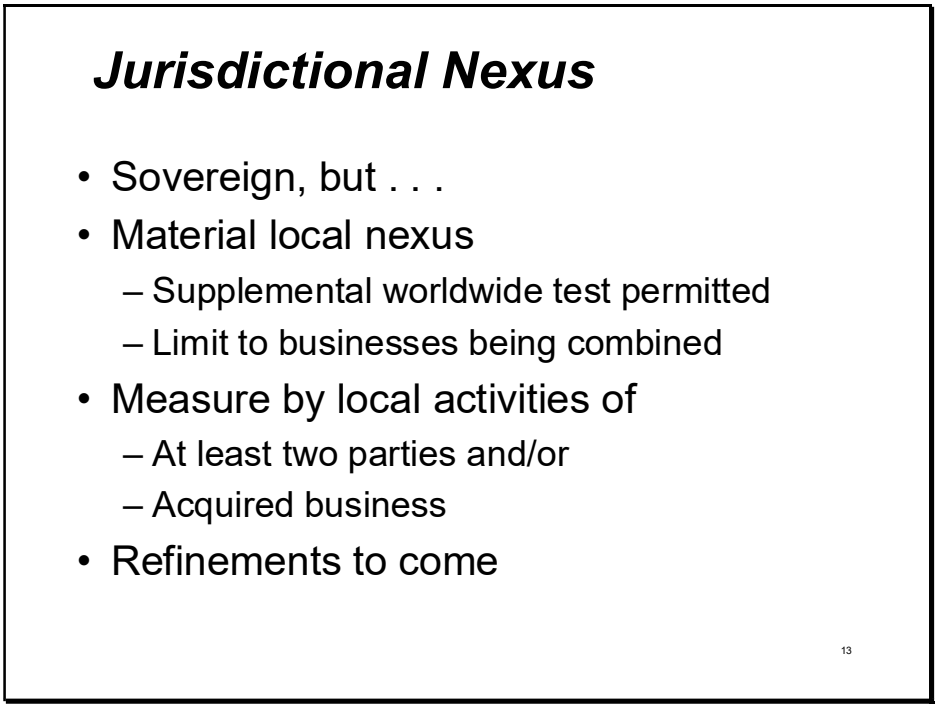
Slide 11



Slide 12



Slide 13



Slide 14

Notification Thresholds

- Clear and understandable
- Objectively quantifiable
  - For example, turnover or assets
  - Not market shares at this stage
- Based on readily ascertainable information

14

Slide 15

Notification Timing

- Permit upon certification of good faith intent
  - Recognizes differences in test
- Suspensive: No deadline
- Non-suspensive: Reasonable deadline
  - Reasonable time
  - Clear triggering event
  - Sufficient development in transaction negotiation process

15

Slide 16

Likely Next Round of Recommended Practices

- Timing of review
- Content of notification
- Transparency
- Periodic Review

16

Slide 17

Likely Next Round – Timing

- Two phases
- Rough contours for Phase I
- Mechanisms for abbreviation of Phase I
- Possibility of limited extension of Phase I
- Special provisions for certain non-problematic transactions
  - Bankrupt targets
  - Tender offers or hostile transactions
- Determinable timing for Phase II?

17

Slide 18

Likely Next Round – Content

- Objective (readily ascertainable) v. subjective
- Abbreviated requirements for non-problematic transactions
- Mechanisms for certainty as to adequacy
  - Prenotification consultation
- Notarization and consularization burdens
- Translation burden

18

Slide 19

Future Rounds before ICN or OECD or Other

- Multiplicity of reviewing agencies
- Non-discrimination
- Procedural fairness
- Confidentiality and information exchange

19

MAURO GRINBERG

Muito obrigado, em nome do Ibrac, em meu nome, ao William Rowley pela magnífica exposição. Apesar dos atrasos, não dele, eu quero registrar aqui uma alteração que nós fizemos no plano do nosso painel, porque nós vamos ter a exposição do Michael Reynolds e depois as perguntas que tiverem a eles dois em seguida, o intervalo, porque os dois fizeram um grande esforço para estar qui conosco, mas têm que viajar ainda hoje. E nós agradecemos, além de tudo, o esforço que eles fizeram para estar aqui conosco. Eu queria registrar ainda que eu já participei de vários eventos do Ibrac, na mesa inclusive, e é a primeira vez que eu tenho que eu tenho que dirigir uma audiência com dois holofotes em cima da minha cara. Não enxergo ninguém aí... Melhorou. Agora um só. Eu vou passar imediatamente a palavra ao Michael Reynolds e quero dizer que ele é sócio encarregado do setor de concorrência internacional do escritório "Allen & Overy" e, da mesma maneira que o nosso Bill Rowley, ele foi coordenador do comitê antitrust da Intrnational Bar Association; agora ele já foi eleito, está para tomar posse, da Section of Business law da International Bar Association; é professor de business law, Direito Comercial e eu tenho acompanhado o Michael desde a minha primeira conferência na IBA que foi em Barcelona, 1999, e tenho visto sempre os seus trabalhos e ansiava por vê-lo aqui conosco e hoje foi a realização de um objetivo. Muito obrigado, Michael. A palavra é sua.

MICHAEL REYNOLDS

Muito obrigado. É para mim um grande privilégio assistir a um seminário tão importante, internacional de concorrência e para mim também é um grande prazer voltar ao Brasil, sobretudo quando está fazendo muito frio na Europa, quando faz muito frio em Bruxelas, tem muita chuva, muito vento. Eu tenho visitado muitas cidades no Brasil, mas para mim é a primeira vez aqui em Brasília. Gostei muito. A paisagem é muito bonita; os edifícios, muito elegantes; a arquitetura muito, muito interessante. Eu acho, particularmente, que precisamos construir na União Européia, uma nova cidade, uma nova capital federal. A Comissão Européia pode comprar um terreno em Andaluzia ou na República Checa porque, atualmente, em Bruxelas é terrível porque todo dia tem greve, tem manifestação, tem chuva, tem vento e podia ser melhor se construíssemos uma Brasília nova da União Européia na Europa.

After that rather controversial political ideas which I only dare to express in Brazil, not in Europe, I will continue in English because I will talk about something rather more specialized and the little Portuguese that I learnt

when I was in the European Commission in Portugal and I know that there some different words and I will risk if I go on making some terrible accident of vocabulary. I think the European speak today to some extent I represent not my only view but what I will try to present is the views of European Commission as I see them and I followed this development as a practitioner as Mauro said, as He head of Allen & Overy International Competition Group, we followed this development trough out our offices in the European Union and I also followed it with my capacity as chair elected of IBA business section and I followed it in the foot steps of Bill Rowley and the developments, he has just talked, we follow the development here in Brazil and the reform process that is now taking place in Brussels. In the IBA is Global Forum For Competition Policy we organized a number of events dedicated to accessing the progress of International Competition Network of the reform process of the European merger control system and we have tried to focus attention on this not only in our main conferences, but in the regional conferences. I would just mention that we have one coming up in 2003 in Mexico City in late June which will follow the ICN conference in Merida and we will be putting the emphasis of that the conference on the developments here in South America.

I'm going to talk about our experience in Europe. I think this is a useful model to analyze. It's important to remember that our system of merger control in Europe is a young system. The regulation providing for compulsory notification of merger of certain size was first adopted in 1990. I've been in Brussels quite a long time and I can remember 15 years before that , before we had this legislation when there was no legislative control requiring pre merger notification and frankly it was chaotic and the system that we have now is a great improvement of what we had then. And the European System has given us, in Europe, a clear distinction of jurisdiction what they called in French 'le guichet unique". Which means the one little office you go and get your approval ticket. The one stop shop, the famous one stop shop which provides a clear distinction of jurisdiction that mergers over certain jurisdictional limit to be notified to Brussels and below those limits they are within the jurisdiction of the 15 member states of the European Union. When the merger regime in Brussels was set up it started with a very well motivated team. They even had their own brand of champagne to celebrate their early victories and they had a number of early victories. When the regime came in Many predicted that the European Commission would not be able to work within time tight limits, that the multinational bureaucracy that we have and Brussels would not be able to cope with a flood of notifications even though they have serious problems of man power resources. It was also predicted that the system would be politically influenced that a telephone call from Elisee Palace or from the German Federal Chancellery would bring about political

pressure towards competition cases and in the early years these predictions were proved wrong. In fact, on He political interference side they've been proved wrong through out. We have not had the degree of political influence that has caused merger decisions to be taken other than not competition grants. And the Commission achieved some formidable successes. It's early records with extremely impressive the ability to handle complex cases to clear 95% of the cases within the first phase process that we have in Brussels of four weeks. There were of course some prohibitions which were upheld by the court and all seems to be going well.

Recently, however, under Commissioner Mario Monti we have had a number of cases, three cases in fact, which have been overturned by the Court three prohibitions decisions and this has set off what we can describe as torrence of criticism about the methods, the fact findings, the evidential standards used by the European Commission, strongly criticized by the European Court of First Instance in Luxemburg. When the merger regime was set up Leon Britain who was, in many ways its founder said that he had created a Rolls Royce machine (...) . The Rolls Royce seems at the moment to have crashed. We now have a system of review and reform which is taking place to analyze what can be done to improve this system. I think it's instructive just to look at some of the things that have gone wrong because, as I say, the system in Brussels is a young system; it's in a formative phase. Other systems such as the United States, which is much more mature that our system in Europe, have also gone through this phases, it's not that dramatic but it's important to see what has gone wrong because I think it has lessons for others antitrust regimes.

The reform process is not being brought about because three cases have been lost in the European Court in Luxembourg. Of course loosing three cases in succession does cause a lot of attention. I think the former U.S. president, Richard Nixon once, said: "If two wrongs don't make a right try three". Some people have said that is what The European Commission looks to be doing. However, the Commission takes all the criticism seriously, it also has made the point that the reform process which it's looking at was going to be undertaken in any event and there was the Green Paper that was published early this year which I already talked about reform, reform of due process, reform of procedure, reform of the jurisdictional rules. And the three appealed cases which we heard about because they have attracted a lot of attention have only served to accelerate that reform. I won't to go through all the reform measures, I just want to highlight some of them which I think are of relevance particularly in the international context and which maybe of interest here in Brazil. First of all, on jurisdiction as I said early, one of great achievements of merger control regulation was the establishment of one stop

shop, the need only to notify on one form in one language to one authority in Brussels for merger over a certain limit. And that, if you are involved in doing business in Europe is an enormous advantage. It will be even more of an advantage and we have 24 member states because that is what we are going to have in Europe. By 2004 we are going to have a number of new states members bringing the total number to 24. A lot of those new members states have compulsory merger control. So the establishment of one stop shop eliminating the need to notify in Lubliana, Viena, Riga, all those countries and centers for antitrust control is a great benefit. And Commission in its review is trying to see how that can be made to work better and this is very positive thing for them to do. It brings about one of the answers to what Bill Rowley described as ingenuity gap, the challenge of business in making a number of multinational fillings around the world. The green paper foresees a number of adjustments to the system to provide a more flexible system because at the moment quite a lot of deals which should really come within the one stop shop dimension actually fall below it so we still have the problem of notifying in a lot of different countries in Europe. And the other thing to remember in Europe is that despite membership of the European Union a lot of the merger control regimes and the antitrust laws of the member states are still very different there hasn't been a the degree of harmonization that we would have hoped for and therefore to improve the working of the one stop shop is a great problem. Many people have said can this form the model for international an system of merger review. The problem with that is that, of course, the one stop shop works within the legal political framework of the European Union because we have the Treatise that establishes European Union and without those we couldn't have this system. Nonetheless I think the working of the model is a very interesting one to analyze.

A second important issue for reform is whether the European Union, we should change the substantive test for accessing mergers at the moment the test in the merger control regulation is whether or not a concentration will created or strength a dominant position. Many have said that that test isn't really flexible enough to deal with merger control and also it doesn't correspond to the test that is adopted in a number of other jurisdictions such as in the U.S., Canada, Australia and indeed now in my country, the United Kingdom which is the test of the substantial lessening of competition. And the Commission in its Green Paper said it were looking at, whether or not, in the interest of international convergence, it should move to the test of substantial lessening of competition and drop the dominance test.

Well, the conclusion announced by Commissioner Mario Monti at the conference that Bill mentioned in Brussels and its subsequent press conference is that the Commission will retain the dominance test. I think the rea-

sons for that are, first of all, that actually a change is opposed by individual member states notably the Federal Republic of Germany which has the dominance test and they will not give it up and also, another reason given in Europe is that now we have jurisprudence for 12 years based on dominance test and suddenly we have to change the test that jurisprudence would be useless. I personally would favor a change to a test which is more in line with that adopted by other jurisdictions because I think that would indeed favor international convergence which I think was objective.

I just want to summarize some of the internal changes that the Commission is making because I think this have lessons and examples for all antitrust agencies around the world. The cases that the Commission has been criticized for the prohibitions in *Airtours, Schneider and Tetra Laval c*ase the criticisms that ware made of the Commission basically by the Court, the Commission had not managed to substantiate its findings which led it to prohibit the cases involved with sufficient evidences. The degree or proof that these mergers were bringing about a dominant position whether individual or collectively that was going to be strengthened or created simply it was not there. The Commission has taken this criticism seriously, it intends to strength the economic analysis of this cases, a Chief economist is going to be appointed, there will be more emphasis on economic analysis, there will be more officials recruited with an economic background because a lot of the cases that we hand, that we deal with the Commission are done by lawyers, not by economists. The Commission is also going to establish an internal system of control whereby by officials outside the merger control unit - the merger task force - will do a peer review analysis, sort of sorciere apprentice analyses of the findings to see if they stand up. It remains to be seen how that will work because in the end of the day there is already internal control and there are many criticize the system in Europe is being to one sided that the Commission is not only the prosecutor, but also the judge and the jury and they say: "Well, this still a internal control". But nonetheless there´s going to be emphasis on strengthening of the analysis and I think this would be welcomed. There is also going to be the strengthening of the rights of defense. Parties to a merger will have early access to the file to check the submissions that are made by competitors, by third parties about their mergers. At the moment it happens very late on proceedings under the proposed reform it is going to happen much earlier. The Commission has also said that it's going to listen much to the voices of the consumers because one of the features of the European Merger control compared to the United States is, I think, the European Commission has often been thought ready to listening to competitors who are complaint about a merger rather than the consumers and very often, we, as lawyers often act for competitors who want to stop a merger so

we actually know how easy that can be if you present your case in the right way to the Commission in Brussels they do listen to the competitors much more than the Federal Trade Commission or the Department of Justice in Washington. I think that will continue to be the case I have to said, but the Commission has said that they will now also listen the consumers much more and there would be a Consumer Liaison Office. Again we have to see in reality how that works whether this is just a talk but that is what they profess they will do.

One of the problems of the European system is that it has tried to do what it has to do with the very tight time limits. You know there is a two phases system. First phase to analyze whether or not the merger raises serious doubts that has to be conducted in one month and then, the second phase, if there are serious doubts to carry out in depth inquires which has to be carried out within a further four months In reality, in particularly in the second phase it's proved extremely difficult for the Commission in these very complex cases with its stretched man power resources to operate within this time limits. Therefore the commission is now advocating a extension of time limits with the agreement of the parties in certain complex cases. It is suggesting that there should be the ability to stop the clock running when parties present undertakings to try to achieve divesture or other solutions to a difficult merger case in the first phase or in the second phase and so we are going to see a relaxation to some extend of the time limits. Many people would say that one of the advantages of the European system compared to the American system, for example, is the fact that you have time limits but the reality is that it has proved very difficult, particularly in complexes cases for the Commission to operate with these time limits and it has resorted to all sorts of methods to extend, for example, finding notifications are incomplete or asking three hundred questions and then issuing a decision that have the effect of stopping the clock and that is very unsatisfactory either. So we are going to have better management, , we are going to gain better analysis. It remains to be seen what can happen as I said earlier , this is a new system and I don't think the Commission should be ashamed that things have gone wrong because now is the chance to correct it. Other systems have needed correcting and I do hope echoing what Bill Rowley has said that this analysis does not take place in isolation I think for all antitrust agencies around the world to take account of the needs that we hear, from the business community, for a assistance internationally and that when you are looking at how your systems is working you can't ignore what is happening else where and the need of convergence

I will stop there and I was very pleased on answer the questions preferable in English but I can have a goal at Portuguese afterwards.

DEBATE 1

Quero agradecer as palavras do Michael Reynolds e agradecer também o fato dele ter permanecido dentro do horário previsto.

Eu quero agora perguntar se há perguntas na audiência; as perguntas também podem ser feitas pela mesa.

Bom, eu vou usar o privilégio da Presidência da mesa e perguntar aqui para o Will Rowley a respeito da ICN x Organização Mundial de Comércio.

Qual é a possibilidade que existe dos assuntos saírem da International Competition Network e passarem para a Organização Mundial do Comércio, e qual a diferença e qual a efetividade maior que se daria na Organização Mundial de Comércio, uma vez que a ICN não tem sequer meios de obrigar as partes a seguir as suas decisões?

WILLIAM ROWLEY

It's always nice to have the easy questions first. Mauro, thank you. If I may, I would say that there is a fine balance that will be weigh over the next several years as to whether the ICN will succeed to be more than a talking shop and turn out to be a place of action and implementation. If it does, then the chance of the WTO being the ultimate arbitrator at least soon the matters of international competition law will be diminished. But, I hope I don't sound too much like I know what I'm saying because I suspect many in this room are better equipped than I to (adventure) on this subject. But let me go on to say that if the ICN does not succeed, in this way, the WTO will, I think, bubble up to the top as the natural institution of choice to do several things.

First of all, in the last round of Doha, there was an agreement that there would be negotiations or discussions about negotiations leading to an agreement at the WTO on competition. And those preliminary discussions are on their the way and I said yesterday at CADE and I have said early to another group that if I were looking at five, ten or fifteen years, I believe in five years we will see an agreement on competition in place of the WTO and one that is largely accepted as being an appropriate forum for competition matters. That ten years from now, we will see the WTO playing real leadership in terms of international policy development and discussion. In fifteen years from now, possibly even as a place for dispute resolutions because somebody

raised a question yesterday, was a very good one, what happens when you have in a international world a transaction that has effects in a jurisdiction, let me suggest India, where there is not the possibility in a jurisdiction for a local agency to do anything about the transaction that would effectively protect its clients, its customers, its consumers. Or there are not to be some institution to each one can turn if one is the Indian consumer to say: "This transaction is desperately harmful to India". And someone would say that it's the WTO. Another way of addressing that problem, and I think I will stop here, is for agencies that are looking at these transactions to look beyond their own consumers to adopt a better thy neighbour, protect, thy neighbour policy as opposed to beg thy neighbour and look to effects in others jurisdictions. It is a difficult, difficult question but it may will be possible, for example, the European Commission to look at the merger of two British tea companies which may have monopolistic affects in India but no effect directly whatsoever in European Union to say: "but uh ultimately there are indirect effects. Oh! They are indirectly affected". So a long answer to a short easy question.

Muito obrigado Will.

Alguma pergunta?

Eu quero fazer uma observação aqui quanto ao trabalho do Michael Reynolds: eu li nos papéis dele que no Regulamento do Controle dos Atos de Concentração na União Européia existe um prazo final, um prazo fatal para notificação sob pena de multa, mas que a Comissão não aplica a multa caso não sejam tomadas atitudes no sentido da implementação do ato.

Agora, a minha pergunta é: o que são medidas no sentido de implementação do ato?

Essa pergunta é feita porque todos aqui sabem, o Michael também sabe do problema que existe com as multas por intempestividade no Brasil. Isso é um fato conhecido, foi falado já na primeira sessão aqui do nosso Seminário, eu quero ouvir a opinião do Michael sobre isso.

MICHAEL REYNOLDS

That's a very interesting question. First of all, I did not mentioned that in my speech that the Commission is going to abolish the seven day deadline which is currently in the regulation within which you have to notify a merger under the present regime, you are obliged to notify a merger within

the seven day of a binding agreement a legally binding agreement. That's not a rise at the stage of the letter of intents. It has to be a letter with legally effects for the parties. That obligation will be taken way because the logic is that in any event the parties are indeed as you prevented from implementing the concentration pending the Commission inquiry.. Now they have been a number of cases where companies were notified late. We were involved in a case involving two Japanese companies who completely missed the requirement, they just didn't spot the need to notify in Brussels because they thought it was just a domestic Japanese merger not indeed is one of the problems. The regulation does catch merger that take place out side the European Union but at first glance appear do not appear to have any effect within it because of the way the thresholds operate.. In most of those cases the Commission has not imposed fines but has imposed fines where companies have taken action to implement their merger. I think the abolition of the seven day requirement is a very sensible change, its in line with the best practices which have been advocated by the ICN working party and in fact, in reality the Commission is very flexible about the time in which you have to notify. But there is no doubt that if the Commission felt that there was the company that deliberately avoided the need to notify, and we had indeed a couple of these cases, it will impose a fine. We had one case where there was a fine of a quarter o a million Euro for what the Commission felt was a deliberate attempt not to notify a merger. So its was not a theoretic power.

Muito obrigado Michael.

Parece que o Bill Blumenthal tem uma observação a fazer.

Quer falar agora?

WILLIAM BLUMENTHAL

Thank you. For those who haven´t met me, I´m Bill Blumenthal from Washington. Mauro will indroduce me after the coffee break. It´s a pleasure to be here and I was going to offer two comments on things that Bill has mentioned. Mainly to establish tha no all north americans think the same about these issues and there are some significant diferences of view among part of practitioners on some of the key broad picture issues that confront the governments.

The first related to the WTO, the U.S. of course was very late in coming around to the view that perhaps the WTO would be an unappropriate mechanism but if you read the Doha declaration carefully there was never an

agreement to negotiate over hardcore cartels there is an agreement to consider negotiation over hardcore cartels. And I raised that in particular because there remains a tremendous skepticism among a number of countries as to whether the WTO is an appropriate forum, is a appropriate vehicle to consider competitions issues. And I think the reason for that is fairly demonstrated by the blue pack that is in the material there in the IBRAC folder that was the WTO annual report. If you slip throug it there are about two hundred pages of material focus on pure trade issues and in page page 57 you have about three paragraphes on competition. There are fair number of people in the competition community who are quite concernd that if the WTO is permitted into the competition space we will confront a world ten years, twenty years out where essentially the competition values are traded off for perhaps steel, perhaps lumber, perhaps raspberrys. There is a list to school of thought that says that trade and the competition values really ought to be compartilized and that the protection of competition requires it. That is huge problem which is... the ICN doesn´t have an enforcement mechanism, we will get into the comments ahead after the coffee break I will be speaking a little bit about that. So the question becomes: if they are disputes how does the world resolve that? Short of saying we need consensus and the absense of consensus is the least common denominator. This system remains very much in evolution and I think that the world has come tremendously far even in the last year and if I may offer a comment on that, the last time that Michel, Bill and I run at the same panel we were in Saint Thomas, it was January of the past year, no... January this year, ten months ago, we were speaking to a group and ICN at that point was three months old it had one meeting and that meeting was focused on the location of the annual conference. There were significant questions to whether was simple a group of north americans of two or three goverments talking to each other or whether might develop something more. What we have seen is that it has developed significantly in something more. It is proven to be quite successful as an organization but in one or another area I desagreed with Bill, I think. Some of us think that part of that success is precisely because at the voting level, at the constitutional level ICN is solely governamental. When we get into some of the details of what ICN has prescribed, after the coffee break you are going to see that many of these prescriptions have some significant teeth. There is no country on the planet that fully satisfies all of the ICN prescriptions and I think there is a real question as to whether it has been a privete bar enterprise or if it's been other than competition agencies, speaking to competition agencies, for competition agencies, by competition agencies. There would have been the same sort of strentgh in the recommendations that automatelly were adopted and endorced

Thank you.

WILLIAM ROWLEY

Could I just ilustrate that the two Bills are perhaps in desgreement here by mentioning or clarifying. I did not mean to suggest that the ICN should not be led by the competition enforcement agencies. I think it´s vital that be led by them. I just think it´s important that others be sitting on the equally level chair at the table not in a lower chair. In terms of the prescriptions that come out of the ICN, the ICN has very few prescriptions so far it´s got eight guiding principals and three recommended practices. Bill Blumenthal will be modest. He has had a heavy hand in helping to write those guiding principles and prescriptions, but you will find in your packet material two sets of recommend practices which were attached in my paper, one being in a group of five practitioners on behaf of the mergers stream line group which put together some recommended, some 35 or 40 recommended practices two years ago for the IBA at ... and a month or so later another set of highly complemetary and very detailed recomended practices coming out of ICC you will find each of ICN´s guide lines and each of the recommended practices endorsed in Naples find their foundation in those two documents which were private sector contribution. So I think it would not be imodest for me on behavour of the private sector to say, but for the private sector the ICN would not be entitled to vote of confidence that we can give today. There is not to suggest that the private sector is a driver in anyway but it is certainly the most enfatically and important contributor. I don´t think you are suggesting otherwise.

WILLIAM BLUMENTHAL

I think the issue is simply who holds the ultimate votes. The ICN, most jurisdictions, not all, but most jurisdictions that participate in tha ICN have reached out afirmativeley to the private sector and have embraced private practitioners, private lawyers, the private business community as advisers That message has not being noted by all participants in ICN or goverments but I think we will continue to see some significant pressure on the part of the goverment to reach out the private sector for precisely reasons that Bill described.

MAURO GRINBERG

Bom, com isso eu quero mais uma vez agradecer em nome do Ibrac e em meu nome próprio, o esforço que William Rowley e o Michael Reynolds fizeram para estar aqui conosco. Eles não poderão ficar durante toda segunda parte do nosso encontro, do nosso painel, porque tem que voltar aos seus países de origem, e o agradecimento ao William Blumenthal eu faço depois, já que os dois vão ter que se afastar em algum momento, e eu quero dizer que após o intervalo, o William Blumenthal vai falar sobre as recomendações específicas da International Competition Network e dos princípios adotados por ela. Será alguma coisa um pouquinho mais dedicada a seus aspectos práticos e depois teremos o Cláudio Considera e finalmente o Conselheiro Ronaldo Macedo.

Eu faço agora um intervalo agora de 15 minutos para o café e peço que todos voltem em 15 minutos.

Muito obrigado.

(...) O próximo expositor é o advogado Willian Blumenthal. Eu quero lembrar que eu conheci o William Blumenthal há alguns anos atrás em uma situação extremamente curiosa para mim porque um amigo meu que morava em Atlanta, brasileiro, me chamou, eu estava viajando, me chamou: "Venha cá. Eu quero te apresentar nosso sócio de Direito da Concorrência, de antitrust". Bom, eu fui lá achando que fosse conhecer o sócio. Aí ele me leva a uma sala com uma enorme televisão e participamos de uma video conferência e foi o momento em que eu conheci o William Blumenthal e mais a diante nos encontramos em alguns eventos internacionais. Ele é sócio do escritório "King & Spalding" , a prática dele fica sediada em Washington, ele foi vice-chair da American Bar Association; ele é o chefe da Merger Reviwe Task Form da American Bar Association e é um dos principais consultores do setor privado para a International Competition Network. De fato ele faz parte do chamado "drefting group" e ele vai nos trazer as recomendações da International Competition Network para controle de atos de concentração.

WILLIAM BLUMENTHAL

First, thank you for that kind introduction and I am glad we did had the opportunity to meet face to face a couple of years ago what is of course, the reason why I am here today. Mario, thank you. So, ladies and gentlemen, now we can formally introduce. It is a pleasure to be here with you today. Michael Reynolds, William Rowley and I, over the past year, have traveled to many parts of the globe on the issues we are dealing today no place has

treated us with greatwer hospitality than Brasilia and I thank you for that. Thank you.

When Bill, Michael and I were in Saint Thomas, ten months ago, when there was a great uncertainty as to whether ICN or some other mechanism for global coordination would really progress. There was a sense that ICN in its first year of being needed to show some concrete progress somewhere, anywhere. It did not much matter where it was. By the time of September 2002 meeting an you recall that the very first order of business was that there would be a meeting, that month, in Italy. By the time of that meeting, there had to be something more concrete than that to put on the table. Fortunately, that did developed in the form of the work of notification and procedures subgroups on which Bill and Michael and I, and many others, have been acting. It is being a large group, it includes the U.S. an the EU as you might have imagined but it also has very, very active roles by many other jurisdictions as Japan, Korea, South Africa, many others are in attendance on a lot of calls. And of course these calls for many of those governments occurring one in the morning, two in the morning. It is quite an effort on everybody's part. But there has been a fair bit to show an that is what we are going to turn to for the next twenty minutes. I am simply going to walk through the guiding principles and recommended practices that emerged out of the subgroups and that were approved, adopted, endorsed at Naples . Unlike Bill's comments, I am not gonna have anything prescriptive to say at least until the very end, this is purely descriptive purely reporting on what has been adopted. Let me emphasize that none of these was drafted with any particularly jurisdiction in mind. And I say that because if we go through this type of talk in many countries there is some tendency to personalize it. I know a lot of countries are in default of some or another the principles and the recommendations which of course they are, because as I said in the comments before, there is no country on the planet that can forms for everything. You recognize that in some of these Brazil are in default. US is default. I identify some in U.S. in default, everybody defaults on some of this and it is simply that now we have some intergovernmental mechanisms by which there is some agreement been reached and this is the direction on which the world ought to converge". So, let me go through the direction.

We begin with the guiding principles. At the very top you have each guide principles and I am going to go into each of these a little bit more detailed. They have been adopted. The work over the next few years will be to try do move from principles into particular practices. There are some particular practices that have been adopted in three areas, Bill mentioned the there

were three, but I will spare some words in those sub parts. There is a lot of work yet to be done. But let start with the principles.

The first one is sovereignty. And it simply begins by observing that every jurisdiction is sovereign with respect the application of its own laws in merger cases. When we say that there is enforcement mechanism, there is no dispute resolution mechanism , there is no peer review mechanism, this is part of what we have in mind. That right now, ICN remains something of a toddler. It is beginning to have progress but we are dealing with baby steps and I think people want to take great care not to do anything that would undermine that. Whether there will eventually be some mechanism for dispute resolution, whether there would be some mechanism by which jurisdictions begins to cede sovereignty. Very much remains to be seen. I think the substantial question is whether that would never occur in the ICN context. It is where we begin get into Bill Rowley vision that perhaps the WTO might take that over but this is a battle for, certainly not for this year and probably not for a number of years to come. There is an awful lot of progress that can be made among governments without needing to cross that bridge.

The second principle is transparency. This one really has four elements. It says that in order to foster consistency, predictability and fairness the merger review process should be transparent in a number of respects. First with respect to the policies practices and procedures that are involved in the review. Second which respect the identity of the decisions makers. Third with respect to the substantive standards of review. And fourth, with respect to the basis of adverse enforcement decisions. That obviously leaves a lot that is open. There is a huge question that is to how transparent must the system be to be transparent. In six lines we are going to get into confidentiality and there is obviously a tension between confidentiality and transparency. If you are too transparence, you begin to invade confidentiality; if you have too much confidentiality you invade transparency. There are a lot of final balances to be stricken. This is in there in a large part because there is a perception on the part of many of the world that the United States is somewhat lacking in transparency. I think there are a lot of people who share that, including in the U.S, and I will noted that this particular principle even if it hasn't been operationalized yet, is already begging to have some effect. During the last two or three weeks, the FTC, the Federal Trade Commission in the U.S. has began to publish in significant cases the basis for decisions not initiate the enforcement action. Many of you have are familiar with the Cruise case in which Carnival and Royal Caribbean Cruises both made beats for Princess cruise linas, ultimately those deals were cleared without a substantial debate in United States and elsewhere. The FTC put out a very detailed statement

unlike anything we have seen before as to why they came up with the enforcement decision. Two weeks later, in a case involving supermarkets mergers, they did the same thing. So we are beginning to see some fruits already.

Third principle is non discrimination. Sort of World Trade Organization concept but it is slightly different here. It says that in a merger review process jurisdictions should not discriminate in the application of the competitions law and regulation based on nationality. That all nationals are treated the same. Now, left opened in this is whether it might be permissible to disfavor your own nationals. In some cases, the U.S. for example, has done that. But it is clear that one of the principles that has being adopted widely is that you will not treat foreign nationals in any worse that domestics. You may treat them better.

The fourth principle is procedural fairness and it doesn't fit in one line we have two of them here. The first is 'prior to any adverse decision". And I focus on that procedure fairness is not limited to every step of the process, at least not yet. For now it is limited to prior to the adverse decision on the merits at the end of the process. The merging parties should be informed of the competitive concerns that form the basis for that propose adverse decision. The factual basis on which those concerns are based and they should have the opportunity to express their views in the relationship to those concerns. Just at the end of the process there is not yet any guarantee of fairness at the early stages of the investigation. All that remains to be seen. The other procedural fairness elements are these that if there is an adverse enforcement decision there should be some opportunity for review before a separate adjudicative body. Now, left open what the adjudicative body is. Might be a Court but it doesn't have to be a Court. It could be a separate group within the same agency. And finally the last element of procedural fairness for third parties provides the third parties who believe they would have some adverse effects from the transaction a mechanism for expressing their views as part of the process. Very open ended, not to be defined probably for another couple of years. But there is at least some notion of third party rights, details to follow.

The fifth principle is that there should be efficient, timely and effective review and this is really at the heart of all the principles, at the heart of what is happening with the merger control process and it also go to heart of the most difficult balances because fairly often if you are going to have an efficient process it is gonna take a little bit of time. At least if you want to be effective. These things tend to maintain a trade off against each other. And they are tough to retain simultaneously. But the notion, at least for now, is that enforcement agencies should be provide with the information's they need to review the competitive effects. They should not impose unnecessary transac-

tion costs and all of these should happen with a reasonable and determinable time frame. You may think that the reference for determinable time frame was intended for Brazil, it was not, it was intended for U.S. That's basically saying the Hard Scoot process that we practiced in the U.S. is viewed by many as being out of control. The fact that the word is determinable and not determined was the subject of an extensive discussion, extensive negotiation, because clearly the Hard Scott process was not determined. But there are some view that perhaps it might be determinable. This is another one to remains to be flashed out.

Coordination. This is a sense that right now countries of the world should be trying to coordinate under merger review process. And it is distinguished of the next line which is convergence. This is aspiration, this is what people hope to get over the next decade. There is some desire to converge, there is a recognition that convergence would be extremely tough to attain. We can coordinate at the meantime. Convergence that is something for... First Ill work at the next slide.

And the final slide is confidentiality. The one tha provides the merger review process, should provide for protection of confidential information. What those protections would be. Very much have yet to be defined, they are not being to be taken for a while, there is a extensive treatment of them in the OCDE and ICC paper, I think its yellow in the materials, and you see towards the end pages and pages of treatment on what protections ICC and BIAC would recommend affording to the protection of confidential information. Clearly the ICN and the governments of the world are not yet prepared to buy it on to that set of issues. And this we will see. We are not gonna do at this year either.

Well, moving to the recommended practices, that were endorsed in Naples, and there are three areas that Bill Rowley mentioned: Jurisdictional Nexus, Notification Thresholds and Notification Timing. And I will run trough each with a little more detail. With respect to Jurisdictional Nexus the practices begin again with the recognition that each jurisdiction is sovereign with respect to assertion of access. However, the second bullet, there really ought to be a material local nexus before a transaction is subject of a merger review. This is directed to many, many jurisdictions that have a world wide test. There is a sense that if you have a world wise test and a local test, that is ok. But if it is just the world wise test, that is probably too broad. And further the local nexus ought to be focused on the business being combined that if you are buying a particular division say from a multinational it should be looking not at all of the activities of the multinationals but the activities of the business that is part of the transaction.

In a single most controversial provision the governments adopted a recommendations that local activity that should be measured by the activities of at least two parties to the transaction or perhaps, if not both parties at least the acquired business. There were some dispute on this and the reason that we use the term "endorse" ....as supposed to adopted for the practices is because a few countries opted out based on this provision in particular and the concern was a potential competition concern. The concern was if you are a relatively small jurisdiction, and Denmark was most concerned on this, if its a small jurisdiction but has a dominant firm, if it is holding competitive check by a potential entrant across boarder, and if they then buy the potential entrant, say in Germany, that would not be captured within this jurisdictional provision. This is not a point that was missed on the draft. People were acutely aware of this risk. And the sense was: Yes, that is real but it is a concern so seldom. It is a concern of two or three transactions out of ten thousand every year. That is for the greater good, the good of the entire global system we hope that those will be dealt with a normal transaction in the jurisdiction that they do have to file, after closing and if it cannot be dealt with either of those basis , well sorry, but there is a entire global capital market people have to protect. We can´t be running around asserting jurisdiction to widely. But this issue remains in debate.

The next area: the notification thresholds. The principle here is that the notification thresholds should be clear, should be understandable, the should be objectively quantifiable, for example, thresholds based on sales, on turn over, on assets? Are things that can be determinate right out of financial statements. There is a little bit of flexibility in financial statements, we certainly see that on United States but at least there are numbers that one can point you prepared in the ordinary course. Market shares by contrast are a much tougher concept. And the sense is that the wider market share will be very important part of the review process. (...) Not yet. Not at the jurisdictional phase. At the jurisdictional phase people should be looking to hard numbers because 95% of the transactions are harmless and if people have to sit down and determinate market shares in some details that is going to over burden the process.

Finally the notification thresholds should be based on ascertainable information and it is not materially different form turn over or assets.

The next element: notification timing. There is a sense that timing... let´s break timing into how early may you notify and how late must you notify. There is a sense that governments should permit parties to notify, that you may notify upon certification of a good faith and intent to merger. But there are differences in the tests and the commentary that was offered specifi-

cally takes account of that. Different jurisdictions have different views as to what is necessary to certify good faith. The U.S. and Canada, for example, have a letter of content standards. And urge to have a letter of contend standards in the ICN contest as did ICC and BIAC, as did the IBA. And those were voices that were simple shot out virtually every other jurisdiction that was heard on the issue said that the process should not begin as a matter of right until definitive agreement. And if there had been a vote that was taken on a global bases it would have been predominantly in favor of a fully specified lengthy definitive agreement binding on the parties. The U.S. wants to permit it earlier the ICN said that's fine but its not a standard that would be reached to the rest of the world.

In terms of how late you should be permitted to notify, there is a difference between suspensive and non suspensive regimes. If it´s a regime, that bars the parties from closing while the merger process is proceeding such as U.S., such as Canada, such as Europe. The sense is: there should be no should be no deadline because the parties have the incentive to file and let them control of the detail of the timing and that was the view that Michael have indicated the E.U. has just adopted. With respect to non suspensive regimes however, Brazil, Australia, other jurisdictions as well, if it´s not suspensive and the parties can close while the process of review is proceeding. There is a sense that the government has an entitlement to mend a reasonable deadline the filing. So that the parties can´t simple close proceed and leave the government without recourse. Exactly what that time is, what is reasonable is something on which people can differ but there is a sense that reasonable would be measured in terms of... certainly not months, probably not days, but probably weeks and probably less that four weeks. From a clear triggering event and the clarity triggering event was extremely important and further for that triggering event should involve a stage in the transaction process where there is sufficient development to show that the parties are sufficiently dedicated to the deal. Maybe not binding or although ideally binding but certainly far enough into the process that it would not be burdening transactions prematurely.

The ICN has announced that the areas of development for recommended practices over the next year: timing of the review process; content of notifications; transparency and periodic review.

Periodic review. There is a sense that governments from time to time should review the details of their review process. They should review the thresholds, they should review whether the way that they conduct the process is really working. This is directed at everybody and the U.S. was the prime offender. It took us twenty years to enact a revision in the Hart Scott thresh-

olds. That was very painful to the business community around the world for the let apart of those two decades we of course are not alone. So there is a sense that the periodic review is very important. Transparency is in there because of a sense that it needs to be addressed and it needs to be addressed because there are some jurisdictions, and again the U.S. is a prime offender, they are or not sufficiently transparent. Let me go on to the timing and content and for this I have some more details.

On timing, the areas that are under discussion are these. First: many jurisdictions have a two phases process and there is a sense that that is a more efficient way to proceed, it´s likely that a recommendation of the two phases merger review process will be adopted this year. You will see it in the ICC/BIAC paper and in the IBA paper. Not everything in those papers is being adopted by the group, I mean, those papers are urged a letter of content standards, couple of slides back, and that clearly (didn't carry the debate) with ICN. The two phases is one where there is significant support. There will be rough contours about what we would expect for phase one. The problem be flexible. I don't think we are going to see the ICN saying that phase one should be in thirty days, as it´s in U.S, as it is in Europe. But in Canada , for example, it´s twenty days or forty days, depending on the nature of the deal. Most jurisdictions that have two phases system, have the first a phase from three weeks to six weeks. My sense for what I have heard so far is that most countries say that it doesn't much matter if it takes three weeks or six weeks or something in between but something on that order of magnitude is roughly what we ought to be discussing. Within that phase one review there will be probably, not certainly, but probably some sense that there should be a way of shortening the period. Whether it is early termination that some jurisdictions have, whether it is, as in Canada, a mechanism for a short or a long form. With the short form, is a truncating mechanism, or as in Canada has, (...) an advance ruling certificate that avoids the need to file law together. There are a number of different mechanisms where the ICN looks at the good ideas and people ought to think about that. There is also a sense that phase one sometimes deals with the problem of the transactions that maybe can be resolved in phase one. The United States, and a number of other jurisdictions, do not have that mechanism for extending phase one. Sometimes there are a sort of mechanism that are used. In the U.S. is not uncommon to get towards the phase one to the government say: “we really need two weeks”. We don't have a mechanism for extending two weeks. Why don't you pull your filing and refile tomorrow? And we won't charge you a new filing fee. And that happens with some frequency. The Europeans, by contrast, have a mechanism for formally extending the phase one and there is a sense that it is a fairly good idea. I think we will probably see some serious discussions on

that. There is a sense that special provisions ought to be in placed for certain types of non problematic transactions. Bankruptcies, hostile tender, hostile take overs, tender offers. I quickly add that if it´s a problematic bankruptcy involving two of the last competitors, last three or four competitors in the field, that wouldn't qualify for abbreviated treatment. Nor would a hostile take over involving two direct competitors. But if it´s a non problematic transaction, there is a sense that some shorter period might be considered. And finally for phase two, we are back to the question of determinable timing. We may or may not get into that year. I think it is a big question is to whether the governments will really want to get into, whether it ought to be a four months period as it is in Europe, whether it is a four month period with extension as it often is in Europe. Whether it is a six month period, but sometimes nine months, sometimes it´s twelve, sometimes it´s eighteen, as it is in the United States, and in some other jurisdictions. We may not have some development on that.

The next slide content, the next area to be addressed this year. What should the form say? What content should be provided to the governments? One big questions is: will be this phase one only? To my guess it will be only phase one because when you start specifying the content of a full phase two that is very case specific. And there is a progress made only in phase one that would probably go far. There are something of a (golf) between objective and subjective systems, you will see that ICC, BIAC, IBA, all urge and objective system information that is readably ascertainable right out of the books of companies. And it´s all that should be provided as part of the initial notification in contrast to, for example, a subjective filing that says: tell us why shouldn't we have a concern here? What are the markets? What is the shares in those markets? That is the IBA position. The BIAC position. The ICC position. Curiously it´s not the ABA position. Notwithstanding the fact that in the U.S., the ABA lives in a regime that has an objective set of requirements. The reason for that is because we have seen is that with objective requirements what you often do is just put off two or three weeks into the filing. The call that comes from the agency that says is always: “oh! We cannot tell anything about from information”. Are there any issues that we ought to be concerned with? It´s very clear that most jurisdictions, the majority of the jurisdictions of the would, have subjective requirements and we may see a language that says something like while the objective is ok, subjective is enormous. Certainly we are not going to see what is in the BIAC, ICC, IBA proposals. There is, however, a sense coupled with that, that many transactions are not problematic and where the transaction is clearly competitively harmless, there should be abbreviated requirements. Many people will say that the

places where the real problem arises, where the real burden arises is in the those jurisdictions that have low thresholds, subjective requirements, and initial information remains demands sort of like European form CO. When people say that, what they are really thinking about are a number of jurisdictions in Europe in particular. Although, there are many non European jurisdictions with the same thing – it would be said. There is a sense that for those jurisdictions they ought to be a way to shorten it.

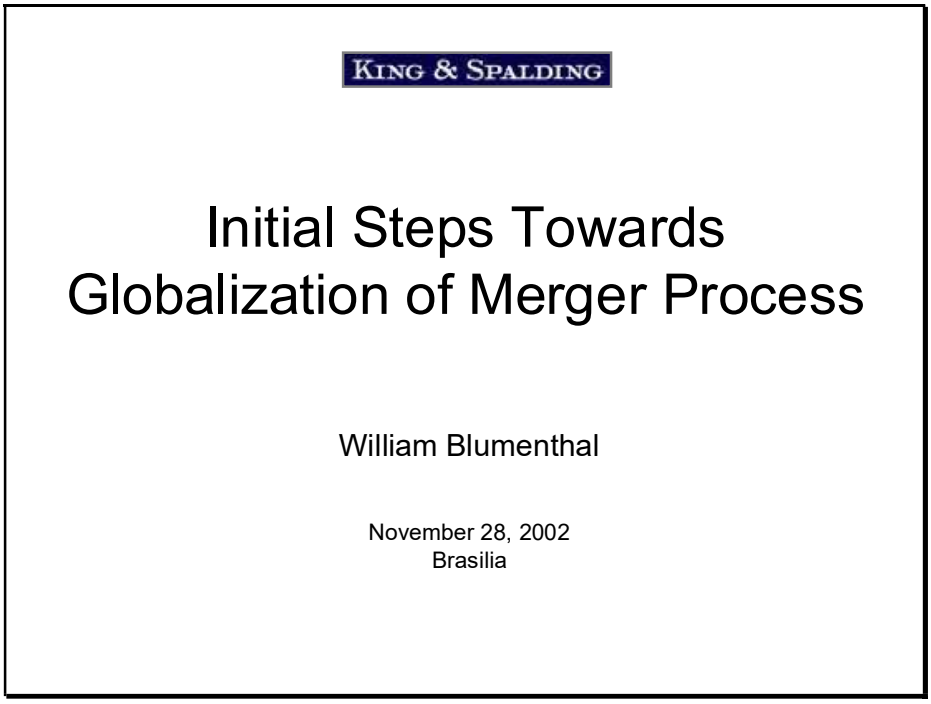
Let me quickly deal with notarization and consularization at the bottom. Some countries require business executives to go to the Counselor office to certify . And that´s probably ok with you have one filing. But if you have ten or fifteen filings, you will have to go to a number of cities because not all jurisdictions have counselor officers in the same place. There is a sense that it´s too much of a burden, that a simple certification without formal consularization should be appropriate.

Finally, translation. Translation is an extremely costly process. We estimated as being a hundred dollars a page. Many of you may have passed for this experience, spending many thousands of dollar per (case). There is a sense that, at least at phase one stage, translation should be fine for purposes of the filing itself but we expect to ordinary course documents, which respect to attachments, that those ought to be taken in the original language.

There is more to be done in the future...

And let me say thank you. It is gonna take a lot of work this year, next year and the years ahead. It will take a lot of flexibility on the part of the agencies, on the part of the national legislators because often these are not agencies choices, they are often legislative that give rise to the problems. It will probably take at least five years, probably ten years, before real progress has been made but with the prospect of sixty to seventy jurisdictions reviewing every transaction, or potentially reviewing every transaction with the burdens that would fallow the capital markets as a result. That is simply too painful to bear. If Michael Reynolds, Bill Rowley and I have been traveling the world on these issues it is because a number of people looked into a potential view of the future, few years ago, and said that this is just too terrifying and there is now a movement for propositive changes on a global bases. We hope that those of you in the private practices in the the goverment services in the business community will join us. Obrigado.

Slide 1



Slide 2

Slide 3

The Problem

- Jurisdictional net is often wide
  - The global triumph of the *Alcoa* doctrine
- Even transactions between firms from a single nation are caught in multiple jurisdictions
- The results
  - Excessive compliance burden
  - Potential for inconsistent outcomes

3

Slide 4

Steps towards Reconciliation

- Early recognitions
- More recent steps
  - OECD
  - WTO
  - ICN
  - Bilateral or regional coordination
  - Private bar groups

4

Slide 5

Why It Matters

- *To protect the world's capital markets!*
  - Incentives for investment require mechanisms for exit
  - 95% of transactions are competitively innocuous
- Excessive transaction costs frustrate the desirable operation of markets
- Affects industrialized *and* less developed countries

5

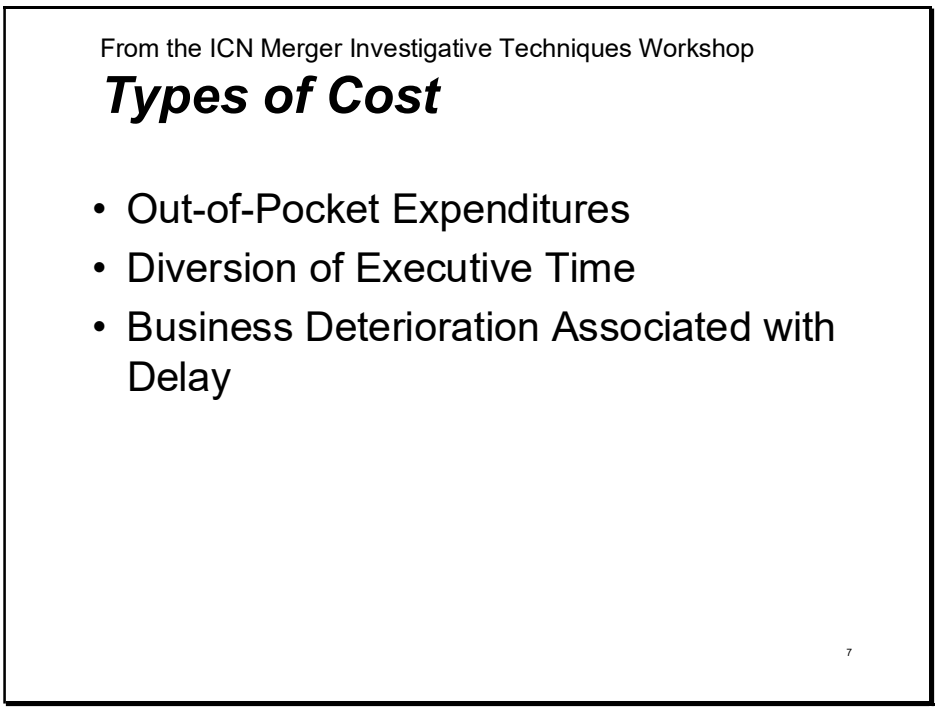
Slide 6

Some Details on Cost . . .

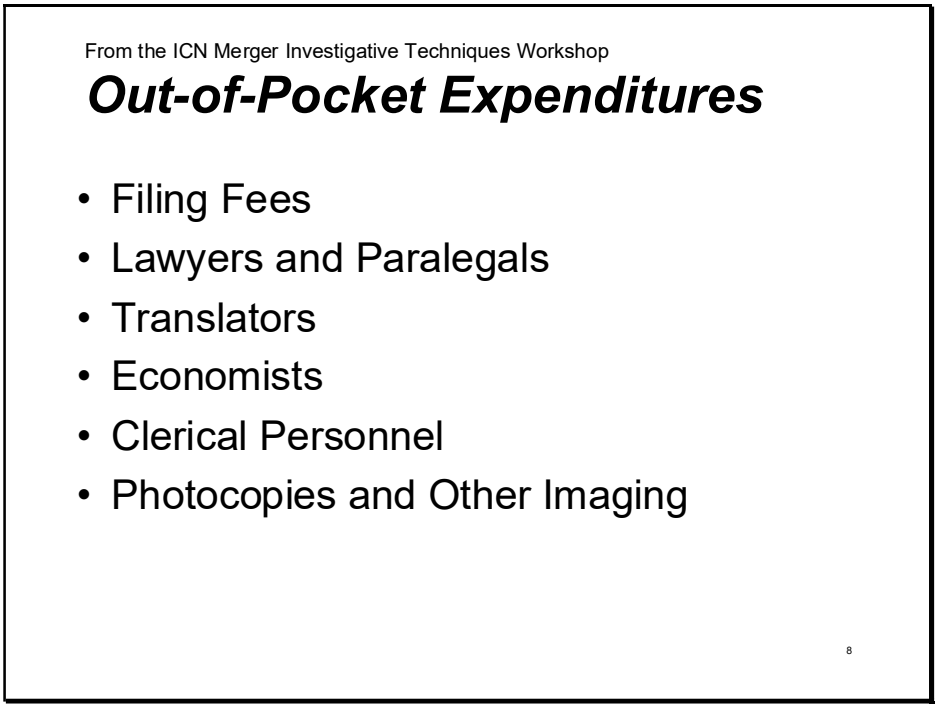
- The next 11 slides were prepared for the ICN Merger Investigative Workshop held last week in Washington, DC
  - Modified with blue background to distinguish them from the prepared remarks here
  - Focused there on investigation after initial notification has been submitted
  - Issues such as jurisdiction and timing for initial notification are equally important

6

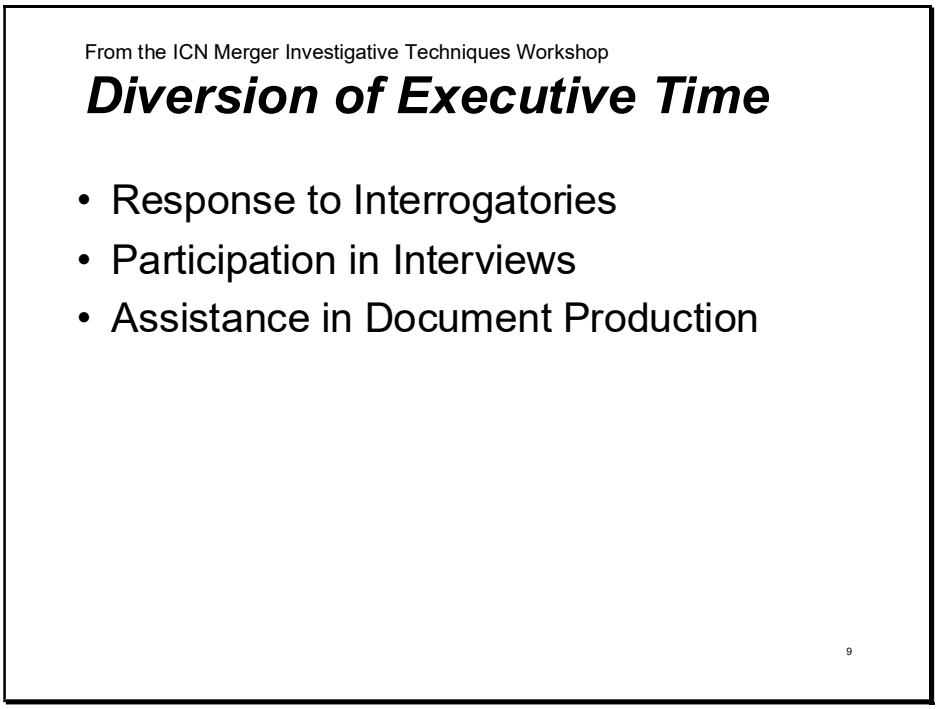
Slide 7



Slide 8



Slide 9



Slide 10

Slide 11

From the ICN Merger Investigative Techniques Workshop

Cost Estimates (1): Document Review

- Labor Time per *Review* Carton
- Sources of Variability
  - Number of Sources?
  - Number of Sites?
  - Responsiveness of Sample?
  - Paper or Electronic?
  - Working or Archive Files?
  - Number of Passes?
  - Indexing and Ancillary Tasks?

11

Slide 12

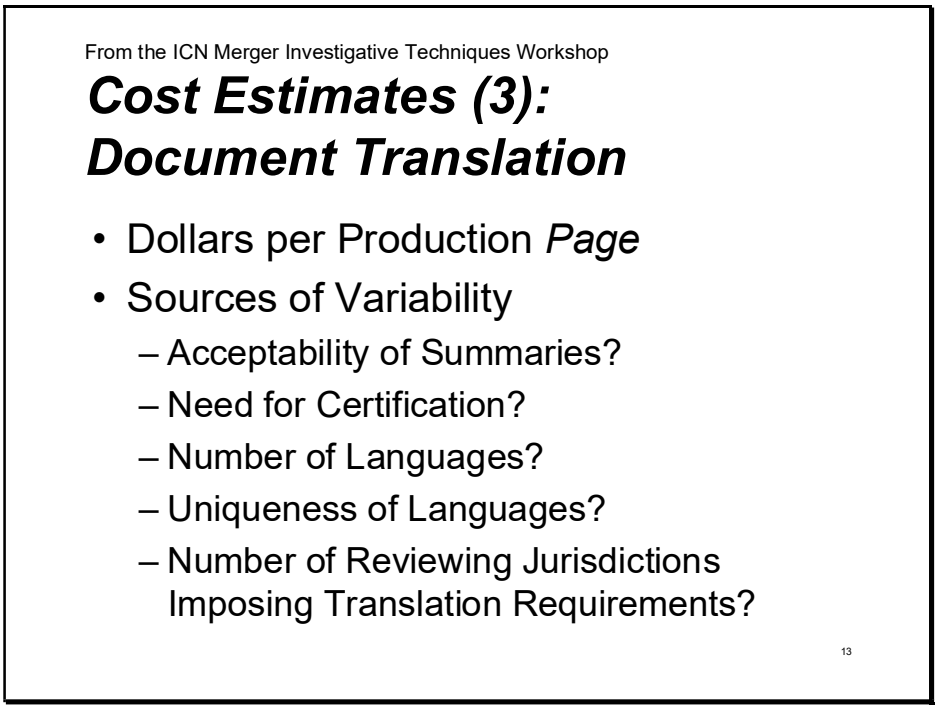
From the ICN Merger Investigative Techniques Workshop

Cost Estimates (2): Document Imaging

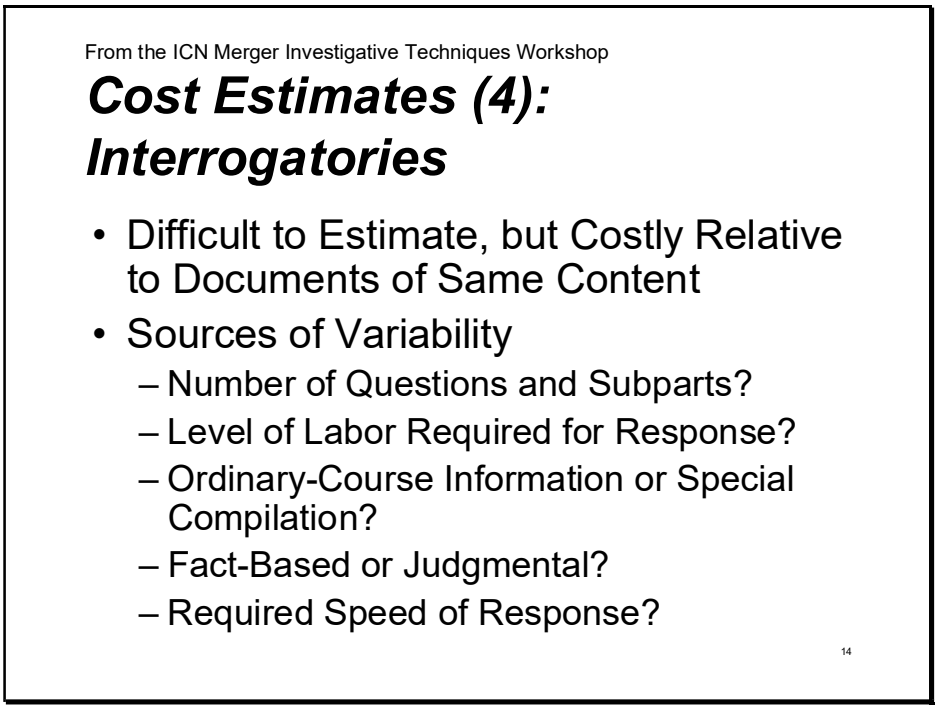
- Dollars per *Production* Carton
- Sources of Variability
  - Type of Image?
  - Number of Copies?
  - Speed of Turnaround?
  - Sorting and Other Processing?
  - Image Only or Text?

12

Slide 13



Slide 14



Slide 15

From the ICN Merger Investigative Techniques Workshop

Cost Estimates (5): Interviews and Depositions

- Predictable, but Highly Variable Cost
- Sources of Variability
  - Level of Required Company Personnel?
  - Telephone or In Person?
  - Formality?
  - Stage of Investigative Process?
  - Duration?

15

Slide 16

From the ICN Merger Investigative Techniques Workshop

How Agencies Can Help (1)

- Limit the Number of Document Sources
- Focus on High-Yield Files
  - Minimize Ratio of Review Cartons to Production Cartons
- Search a Given Source Only Once
- Minimize Searches of Electronic Files
- Limit Packaging Instructions
- Minimize Translation Requirements, and Accept Summaries

16

Slide 17

From the ICN Merger Investigative Techniques Workshop

How Agencies Can Help (2)

- Do Not Request "All Documents" if "Documents Sufficient to Show" Will Be Adequate
- Request "Documents Sufficient to Show" in Lieu of Interrogatories
- Use Focused, Fact-Based Interrogatories
- Conduct Telephone Interviews

17

Slide 18

Returning to This Seminar . . .

- Better investigative techniques are only a partial answer
- More comprehensive "best practices" are under development, too
  - ICN Guiding Principles
  - ICN Recommended Practices

18

Slide 19

ICN Guiding Principles

- Sovereignty
- Transparency
- Non-discrimination based on nationality
- Procedural fairness
- Efficient, timely, and effective review
- Coordination
- Convergence
- Protection of confidential information

19

Slide 20

Sovereignty

"Jurisdictions are sovereign with respect to the application of their own laws to mergers."

20

Slide 21

Transparency

"In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits."

21

Slide 22

Non-discrimination

"In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality."

22

Slide 23

Procedural Fairness (1)

"Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an opportunity to express their views in relation to those concerns. . . ."

23

Slide 24

Procedural Fairness (2)

". . . Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body. Third parties that believe they would be harmed by potential anticompetitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process."

24

Slide 25

Efficient, Timely, Effective Review

"The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time frame."

25

Slide 26

Coordination

"Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs."

26

Slide 27

Convergence

"Jurisdictions should seek convergence of merger review processes toward agreed best practices."

27

Slide 28

Confidentiality

"The merger review process should provide for the protection of confidential information."

28

Slide 29

ICN Recommended Practices

- Jurisdictional Nexus
- Notification Thresholds
- Notification Timing

29

Slide 30

Jurisdictional Nexus

- Sovereign, but . . .
- Material local nexus
  - Supplemental worldwide test permitted
  - Limit to businesses being combined
- Measure by local activities of
  - At least two parties and/or
  - Acquired business
- Refinements to come

30

Slide 31

Notification Thresholds

- Clear and understandable
- Objectively quantifiable
  - For example, turnover or assets
  - Not market shares at this stage
- Based on readily ascertainable information

31

Slide 32

Notification Timing

- Permit upon certification of good faith intent
  - Recognizes differences in test
- Suspensive: No deadline
- Non-suspensive: Reasonable deadline
  - Reasonable time
  - Clear triggering event
  - Sufficient development in transaction negotiation process

32

Slide 33

Likely Next Round of Recommended Practices

- Timing of review
- Content of notification
- Transparency
- Periodic Review

33

Slide 34

Likely Next Round – Timing

- Two phases
- Rough contours for Phase I
- Mechanisms for abbreviation of Phase I
- Possibility of limited extension of Phase I
- Special provisions for certain non-problematic transactions
  - Bankrupt targets
  - Tender offers or hostile transactions
- Determinable timing for Phase II?

34

Slide 35

Likely Next Round – Content

- Objective (readily ascertainable) v. subjective
- Abbreviated requirements for non-problematic transactions
- Mechanisms for certainty as to adequacy
  - Prenotification consultation
- Notarization and consularization burdens
- Translation burden

35

Slide 36

Future Rounds before ICN or OECD or Other

- Multiplicity of reviewing agencies
- Non-discrimination
- Procedural fairness
- Confidentiality and information exchange

36

Slide 37

And Then There's Substance . . .

- Issues of substantive differences among merger control regimes, too, are being addressed within ICN and other organizations
- But that would be another full presentation

37

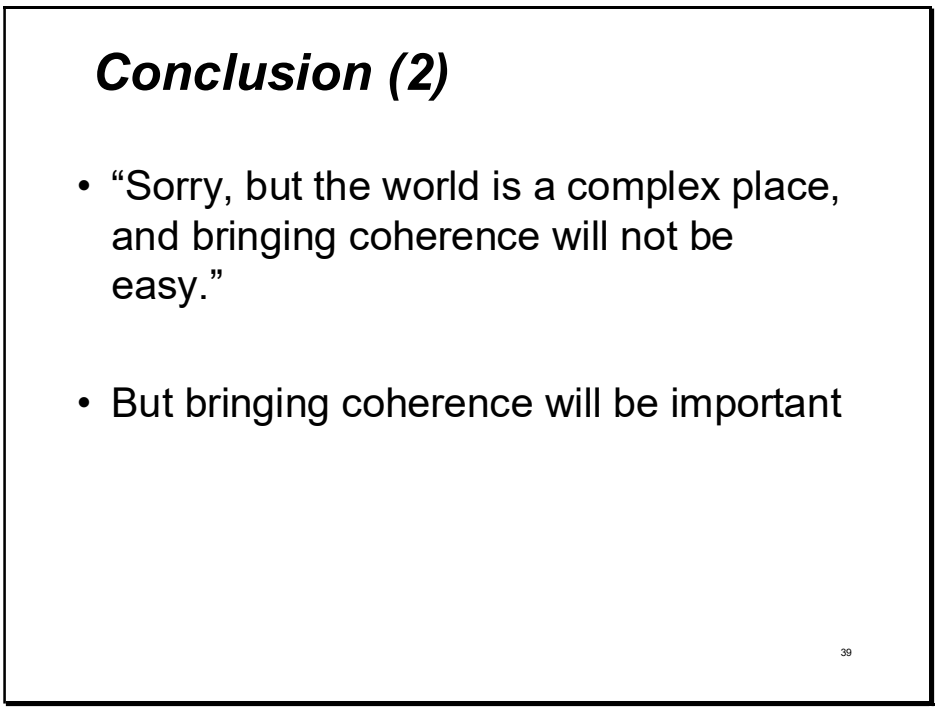
Slide 38

Conclusion (1)

- These issues are addressed more fully in the recent article, included with the seminar materials, from *Antitrust Report* (Lexis-Nexis Matthew Bender)
- The editors cut the one line that best seemed to summarize the current status of affairs . . .

38

Slide 39



MAURO GRINBERG

Muito obrigado ao William Blumenthal.

Eu quero imediatamente passar a apresentar o Cláudio Considera, que todos aqui conhecem, que é o nosso Secretário da Secretaria de Acompanhamento Econômico, e é graduado em economia pela Universidade Federal Fluminense, é Mestre em Direito pela Universidade de Brasília, Doutorado em economia pela Universidade de Oxford e Professor de Economia da Universidade Fluminense e do Instituto Brasileiro de Mercado e Capitais.

Passo à palavra ao Cláudio Considera.

CLÁUDIO CONSIDERA

Eu iniciaria dizendo que as três instituições brasileiras são membros da ICN. Nós nos inscrevemos no ano passado e participamos então do primeiro encontro anual que se realizou em Nápoles há pouco tempo atrás, e como tais, fomos a favor da adoção e signatários das recomendações de melhores práticas feitas pela ICN.

Não quer dizer com isso que nós possamos dizer hoje que adotamos todas essa recomendações, mas quer dizer que nós procuraremos adotar e melhorar nossas melhores práticas no que diz respeito à questão de análise de atos de concentração. Então, nós devemos sempre nos perguntar a quem atende essas melhores práticas.

Nós não devemos deixar de ter consciência de que as melhores práticas devem atender não apenas às empresas, mas devem proteger o mercado de mergers anticompetitivos, que proteja o consumidor de atos de concentração anticompetitivos.

Então nós devemos ter os três objetivos em mente e não apenas atender as demandas do setor privado, pura e simplesmente, que muitas vezes colocam isso como o principal efeito.

A vantagem, evidentemente, de nós sermos signatários de um documento que não tem enforcement quanto ao Ministério, como Blumenthal chamou atenção, é que evidentemente neste caso nós não temos os nossos diplomatas nos avisando que aquela palavra lá pode significar alguma coisa diferente do que ela está dizendo ali, então não podemos abordar aquela palavra específica; devemos estar discutindo uma ou duas vírgulas que tem nos acordos e na verdade nós poderemos ser cobrados num âmbito, como por exemplo, da OMC. Então essa é a vantagem de nós comprometermos a alcançarmos suas melhores práticas que estão determinadas ou sugeridas pela ICN, pela International Competition Network.

Então, eu vou procurar chamar atenção do esforço que nós fizemos ao longo da nossa gestão, nas diversas Secretarias e mais no CADE. Acho que eu posso, de certa forma, falar em nome dos três, de todo esforço que nós fizemos para alcançar aquilo, de certa forma assinamos em Nápoles. E gostaria de chamar a atenção de fato que a grande modificação é que nós poderemos afirmar que estamos seguindo aquilo que nos está recomendado pela ICN. De fato está na nova versão do projeto de lei e da formação da agência que está agora na Casa Civil. E aí aproveito para não polemizar porque ele não poderá falar neste momento, mas talvez depois, meu amigo Pedro Dutra, que de fato uma injustiça foi cometida.

Nós estivemos com esse projeto durante três meses e meio em Consulta Pública. Nunca houve no Brasil, talvez no mundo, nada semelhante. Três meses e meio de Consulta Pública. Nós incorporamos todas as críticas que eram possíveis e sem corporato, evidentemente bobagens do tipo: "Achamos que deve ficar, o projeto deve ficar no Ministério da Justiça, no Ministério da Fazenda". Isso a gente não podia botar. Incorporamos todas as críticas.

Hoje temos num projeto uma agência instrutora e temos um Tribunal, ambos independentes, como sempre quiseram os que estão aqui presentes, e que nós, por motivo de determinação inicial do Presidente da República, não poderíamos fazer. Mas depois, aos poucos, começamos a convencê-los de que essa era a única medida possível para que se tenha um projeto efetivamente apoiado pela Comunidade de Defesa da Concorrência Brasileira. Então, nós fizemos tudo isso. Agora, evidentemente que nós não vamos voltar a fazer outra Consulta Pública. Então , depois de uma série de críticas , faz outro projeto, não vai ser assim! Nós vamos escrever o projeto final. E agora a sociedade vai discuti-lo onde deve discuti-lo: no Congresso Nacional. Provavelmente teremos alguns projetos substitutivos que serão efetivamente Votados. Acho que poucas instituições escutaram tanto os colegas que militam nessa área como as três instituições escutaram.

Bom, então o que nós fizemos ao longo das gestões durante esses quatro anos?

Eu acho que nós demos um caminhado muito grande para duas coisas que estão, de certa forma, juntas : a unificação de procedimentos e a transparência.

Isso foi dado. Eu acho que o guia para análise de atos de concentração, hoje um guia conjunto da SEAE e da SDE, tem ali o que é considerado, vamos dizer, de melhores práticas em termos no mundo, ou seja, nós dizemos como fazemos uma análise.

Nossos processos saem analisados exatamente daquela maneira. Muitas vezes desagrada a uns e outros, mas nós não saímos daquilo; damos uma total transparência nesse procedimento. É uma outra melhor prática recomendada.

A transparência para os nossos procedimentos é total: nós publicamos, fazemos propaganda dos nossos pareceres, o CADE publica cada uma das suas decisões, ela é amplamente justificada em cada elemento, cada voto de cada Conselheiro é plenamente justificado por este Conselheiro-Relator e o nosso Parecer é amplamente justificado porque chegamos àquela conclusão.

Eventualmente, vai haver discussões a respeito disso e o CADE julgará finalmente e tomará a sua decisão final.

Mas não tenham dúvidas que em termo de transparência da análise, em termos da existência de um guia, onde todos poderão dizer, em termo de unificação de procedimentos, nós estamos perfeitamente de acordo. E aproveito, inclusive, dentro dessa questão de melhores práticas, para anunciar que nos próximos dez dias provavelmente estará à disposição dos Senhores, um guia para análise de preços predatórios e provavelmente em vinte dias, um guia

para análise de integração vertical. Então são os dois últimos trabalhos que saíram ainda este ano, mas já está sendo também elaborado um guia para análise de joint ventures que está sendo também elaborado; mas isso vai ficar para o próximo ano, ou seja, essa clareza de procedimentos nós temos procurado dar e essa transparência no que diz respeito aos procedimentos, às três instituições. A questão da confidencialidade, nós procuramos, sempre que possível, dar condição de celeridade aos documentos, conforme solicitado pelas empresas. Muitas vezes não o fazemos e os critérios pelos quais é concedida a confidencialidade estão publicados pela SDE e eles são adotados pela SEAE, mas haverá uma Portaria, e isto é um problema de arrancar qualquer coisa da nossa PGFN atualmente, mas será uma portaria minha dizendo oficialmente que os mesmos procedimentos da SDE são adotados pela SEAE.

Mas todos sabem que na prática é assim. Então, vocês poderão dizer: "Ah, mas não é dado toda confidencialidade pedida!" Não, não é. É dado a confidencialidade segundo aqueles critérios.

Às vezes, chegam uns estudos lá, por exemplo, um estudo da cidade cruzada. É importantíssimo para uma decisão de um Parecer nosso e, então, a empresa pede confidencialidade. É que aquilo ali não é confidencial para a empresa, não pode ser considerado. Evidentemente alguns segredos das empresas, no que diz respeito a sua contabilidade, ao seu faturamento, a sua participação, uma série de coisas, é dado confidencialidade, porque nós achamos que aquilo ali são segredos da empresa, outros não o são.

Então os critérios para concessão de confidencialidade são claros: são publicados pela SDE, são dotados pela SEAE.

Questão da defesa eu acho que há uma ampla oportunidade de defesa para todas as empresas ao longo de todos o processo. Acho que na verdade, defesa demais até atrasa um pouco os procedimentos e algumas pessoas sequer, houve um murmúrio, meus espiões espalhados na platéia me contaram que os meus cinco minutos causaram espécie de manhã...

Mas o que acontece é que quando vier à agência será assim, não haverá oportunidade de defender pela segunda vez junto a um segundo órgão instrutor. Não haverá isso. Haverá uma agência que instrui e envia um Tribunal.

A Defesa é mais corretamente feita junto ao juiz, junto ao Tribunal que vai julgar. Nós seremos os acusadores, os promotores da concorrência, e haverá um juiz onde a defesa será melhor feita.

A despeito disso, junto à Agência haverá ampla oportunidade das empresas apresentarem a Dinalzem, poderia dizer aos Senhores suas justificativas: porque que aquele ato não é anticompetitivo. Eu costumo dizer que tem

um momento que eu digo eu não quero escutar mais, e as empresas ficam bravas comigo e eu digo: não adianta, eu não quero mais escutá-las, já tenho todos os elementos, é minha decisão se eu vou escutá-los mais uma vez repetindo os mesmos argumentos para ver se me convencem pela repetição dos argumentos! Isso é algo que tem um limite para ser isto; o ato de concentração tem que ser terminado no nosso nível.

Então a defesa é ampla e eu acho que até às vezes ampla demais, mas é assim. Têm sido assim.

Existe uma ampla divisão de trabalho dentro dos três órgãos que compõem a defesa da concorrência hoje em dia. Hoje em dia, diferentemente do passado, a SDE não inicia um processo e um ato de concentração do seu início como se não houvesse análise da SEAE anterior. Hoje em dia não é muito claro que a SDE inicie a partir de um trabalho feito pela SEAE. Nunca foi assim. Antes não era assim. E mais do que isso, hoje em dia o CADE não inicia uma análise de um ato de concentração pensando que o que fizeram SDE e SEAE foi uma mera opinião. Não, o CADE hoje diz: aquilo é uma instrução do processo é nós, pura e simplesmente, iremos avançar a partir dessa instrução, que ele está portanto, novamente, nós estamos de acordo com as melhores práticas de procurar sempre permitir uma melhor análise de um ato de concentração e não a sua pura e simples repetição ou briga entre as instituições.

Outra coisa que nós adotamos nessa direção foi o rito sumário.

O rito sumário ele não substitui de forma nenhuma o instrumento que está disposto no Projeto, porque ainda há um julgamento do CADE desses ritos sumários que me digam, que os Senhores sabem hoje em dia, ser totalmente desnecessário.

O Dr. João Grandino se queixa constantemente conosco de ter de julgar determinados atos de concentração totalmente sem sentido de estarem sequer apresentados ao Sistema como nós todos concordamos.

Então, o rito sumário libera, hoje em dia, no âmbito dos três órgãos, 40% dos atos de concentração que entram no Sistema. Dentro da SEAE significa que em média sai em 20 dias; há alguns casos de concentração que saem em 3 dias.

Se as empresas preenchem corretamente o questionário inicial do CADE, saem em três dias os atos de concentração, sem nenhum problema maior.

Então novamente, diminuindo os custos administrados, procurando dar maior celeridade ao processo, algo também que nós fizemos no período recente, e depois endossado pelo CADE, aliás foi algo que nós fizemos em

conjunto e foi endossado pelo CADE de uma forma diferente, através dos acordos ao invés das cautelares pura e simples que permite uma garantia ao mercado. E aí eu estava, é bom a gente mencionar que, nesse caso que nós estamos falando em termo de melhor prática, é a melhor prática para garantir o consumidor, para garantir a eficiência do mercado, para garantir que um ato anticompetitivo não se efetive antes de julgado pelo Sistema.

Evidentemente que a melhor forma de fazer isto, e isto não substitui definitivamente, é apresentação prévia que está previsto no Projeto que ora está na Casa Civil. Novamente, isso está dentro do que nós consideramos, devam ser as melhores práticas; a participação internacional que nós temos tido em todas as instituições internacionais.

Nós somos membros observadores da OCDE, temos comparecido a todas as discussões na OCDE, apresentando papers, colocando nossas idéias em julgamento, no que é o melhor fórum internacional para discussão deste problema. Não temos feito qualquer vergonha ao colocar nossas práticas em discussão. Muito pelo contrário, participamos da OMC; agora retornarmos com mais força porque durante um período a OMC ficou com umas discussões completamente fora de propósito, logo após Doha, mas agora voltamos a vários procedimentos de negociação. Entendemos as duas últimas reuniões, nais quais foi discutida toda parte de princípios e lá estivemos junto com a Delegação Brasileira, junto com nossos diplomatas. Temos participado de Alca, Mercosul, como representantes brasileiros, participamos da ICN de onde somos membros, participamos de alguns vários seminários, como por exemplo o Seminário da Fordham em Nova York, onde também colocamos nossas idéias em julgamento, e garanto aos Senhores, temos nos saído bastante bem de forma geral internacional, ou seja, não estamos inventando nenhuma roda e não estamos contrários à tendência mundial na área de exames de ato de concentração. Temos dois problemas que nós não conseguimos resolver ainda: o primeiro, é a questão do valor do negócio para comunicação que foi abordado ali pelo Dr. Blumenthal, que isto está muito vago, mal definido na lei 8884; os 400 milhões passaram a ser interpretados como sendo mundiais e isso é um transtorno, evidentemente é uma bobagem essa interpretação, isso tem que mudar e está sendo mudado no projeto onde vai ficar bastante claro onde é, e a questão da jurisdição onde deve ser comprovado e se vai estar de acordo com o que está recomendado pela ICN, e algo que eu acho que não está resolvido no novo projeto, embora nós tenhamos feito um esforço muito grande para fazê-lo. Ainda assim, acho que cabem várias interpretações ali, que é essa questão do tempo para apresentação do ato de concentração.

Eu receio que nós não tenhamos conseguido dar uma solução boa a isso. Vários dos nossos amigos acham que sim; eu continuo achando que não,

mas aí eu acho que a Comunidade poderá colaborar efetivamente na discussão do tema no Congresso Nacional e tentaremos fazer que fique melhor definido essa questão do tempo para apresentação do ato de concentração, de forma que nós evitaríamos esse montão de discussão de tempestividade que se faz no sistema atualmente. Isto nós não conseguimos resolver. Eu acho, enfim, que demos uma melhorada em não fazermos algumas restrições e eu acho que uma coisa que ainda falta é amadurecer.

Eu acho que eu abordei praticamente todos os temas que o Sr. Blumenthal comentou a respeito e eu tinha preparado isso um pouco antes dessa apresentação do Dr. Blumenthal, mas à medida que eu fui acompanhando o que o Dr. Blumenthal falava, eu acho que estava dentro do que se recomenda como melhores práticas que o Brasil é signatário.

Eu gostaria, entretanto, de chamar atenção de um ponto que eu já falei rapidamente de manhã e que pode vir a trazer transtornos para nós no futuro, em termos de melhores práticas, que se diz respeito a decisão administrativa versus decisão judicial. Isto daí eu acho que vai se tornar um problema e poderá trazer insegurança jurídica de inseguranças econômicas gravíssimas, com o risco de desmoralizar o Sistema Brasileiro de Defesa da Concorrência. Eu acho que nós devemos estar alerta. Isso não se deu ainda por pura sorte, poderia, ou por desistência da Kaiser na verdade, no caso Ambev.

A Kaiser ameaçou de entrar na justiça naquele momento. Ela não entrou. Então, poderia ter nascido lá o primeiro problema, não nasceu ainda, mas ocorrerá, ocorrerá dentro em breve, já ocorre na questão que não causa insegurança política ,mas causa, vamos dizer, uma certa desvalorização do sistema já que as multas de cartel não são cobradas; não foram cobradas ainda porque as empresas foram para o Judiciário.

Então, nós temos que olhar essa questão, e aí eu estou me referindo ao que são as melhores práticas para a sociedade, não pura e simplesmente para as empresas, no caso das multas por condutas, mas poderá ser uma péssima prática para a economia mesmo, para a insegurança econômica e jurídica num futuro que não será muito longínquo não.

Garanto aos Senhores que a primeira restrição séria que o CADE fizer a respeito de atos de concentração nós teremos um caso no judiciário e teremos o primeiro problema, com o risco de sermos desmoralizados pelo Juiz da Primeira Vara que não entende nada disso e que tomará uma decisão completamente absurda a respeito de um ato de concentração, e aí nós teremos todos os procedimentos protelatórios ao longo do nosso Sistema Judiciário. Eu acho que alguma coisa que o Ibrac tem de prestar atenção e começarmos uma cruzada em tornos de termos essa volta de algo que vamos perder em breve.

Muito grato.

MAURO GRINBERG

Muito obrigado ao Dr. Cláudio Considera, como sempre incisivo e falando o que pensa e o que acha, e nos brindando com as suas posições bastante claramente.

Quero apresentar agora o expositor Ronaldo Porto Macedo Júnior, Conselheiro do Conselho Administrativo de Defesa Econômica, mestre em Filosofia pela USP, Doutor em Teoria do Direito pela USP, Professor da Faculdade de Direito da USP, Promotor de Justiça, Visiting Schoolar da Harvard Law School de 94 a 96.

Dr. Ronaldo.

RONALDO MACEDO

Boa tarde a todos!

Eu acho que as minhas cordas vocais vão conferir um tom mais grave do que eu pretendia à minha fala, eu espero que isso não atrapalhe o andamento.

Eu gostaria de agradecer o convite que me foi feito para participar deste Painel, e gostaria antes mesmo de trazer algumas observações sobre esse tema tão candente, tão importante, dar a notícia mais uma vez, ainda que isso já tenha se tornado público na sessão da manhã, da nota conjunta firmada entre a Secretaria de Acompanhamento Econômico, a Secretaria de Direito Econômico, e o CADE, relativo à prioridade que o Sistema Brasileiro de Defesa da Concorrência conferirá a todos os processos nos quais estiver sido firmado um acordo de preservação de reversibilidade de operação ou no qual tenha sido concedido a medida cautelar.

Evidentemente uma decisão como essa, visa de um lado, dar coerência a essa preocupação de todo sistema em decidir em tempo econômico, minimizando os eventuais riscos ou prejuízos que o próprio tempo natural da decisão possa provocar; e visa também fortalecer esses institutos, e a melhor maneira de fortalecê-los é certamente diminuir os seus efeitos colaterais e, de alguma forma, torná-los mais eficiente possível. Então essa decisão me parece que vem de maneira muito oportuna, ser reanunciada neste Painel sobre melhores práticas.

Eu gostaria, na verdade eu pensei a minha fala, em torno digamos, a partir das recomendações feitas nos documentos oficiais da ICN, da OCDE, e da IBA que foram aqui de maneira muito didática, sintetizadas na fala do Prof. William Blumenthal.

Eu gostaria de partir de uma premissa, e a premissa básica de um diagnóstico que eu julgo ser trivial, entre todos aqueles que atuam no Sistema, é que de alguma forma, por inúmeros motivos e por várias circunstâncias, o Sistema Brasileiro de Defesa da Concorrência muitas vezes não otimiza os recursos que dispõe, não os utiliza da maneira mais eficaz no tratamento das questões concorrenciais, seja em condutas, seja em julgamentos de ato de concentração; mas eu vou, evidentemente, aqui me focar na questão dos atos de concentração, ou seja, de alguma forma há um número significativo de operações que talvez não precisassem ser comunicadas ao Sistema e que o são, e que acaba, de alguma forma, criando um volume de demandas de decisões que precisam ser dadas, sobrecarregando o Sistema sem que haja uma contrapartida em termos de resultados práticos que justifique esse enorme custo.

Com isso, eu quero focar a minha atenção aqui nesse Painel sobre Best Practices menos, digamos, naquilo que entendo que o Sistema já realiza as Best Practices já realizam as melhores práticas. Dr. Considera já chamou a atenção para vários aspectos: a questão da transparência, da publicidade, dos esforços de racionalização. Com relação a tudo isso, eu não pretendo me estender e muito menos fazer uma defesa do Sistema frente a algumas avaliações que às vezes são feitas de maneira superficial. Pretendo, pelo contrário, pôr a mão em alguns problemas mais espinhosos. E eu basicamente escolhi três para tratar, porque são justamente problemas nos quais, apesar do Sistema Brasileiro de Defesa da Concorrência, digamos, comungar dos princípios, comungar das idéias básicas que já foram aqui bem sintetizadas, de alguma forma não consegue praticá-los, tal como sua melhor crença levaria a fazer.

Primeiro lugar: a questão da inexistência de um critério claro, critério do chamado "the minimis", para impedir que questões com baixo potencial ofensivo à concorrência viessem a ser comunicados ao Sistema.

Em segundo lugar: a questão da clareza sobre qual deve ser o primeiro documento a justificar a notificação de operações, ou seja, qual deve ser o trigger date, qual deve ser o documento e o momento em que esse documento deve ser apresentado.

E aí a questão, em terceiro lugar: a questão das multas que também tem sido objeto de uma celeuma bastante grande, de uma crítica contínua e de uma polêmica inacabada sobre quais devem ser os critérios e quando deve o CADE aplicar uma multa sobre questões relacionadas à notificação.

Pois bem, em primeiro lugar, eu gostaria de chamar a atenção para o fato que não acredito em soluções óbvias para esses problemas.

Me parece que soluções óbvias e que se descobre hoje, ou elas são provocadas por um reconhecimento de que houve óbvias tolices praticadas por todos aqueles que até hoje tiveram que tomar essas decisões, ou por reconhecimento também óbvio, de que elas não eram tão óbvias. Me parece que, portanto, uma simplificação preocupante essa de se imaginar que existe, ou uma má vontade, ou uma falta de atenção em se acolher aquela solução tão simples que poderia desafogar ou resolver, ou colocar o Sistema Brasileiro de Defesa da Concorrência no rumo das *best practices*.

Parece-me que isso também já foi objeto de alguns comentários em painéis que antecederam estes, que a solução destas soluções óbvias, pela via jurisprudencial, ou seja, pela via do tratamento caso a caso, traz alguns problemas para o Sistema, traz alguns problemas para a Comunidade Jurídica, traz alguns problemas para o mercado. Alguns desses problemas, eu diria quase todos, são bastante conhecidos, por exemplo, o alto grau de rotatividade dos Conselheiros do CADE, o que dificulta a consolidação de uma jurisprudência que pudesse se tornar mais vinculante ou mais fortemente estabilizadora das expectativas dos agentes que atuam perante o Sistema Brasileiro de Defesa da Concorrência. De outro lado, a questão da consolidação de soluções pela via puramente jurisprudencial, traz também um outro problema: que é a questão de como saber se aquele caso que foi julgado é igual ao caso que eu devo agora trazer ou não trazer ao Sistema. Em outras palavras: como saber o que deve ser generalizado do precedente, de modo a dar clareza e segurança ao mercado, sobre saber se aquilo é um precedente, se em razão daquela decisão eu tiro algum resultado para o meu caso.

E evidentemente Senhores, qualquer pessoa somente acompanha a jurisprudência de um órgão judicante para saber no que aquilo é generalizável, no que aquilo pode ser aproveitado nas suas decisões no futuro ou no próprio momento; ou seja, fazer, criar soluções pela via prudencial, pela via que a mera decisão alimenta um debate complexo, um debate complicado, que é o de saber interpretar o que o novo precedente trouxe de novidade na interpretação dos dispositivos legais que disciplinam e que regulam o Sistema. De outro lado um dos grandes desafios que o CADE vem tendo, um dos grandes debates que o CADE vem tendo ultimamente, é como de alguma forma mexer nesses problemas, tocar nesses problemas que o Sistema reconhece como problemas, que o Sistema reconhece como situações, que afastam o Sistema das *best practices*, mas como resolvê-los pela via prudencial há problemas.

Há uma outra via que o CADE vem tentado avançar também nestes problemas ainda não solucionados. Qual é? É a via da criação de resoluções.

Resolução tem algumas vantagens, por exemplo, a vantagem da estabilidade. Através de uma Resolução pode-se saber com maior clareza quando um entendimento entrou em vigor, e quando eventualmente, ele deixou de estar em vigor, quando a Resolução foi revogada, de tal forma a inclusive criar expectativas legítimas, jurídicas, direitos, obrigações, para os agentes que atuam perante o Sistema. De outro lado, a Resolução tem uma outra vantagem que já foi objeto de crítica aqui no Painel da manhã: ela permite Consulta Pública.

O CADE tem feito um esforço nos seus últimos meses no sentido de tentar disciplinar com maior clareza um de seus procedimentos administrativos.

Infelizmente, as colaborações não foram tão abundantes quanto a expectativa daqueles que trabalharam na sua realização eram; mas de qualquer modo, a colaboração que houve por parte dos escritórios, de advogados, de intelectuais, tem sido freqüentemente incorporada. Um problema é, contudo, que aquelas Resoluções que tratariam dos problemas mais delicados, e eu elenquei três, peguei três dos mais espinhosos; esses problemas têm contado com uma participação, com uma cooperação relativamente pequena por parte da comunidade; e por outro lado, esses problemas são particularmente complexos. Vai aqui a minha crença também: não são questões que possam ser resolvidas de maneira simples e óbvia através de um documento com cinco ou dez artigos. Por outro lado, ela traz maior estabilidade e permite uma generalização prévia, ou seja, através de uma Resolução retira-se o risco de cada um interpretar o caso da maneira que melhor lhe interesse, ou seja, consegue-se fazer a generalização pela via normativa o que a meu ver é um ganho, em termos de segurança jurídica. Por outro lado, há riscos. O risco, um deles já foi chamado a atenção, é em primeiro lugar saber qual é o limite em que se ultrapassa o limite da própria legalidade, o limite a partir do qual se pode através de uma Resolução especificar alguma lei ou modificar alguma lei.

Todos nós sabemos que as questões jurídicas são sempre polêmicas, sempre passíveis de contestação, o que evidentemente faz com que as questões jurídicas sejam polêmicas no seu sentido etimológico, do polemus, da luta, o que faz evidentemente, que inscrita em qualquer decisão deste tipo haverá sempre quem as condene por entendê-la ilegal, seja pela melhor convicção jurídico-científico-racional, seja pelos interesses a justificar. Por outro lado, como tratar destes problemas? E quero aqui concluir que o CADE tem se esforçado por esse caminho delicado da Resolução por entender que ele é um caminho que consegue conferir um pouco mais de estabilidade e na análise custo-benefício ele me parece ser um instrumento mais adequado do que simplesmente as decisões casuísticas.

Trata-se aqui na verdade, de um esforço não tanto de pensar *best practices*, aliás o CADE tem feito isto. Dr. Considera e outros já chamaram a atenção nos diversos painéis de hoje, chamaram a atenção para os esforços no sentido, sim, de modificar o sistema, criar uma agência, aperfeiçoar a lei 8884 para sintonizar o mais possível, o sistema das best practices. O que eu estou falando aqui, é de um esforço que tem feito o Sistema para criar *second best practices*, ou seja, soluções possíveis dentro do quadro legal vigente. O que é, diga-se de passagem, muitas vezes um esforço ainda mais difícil do que incorporar as *best practices* ou imaginar uma lei que resolvesse o problema.

Com relação à questão do faturamento de 400 milhões, há um reconhecimento de que hoje, inclusive em razão da variação cambial, esta malha de 400 milhões de reais para o mercado internacional se transformou numa malha fina demais. Isso do ponto de vista funcional e do ponto de vista econômico. A questão que se coloca é: como se pode fazer uma interpretação razoavelmente consistente, o menos possível polêmica da lei em vigor, assim, portanto, respeitando o princípio da legalidade na sua inteireza, de modo a criar uma second best practices, ou seja, de modo a criar uma interpretação jurídica o mais adequada possível, da idéia defendida na agência, do projeto da agência, que é de uma flexibilização; que é da exclusão, da eliminação do critério de market share, e por outro lado, um critério mais flexível de faturamento por setores que pudesse, atendendo também à recomendação de melhores práticas, ser flexibilizado e atualizado conforme a dinâmica do mercado recomendasse?

Ora, mas o fato é que nós temos uma Lei que lá coloca o numeral 400, diante de outros enunciados jurídicos e que coloca um desafio no que se poderia, que tipo de construção sólida poderia fazer, nesse caminho.

A questão do primeiro documento vinculativo, me parece também que a solução não é óbvia, e a solução dada pelo TRF que foi mencionada no painel da manhã, é uma solução que não me parece óbvia e não me parece tão pouco que resolva o problema. Há inúmeros julgados do CADE que vem chegando a mesmíssima conclusão que vinha chegando, quando apoiava as suas decisões na Resolução 15, pela mera interpretação da lei, ou seja, não me parece que essa decisão tenha realmente resolvido o problema; pelo contrário, quer dizer, a nossa lei, o nosso caput do artigo 54, tem uma redação deliberadamente, propositalmente ampla, e não é fácil estreitá-la, especificá-la, e muito menos fazê-lo através de Resolução, e fazê-lo através de interpretação vem gerando problemas também muito grandes em termos de incerteza.

Por outro lado, a questão das multas. Todos nós ouvimos o sumário acerca das recomendações da ICN, com relação à importância de que as multas, e qualquer sanção, sejam fixadas com base em critérios, em dados pré-

estabelecidos, disponíveis e de fácil obtenção. Claro, se as autoridades, para aplicarem uma multa, tiverem que fazer uma nova pesquisa, uma nova investigação sobre a situação econômica, sobre o mercado relevante, você vai criar um novo processo instrutório com ampla defesa, certamente seria razoável se supor, que assim seria; para se quantificar e para se discutir dosimetria. Não me parece razoável, não me pareceria racional que a coisa fosse assim. Por outro lado, nós temos um problema prático. Os dados previamente disponíveis, os dados facilmente disponíveis, faturamento, dias de intempestividade, valor da operação; são dados imperfeitos, ou seja, do ponto de vista econômico apresentam problemas para se construir uma regra pouco mais clara acerca da fixação da dosimetria.

Não obstante, tudo isso que eu acabo de dizer, o CADE tem se esforçado num debate público de idéias em tentar encontrar soluções para esse tipo de problema.

Provavelmente, eu diria que necessariamente, *second best* quiça *third best solutions*, ou seja, soluções que só poderão ser avaliadas como boas ou melhores, se comparadas às alternativas que se apresentarem a elas; mas certamente não serão *best practices* porque, vai aqui uma outra convicção forte: para que o nosso Sistema ingresse plenamente no mundo das *best practices*, e já foi dito agora há pouco, que em nenhum lugar do mundo incorpora integralmente todas as *best practices*, mas é certo para uma integração mais profunda com as *best practices*, um grau significativo de modificação legislativa, é necessário.

Parece-me que isso é um desafio não apenas para os agentes, ou seja, para o Sistema Brasileiro de Defesa da Concorrência, como também é um desafio cooperativo de toda a comunidade que atua, toda a comunidade que, de alguma forma, se faz representar num Plenário como este, de advogados, de representantes de empresas e de intelectuais.

Parece-me importante, também, chamar a atenção para algumas dificuldades que o Sistema vem encontrando em implementar e estabelecer estas *second best practices*.

Foi mencionado aqui por exemplo, a questão do acordo de preservação de reversibilidade de operação, ou da questão de medida cautelar e dos problemas jurídicos que pode haver com relação à competência ou não de uma autoridade administrativa exercer um poder cautelar. O que o CADE tem procurado fazer, na medida do possível, na medida em que as *best practices*, as *second practices* são possíveis, é criar o máximo de segurança jurídica para suas decisões. A decisão, por exemplo, de utilizar a medida cautelar e de formalizá-la nos exatos termos de que o Código de Processo Civil já fazia, dando portanto conseqüência à norma da Lei 8884, que diz que se aplica subsidiari-

amente o Código de Processo Civil ao CADE, foi a de simplesmente descrever e dar fundamento normativo, creio eu não inovador, mas apenas especificador. O fundamento legal é a lei 8884 e o Código de Processo Civil, mas o que o CADE procurou fazer nesta situação foi justamente especificar. Também o acordo de preservação de reversibilidade de operação. Não é algo inventado pelo CADE, é algo previsto pela Lei de Ação Civil Pública. O CADE, simplesmente, se inventou alguma coisa, foi no nome; ou seja, ao invés de chamar de Termo de Ajustamento de Conduta, deu um nome mais específico: Acordo de Preservação de Reversibilidade de Operação. Mas não é uma invenção, é uma especificação.

Parece-me que estes aspectos também se reportam a algo que já foi salientado, já se tocou aqui nos painéis anteriores, e que a meu ver mereceria, sim, uma atenção especial por parte do Ibrac, que é um tema realmente importante, que é a especificidade do aparato institucional legal, institucional do Sistema Brasileiro de Defesa da Concorrência.

O CADE é uma figura sui generis, o sistema é uma figura sui generis também.

Nós freqüentemente temos enfrentado no CADE, a dificuldade e o desafio, criativo, muitas vezes, de encontrar quais são os princípios, definir quais são só princípios melhor aplicáveis à função judicante do CADE.

Estou absolutamente convicto que não se pode fazer um transplante puro e simples acrítico, por exemplo, da lei do processo administrativo e dizer ela se aplica a tudo o que o CADE faz. Os contra-sensos que derivariam de uma importação pura e simples como esta seriam manifestos. Não cabe, este não é o foro para discuti-las elas todas. Por outro lado, me parece que afirmar que o CADE exerce uma função judicante em tudo semelhante à função judicante do Poder Judiciário, também seria um excesso, algo incabível, algo que certamente não se sustentaria.

Ora, nós estamos aqui diante de uma situação jurídica nova, diante de uma situação que é nova para a doutrina do Direito Administrativo, diante de uma situação que é nova também para o próprio Judiciário.

A questão que o Dr. Considera chamava a atenção que é a meu ver, certamente um dos mais interessantes e complicados capítulos da defesa da concorrência no Brasil e da conformação do Brasil às *best practices*, que é a relação entre o controle judicial e as decisões administrativas no âmbito do Sistema Brasileiro de Defesa da Concorrência. Está ainda a merecer não apenas uma melhor configuração institucional legal que, oxalá seja feita através dos meios legislativos em breve período de tempo, como também está a merecer, a meu juízo, uma configuração até mesmo doutrinária.

A doutrina tradicional que orientou, que serviu de base para a compreensão do que é a atividade administrativa clássica, típica da administração direta e indireta, vem se demonstrando incapaz de dar soluções precisas para todo esse novo campo do direito da regulação e da defesa da concorrência. Ora, isso a meu ver, mais uma vez, corrobora a idéia de que não há soluções triviais para esses problemas; e não há soluções triviais e as soluções imperfeitas devem ser avaliadas tendo em vista as restrições, os constrangimentos que o Sistema Institucional Legal em vigor impõe.

É por esse mesmo motivo também que eu gostaria já de caminhar para a minha conclusão. É por esse mesmo motivo que me parece que a própria avaliação do Sistema Brasileiro de Defesa da Concorrência, o seu desempenho, tem que ser visto também à luz destas mesmas considerações. Não apenas a partir da análise simplísta e apressada pela qual se comparam *as best practices* e se verifica a sua inexistência, o seu descompasso no Brasil; para se dizer que os órgãos não atuam bem porque eles estão distantes das *best practices*. Ora, é importante distinguir e reconhecer por que eles estão distantes das *best practices* e quais têm sido os melhores esforços na direção dessa aproximação.

Parece-me que este zelo é essencial para que se faça uma análise, uma avaliação correta e justa do real desempenho das instituições. Me parece descabido julgar desempenho de instituições a partir de falhas legislativas; se assim fosse, a nota de avaliação, se é que faz sentido ter nota, mas, enfim, a nota de desempenho deveria ser basicamente sempre a mesma, pois os problemas na medida em que eles estiverem vinculados a determinações ou constrangimentos legais ficarão vinculados a este mesmo tipo de avaliação negativa.

Finalizando, eu gostaria de portanto, tocando nestes pontos sensíveis, chamando a atenção para estes aspectos que entendo que o Sistema Brasileiro de Defesa da Concorrência ainda está distante das melhores práticas, chamar a atenção para os esforços que tem sido feitos, e chamar a atenção também para a absoluta abertura que tem tido o Sistema no sentido de receber a colaboração para resolver esses problemas, que se fossem triviais certamente teriam sido trivialmente resolvidos.

Obrigado.

DEBATE 2

Muito obrigado ao Conselheiro Ronaldo Macedo e pela exposição que eu posso chamar de brilhante. Eu quero usar o privilégio da Presidência

dos trabalhos para fazer duas observações: primeiro, uma das razões que nós todos temos alegado em virtude das quais o Brasil está distante das melhores práticas, não depende em nada dos órgãos em si que fazem esforços monumentais para atingi-las, dependem muito mais de orçamento, de aparelhamento humano e material que os órgãos não tem, e a culpa obviamente não é deles, a culpa é de quem os habilita para isso. E eu quero também fazer uma outra observação que sim, nós colaboramos com o trabalho, com pesquisa a respeito das multas, nós colaboramos nos defendendo delas.

Quero saber se tem perguntas do auditório.

Dr. João Bosco?

Aqui na frente à primeira fila.

JOÃO BOSCO LEOPOLDINO

Eu queria partir de uma observação que o Dr. Cláudio Considera fez, da qual discordo em parte e concordo também na outra parte; e partindo também dos ensinamentos do nosso colega Dr. Ronaldo e pedindo perdão ao Blumenthal pela intromissão indébita em seara que não é da minha competência.

Mas eu gostaria de fazer uma observação: o Dr. Cláudio Considera fez uma crítica com relação ao fato de acesso ao poder judiciário em decorrência de um ato do CADE.

O CADE é um órgão judicante como disse o Dr. Ronaldo, é uma posição judicante, sui generis. O processo administrativo é sui generis e, eu vou até além do Dr. Cláudio Considera porque quando ele disse que o Juiz Federal de Primeira Instância não entende e vai dar uma decisão absurda, eu até defendo sempre a tese da decisão do CADE deveria caber recurso direto para o Tribunal Federal de Recursos porque não teria sentido de uma decisão de um colegiado de economistas, de juristas, e toda uma especialização, caber recurso a um juiz monocrático. Que o juiz monocrático não conheça essa área aí é uma outra preocupação, e também os juízes do Tribunal não conhecem, porque não estão preparados para isso.

Mas aqui é que eu queria fazer a intromissão indébita no Direito Norte-Americano, e por isso pedi perdão ao Dr. Blumenthal, porque quando a Suprema Corte Norte-Americana, principalmente em três casos que eu cito, e que estudei com os meus alunos na semana passada, ou nessa semana, o caso do United States versus United Company, o caso United States versus Transmissouri Freight Association e o caso United States versus Ebston Pie. A Su-

prema Corte teve dificuldade enorme para saber primeiro interpretava aquela lei ou se aplicava aquela lei àqueles determinados casos; no caso do Freight Transmissouri se aplicava aqueles casos, e se uma lei federal era aplicável ou não aos Estados.

Então essa discussão, nós tivemos na Suprema Corte Norte-Americana. E veja depois um outro aspecto importante, é que na verdade o direito norte-americano, que hoje é avançadísssimo, nós respeitamos e vamos dizer assim, aprendemos; os europeus também foram aos Estados Unidos para aprender o direito da concorrência, mas há um aspecto importante: os Estados Unidos só chegaram ao Cellar Quefavor Act, Antimerger act em 1948, 50, ou seja, houve uma longa trajetória para que se chegasse a esse ponto de regulação das concentrações, mais de 50 anos. Nós fomos até mais velozes, o que prova nossa capacidade de aprendizagem é muito grande, fomos mais velozes nesse ponto até porque nos apoiamos na experiência alheia, lógico.

Mas de qualquer forma, esses aspectos me preocupam, e hoje realmente impedir que, e aí volto ao ponto central pelo qual concordamos e discordamos, ou seja, impedir que uma decisão do CADE vá ao Poder Judiciário, que hoje aí nós teríamos é que mudar a Constituição em termos de competência. Uma decisão do CADE que vai ao Poder Judiciário, afronta diretamente o artigo 5º no seu inciso, que me parece XXXVI, que diz que nenhuma lesão ou ameaça à direito poderá ser excluída da apreciação do Poder Judiciário, e aí realmente existe o problema que nós não temos ainda uma disposição naquele sentido. Ela terá que ir ao Juiz de Primeira Instância. Se ele sabe ou não direito da concorrência, aí é um outro problema, porque às vezes ele não sabe.

Então, veja os Senhores que realmente é uma preocupação e isso ocorre, não é só no direito da concorrência; ocorre no direito administrativo.

Aí é que estaria, a meu ver, o problema da promoção da concorrência, um trabalho junto às Universidades, e para que nós tenhamos condições de não acontecer isso que o Dr. Cláudio critica e que eu concordo. Vai a um juiz de Primeira Instância, mas é um direito da empresa recorrer ao Poder Judiciário; o problema é que o juiz também não está preparado para aquela questão, mas também, aí eu volto ao paralelo, a Suprema Corte Norte-Americana teve dificuldade também em aplicar o Sherman Act nos seus inícios.

Somente essa observação e concordamos em parte.

CLÁUDIO CONSIDERA

Eu acho que nós concordamos totalmente Dr. João Bosco, eu não quero evitar que o ato vá ao Poder Judiciário, de jeito nenhum, eu não afron-

taria à Constituição; o que eu quero chamar atenção é que existe um problema e que esse problema vai se manifestar logo, logo e nós temos que começar uma cruzada para dar uma solução à ele que não será certamente evitar que ele vá ao Judiciário.

Talvez se existisse uma Corte especial para isso. Eu não sei que solução é possível, acho que eu estou querendo dizer o seguinte: nós vamos ter um problema já já e eu não quero evitar de jeito nenhum que ele vá ao Judiciário; eu não tenho esse, sou um pouco radical mas nem tanto; jamais afrontaria à Constituição.

Então eu acho que é isso que nós temos que nos preocupar.

Nós temos um problema à frente e devemos imaginar que forma.

Nós, por exemplo, chegamos a pensar em propor, agora mesmo no Projeto, dar aos Conselheiros do CADE o status de Ministro, de forma que das decisões dele só pudessem ser recorridas ao Superior Tribunal. Nos disseram que isso não é verdade, que isso também não seria possível. Eu conversei com o juiz do STJ e ele me disse que não, não há essa possibilidade, que vocês teriam vários problemas, etc, etc. Então eu não sei que problema, como resolver esse problema. Existe um problema. E aí nós temos que nos atentarmos a isso e eu acho que convocar o Ibrac para essa tarefa que é uma tarefa que todos deveríamos ter preocupação, ou seremos desmoralizados.

O direito da concorrência, o que eu quero chamar a atenção dos Senhores, será desmoralizado se a cada momento, imagine, mesmo agora o que aconteceu com o Sr. Monti; e olha que não é uma coisa trivial, vão ser três decisões, foram desmontadas pela Corte e por uma Corte Superior, não é uma Corte de Primeira Instância. Então, isso desmoraliza um pouco o Sistema de Defesa da Concorrência. Nós temos que correr atrás de alguma legislação, para que a gente não se desmoralize num futuro que, eu acho que vai ser próximo.

MAURO GRINBERG

Eu tenho aqui mais uma pergunta que me foi feita por escrito pela Dra. Maria Soares.

Ela parabeniza o Dr. William Blumenthal, e pergunta: Quais os mecanismos adotados no Sistema Americano para estimular a rapidez no atendimento das solicitações de informações do órgão regulador, obviamente na análise dos atos de concentração.

WILLIAM BLUMENTHAL

The main mechanisms are inherent to the structure of the review process itself its not a system of fines. There is provisions for fines under Hart Scott but I don't believe they have ever been imposed. The mechanism is principally one of the dead lines themselves and it's something that applies in a suspensive system the way that is not applied in a non suspensive system, so I don't know if it can be analogised for purposes of Brazil. But in a suspensive system what works is if you have two phases. If you have phase one of thirty days, you put in the filing you get a call from the government say: "ten days into the waiting period". And they will would say: We have some questions for you. We need some documents. We need your strategic plans which are not required as part of Hart Scott process.. It's part of the final filing list. We will need some marketing plans, we need some documents related to the deal. We need some information that is not part of the initial filing. And we need a fast, during two or three days because we have this process to follow and it date ten today that leave us twenty days more in the waiting period. Thirty days in the waiting period. If in the end of that time we haven't got reasonable confort then we are going to issue a second request. So what you will do upon getting a information like that is to scramble and get with the client, get the documents, get them to agencies, offer to go and talk to the agency. I raised that and it applies you get that call in only 10% of the transactions and the reason for that is that 90% of the transactions are clearly once that well reportable because we have fairly low thresholds as well. They are reportable but the agency can take a look based even in very primitive information and conclude, there is not a problem here and often they will give a early termination sometimes that's late in the initial period. With respect to phase two, that is quite a bit more problematic but the intuition again is the clock doesn't start. You can't clear your deal until after you have responded to the information request. So, that's how that works. If we had the system they have in Europe, where the agency has to make a determination within four months our mechanisms wouldn't work. If you have a final line time tactically people might say: "well, let's squeeze the agency". And the agency obviously can put itself in that position. So, in that type of system there is a need for fines and the European of course have fines and they use fines fairly often.

Let make a point on the interest of the business community because I want to make clear when I talk about squeezing the system squeezing the agency clearly parties to the transaction might have that incentive but the business community does not. Not the business community as whole and I want to emphasise the interest of the business community is substantially more aligned with the interest of the consumers than one typically thinks, not just for political reasons not just because if we are to harsh on consumers there will be a political reaction, something much more fundamental and that

is that in most transactions, the consumer is a business. If you look at the majority of the merger interventions in the world they deal not with finished households good, but with the intermediate goods where the seller is the good of the business but so is the purchaser. The victim in those cases whether is a cartel case or a merger case, the victims are themselves, businesses. So, when the business community is urging reform, is not a urging reform with the objective of subverting the interest of the competition statute. The urging of reform is based predominantly on a view that there is a weight of burden that has to be made. And weighing those burdens the business community will urge somewhat less enforcement and perhaps a more efficient enforcement.

BATUIRA MENEGHESSO LINO

Na verdade eu não queria fazer uma pergunta, queria fazer uma observação.

Eu fico muito preocupado como advogado porque tenho ouvido freqüentemente essa alusão a que as decisões do CADE não devem ser levadas ao Judiciário porque os juízes não tem capacidade de decidir assuntos econômicos.

Eu fico me perguntando se, por acaso, as questões que envolvem medicina devessem ser resolvidas pelos Conselhos Regionais de Medicina e as que envolvem Engenharia devessem ser resolvidas pelos Conselhos Regionais de Engenharia; porque juízes também não conhecem medicina e não conhecem engenharia.

Eu só queria fazer essa manifestação, porque o Brasil ainda é um país que tem três poderes, e o Judiciário tem um papel a cumprir.

Obrigado.

LAÉRCIO FARINA

Apenas a aduzir ao comentário do Dr. Batuíra que de fato isto faz parte do jogo do Estado de Direito.

Não me parece que eventuais revisões de decisões do Tribunal Administrativo por parte do Poder Judiciário virão a desmoralizar.

Eu tenho um pouco de dúvida, ao contrário da colocação do Dr. Cláudio, de que na União Européia o Dr. Mario Monti tenha sofrido algum desgaste na sua imagem ou na sua força como agente da comunidade para fins da concorrência, além daquele movido pela imprensa.

Me parece que faz parte realmente do jogo do Estado de Direito.

Como uma provocação ao Dr. Ronaldo, eu queria fazer a seguinte colocação: Nós sabemos que é da tradição do sistema do direito brasileiro, do Sistema Jurídico Brasileiro, a forma, e os Tribunais Brasileiros são muito sensíveis à questão da forma. Portanto, me preocupa muito quando a questão do Processo do CADE é colocada sob a ótica de que é um processo sui generis. Parece-me que é sui generis sim, com relação à matéria, mas não com relação ao procedimento.

De qualquer maneira, o CADE está distrito às disposições do artigo 37 da Constituição Federal que trazem a questão da legalidade como um dos elementos dos quais não se pode escapar.

E a questão da lei do processo administrativo, ao contrário de uma questão de simples importação dos seus conceitos para o processo do CADE, se trata de simples aplicação da lei. Porque na verdade, no Sistema Jurídico que está aí, nós temos a lei do processo administrativo e exceção feita àqueles pontos em que ela conflite com disposições expressas da 8884. Ela merece e deve ser aplicada.

Eu acho que tratar o processo antitruste no Brasil como sui generis, ele processo, aí sim nós estaríamos diante de um risco de grandes revisões por parte do judiciário.

No que toca à matéria, me parece até que há algumas teorias relativas à discricionariedade técnica que acabam até retirando, em determinados pontos. Não estou falando da decisão como um todo do Poder Judiciário, a reapreciação da matéria em função da discricionariedade técnica.

Eu gostaria de ouvir um pouco mais do Dr. Ronaldo uma discussão sobre esse tema.

FRANKLIN DA COSTA, Membro do Ministério Público Federal.

Essa questão colocada realmente pelo Dr. Considera é uma, nos preocupa a todos e eu quero aproveitar aqui que devemos ter muitos estudantes e também a presença do nosso cnferencista internacional. O nosso Sistema é um Sistema de tripartição de poderes. Onde nós temos a cláusula 5ª que já foi referenciada aqui pelo Dr. João Bosco, e que se trata inclusive de cláusula pétrea; só poder-se-ia modificar este dispositivo constitucional por uma evolução ou um golpe de estado. E parece que nós estamos distante disso, considerando o aperfeiçoamento da democracia do nosso país nos últimos anos.

Em segundo lugar, quero lembrar principalmente aos estudantes, e também aproveitar novamente a presença do nosso cnferencista internacional, que o CADE não é o único Tribunal Administrativo que nós temos. Come-

çando pelos Tribunais de Justiça Desportiva, depois pelos Conselhos de Contribuinte, Junta de Recursos da Previdência Social, então o CADE é mais um a integrar este Sistema e nenhum desses está excluído da apreciação do Poder Judiciário.

A constituição faz uma ressalva expressa quando trata da questão da justiça desportiva que diz que o Judiciário somente acatará alguma postulação referente aos Espetáculos Desportivos depois de esgotadas as instâncias dos Tribunais de Justiça Desportivos.

Mas Dr. Considera, este tormento não é só seu.

Nós do Ministério Público temos grandes problemas, grandes embates com o Judiciário, pela dificuldade de compreensão de determinadas questões; questões ambientais, por exemplo, questões de consumidor, questões de probidade administrativa.

Diante do Estado Democrático de Direito, diante da discussão, eu gostaria também de prosseguir um pouco mais um minuto apenas.

Essa, toda essa circunstância nos atormenta.

Quando se escolhe a carreira do Judiciário e Jurídica, é o nosso eterno tormento porque não é uma ciência matemática, não é uma ciência exata.

E aí cabe aqui o elogio, a iniciativa do Ibrac com essas Conferências, que somente com essas Conferências, esses estudos, se conseguirá levar até quem tem posição de decisão no caso judiciário, conhecer o problema.

É o que nós estamos fazendo no Ministério Público; estamos fazendo reuniões setorizadas e conferências setorizadas com os juízes de 1º e 2º grau, onde nós trazemos técnicos, especialistas em questões de direito ambiental, de direito do consumidor, para tratar diretamente com o juiz para que eles tenham uma compreensão dessa questão. Então a questão trata-se de difusão de conhecimento e não de restrição de direito que é uma garantia constitucional.

E aí então nós chegaremos a isso: Difusão de Conhecimento.

Muito obrigado.

CLÁUDIO CONSIDERA

Dizer o seguinte: Acho que as pessoas, depois que eu falei pela segunda vez, elas quiseram fazer o ponto que, encima da minha primeira fala, ainda parece que não escutaram o que eu falei pela segunda vez, ou seja, as pessoas vieram, fizeram discurso, tanto os dois, daquela ponta àquela ponta, como se eu tivesse falado exatamente aquela coisa anterior.

Ou seja, eu disse assim: eu não quero passar por cima da Constituição. Eu alertei que existe um problema.

Não é possível que, por exemplo, uma fusão como da Ambev ficassem 8 anos no Judiciário. Lamento mas, isso daí é um processo econômico. Se tem um doente que teve um problema e tem um hospital, nós teremos um problema entre um doente e um hospital, mas lamento muito, que é muito importante, mas não dá para deixar uma fusão do tamanho de alguns bilhões, suspensa por 8 anos.

Lamento, mas não dá. Então, nós temos que arrumar formas de tornar isso melhor do ponto de vista da segurança jurídica e econômica. Isso é o que eu falei.

Se as pessoas querem achar que eu falei que passar por cima da constituição, que achem, mas eu não falei isso, volto a repetir, e as pessoas quiseram fazer seus pontos sem escutar a segunda para não perderem a pergunta e quiseram fazer discursos belíssimos que não cabem aqui.

Muito obrigado.

RONALDO PORTO MACEDO

Eu gostaria de, pegando o mote dessa controvertida questão, pegar um outro mote, que diz respeito a importância que vejo da própria participação do Ministério Público nessa questão, ou seja, da tradução ou da maneira pela qual as questões concorrenciais vão chegar ao Judiciário.

Me parece que é inevitável, é uma constatação banal. Tudo que o CADE fizer de relevante impondo sanções, especialmente em condutas, qualquer, aliás, Dr. Considera já chamou a atenção sobre isso, qualquer sanção relevante imposta à qualquer empresa será levada ao Judiciário.

Me parece que uma das estratégias que se deve tomar, sem prejuízo de se pensar num desenho de como, em qual instância do judiciário, sempre do Judiciário será levado a questão, é justamente preparar a melhor estratégia. Ontem mesmo, a convite do Ministério Público Federal, estive lá dando uma palestra sobre o CADE e o Ministério Público, e enfatizava justamente este ponto. Me parece que este é um aspecto estratégico da divulgação da cultura da concorrência.

Divulgação da cultura da concorrência, não apenas divulgação do estudo da concorrência entre acadêmicos, entre advogados, não; é uma divulgação institucional da cultura da concorrência entre os órgãos que colaboram, seja na instrução, seja na maneira pela qual as demandas serão levadas ao Judiciário.

A falta de especialização do Judiciário em inúmeras áreas, como já foi mencionada pelo mesmo Ministério Público, que falou agora a pouco, tem sido em grandes medidas, nas áreas que ele mesmo mencionou, meio-ambiente, consumidor, infância e juventude e idoso; e falo à vontade sobre isso, porque sou também membro do Ministério Público. Tem sido suprida, em grande medida, por esta especialização até do órgão que leva a demanda; leva a demanda tem uma capilaridade nacional, atua em todos os âmbitos e graus de jurisdição e que portanto, pode ser um aliado poderoso assim como pode ser, na hipótese de não haver essa afinidade, pode ser um obstáculo, assim como o Judiciário por vezes é um obstáculo também, oxalá ainda bem que nem sempre o é, e da maneira geral não é. É uma garantia do segredo do estado do direito.

Com relação à questão da forma e da tradição, longe de mim, Dr. Laércio, querer dizer que não se aplica a lei do processo administrativo. O que eu estou aqui afirmando é que não se aplica apenas ela, e estou afirmando também, que em muitas situações é necessário entender que a principiologia que melhor se adapta, em respeito ao Princípio da Legalidade, à função judicante, é uma principiologia pensada, funcionalmente direcionada à função judicante. Creio, é claro que aqui não é o foro para discutir no detalhe isso, que muitas vezes os princípios que norteiam a função judicante e que estão, não na lei do processo administrativo, mas no Código de Processo Civil. Se fizermos uma interpretação inteligente, sistemática e integral do sistema jurídico, são aquelas que fazem, digamos, a melhor atenção ao princípio da legalidade.

Não quero com isso estar nem temperando nem mitigando aos efeitos da lei do processo administrativo; quero sim chamar atenção para a importância da utilização de princípios integradores até mesmo quando se pensa o processo administrativo e não apenas as questões substantivas. Quero chamar atenção, também, para um fato de que o reconhecimento de que o CADE tem este aspecto sui generis, e faça-se reconhecimento, a meu ver, da minha perspectiva, já me faz antecipar problemas numa cultura que provavelmente não enxergará da mesma forma.

Creio que também aí será necessário um trabalho pedagógico, acho que não apenas de divulgar cultura da concorrência, mas uma nova cultura acerca do processo administrativo, uma nova cultura acerca dos princípios que devem nortear a integração sistemática do sistema legal nas questões relacionadas à regulação e concorrência, inclusive com relação ao devido processo legal aplicado.

Mas não acredito que o fato do Judiciário provavelmente não venha a pensar, em muitas situações da mesma forma, não vá significar problemas.

Uma das preocupações recentes do CADE, que às vezes até vem sendo chamada como uma certa preocupação formalista do CADE, a meu ver, reage, responde a uma preocupação estratégica de já preparar uma fundamentação, uma racionalidade decisória perfeitamente traduzível e perfeitamente clara, para quando as questões forem ao Judiciário, ou seja, acho errado imaginar que estamos em mundos diferentes: o mundo da jurisdição administrativa e o mundo da jurisdição judicial.

Mas é importante se queremos efetivamente não só garantir a eficácia do Sistema, como disseminar essa cultura da concorrência, preparar essa tradução; o que faz com que muitas vezes o CADE tenha tido não só uma preocupação, às vezes até didática, às vezes até enfadonha, para aqueles que assistem aos julgamentos, mas também de justificativa desses princípios, o que, insisto, não significará, antes pelo contrário, antecipo que haverá ruídos nesta comunicação e nesta tradução de linguagens entre essa jurisdição administrativa e a jurisdição judicial.

MAURO GRINBERG

Eu agradeço em nome do Ibrac.

WILLIAN BLUMENTHAL

I'm not gonna come any close to constitutional issues in Brazil but I did want to leave everybody with a few thoughts because I don't whether you are gonna e comforted or discomforted to hear that these are not uniquely Brazilian issues. In the U.S., for example, we have over the years had many debates about whether we should have a Federal Court dealing only with competition law issues. We have one for Intellectual Property, we have one for taxes and people who say that maybe we could have one for competition. But that has never happened. We have, however, something of a natural experience and we have, as you know, two agencies the Justice Department and the Federal Trade Commission. In mergers the Federal Trade Commission can proceed administratively but the Justice Department cannot it must proceed through the Courts. It's been that way been for many years and every year there is some Seminars somewhere where people debate which is the better system and the results remain inconclusive after fifty years and if your are interested you could find the proceedings but I doubt you would find them terrible instructive. In the U.S. during the nineteen nineties roughly twenty mergers ended up litigated in the Federal Courts. I handled two of those for the parties. In both cases we were in front of federal court judges who were totally unschooled in the economics. But in both cases they were very wise

and they had a very good intuition and they understood good evidences, they could distinguish good evidences from bad evidences often in the way that the agencies themselves seem have difficulties in doing. I think we found that that protection was an important protection. I might have had a different view if I had lost either those two cases but it was an instructive experience that people untutored in economics can often very wise.

Let me give the flip side. It is something the we experienced in U.S. in the nineteen eighties and I would predict that the Europeans are about to experience it as well. And that is that the effect of the appellate review where administrative decisions are reversed in a fairly regular basis is not something necessarily good for the private sector and often will lead to very significant increases in burden. There are those who right now are utterly gleeful at the decisions of the Court of First Instance in Europe reversing the decisions about the Competition Directorate. There are others of us who are terrified because for years we in the U.S. have been asking why does it take us a thousand of cartoons the process a merger that the European handle in ten. And the reason for that is that there is a time in the nineties eighties when the Justice Department and the Federal Trade Commission were reversed repeatedly because their presumptions were not honoured because their intuitions were not honoured as they have to. They were put to their proof on every point and if that happens the result typically is just a ballooning heavy burden. It's an extraordinary complex issue on which I clearly am not going to take any position. Not only in respect with Brazil but with respect to the best practices generally.

CLÁUDIO CONSIDERA

I want to ask you how long takes the decision of the Court?

WILLIAN BLUMENTHAL

The question was how long the decision of the Court took. Typically these decisions are made on the basis of preliminary injunctions hearings not final decisions. Although the preliminary injunction hearings can be in three or four weeks hearings and were in those cases, in both cases which I am thinking, One was a DOJ case and other a FTC case, the government in initiated the litigation, the hearing began about three months later. There was roughly one month hearing and the decision was then issued in about two weeks. So, four and a half month.

MAURO GRINBERG

Eu quero agradecer muito a presença do William Blumenthal, Cláudio Considera e ao Ronaldo Macedo pela presença. Exorto à todos para permanecerem aqui para a entrega do Prêmio Ibrac-Esso e o Painel está encerrado.

Muito obrigado a todos.