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**VIA FAX to +48 22 826 6125 and EMAIL to [marek.niechcial@uokik.gov.pl](mailto:marek.niechcial@uokik.gov.pl)**

Marek Niechcial  
President  
Office of Competition and Consumer Protection of Poland  
Pl. Powstańców Warszawy 1  
00-950 Warszawa  
Poland

Dear President Niechcial:

**Re: Treatment Of Joint Ventures In Polish Merger Control**

We write on behalf of the Merger Streamlining Group (the “Group”), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.<sup>1</sup> The cornerstone of the Group’s activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* (“Recommended Practices”) of the International Competition Network (“ICN”),<sup>2</sup> of which, as you know, the Office of Competition and Consumer Protection (the “OCCP”) is a longstanding member.

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other jurisdictions (e.g., the United Kingdom, Germany, France, Austria, Russia, Brazil, India, China, Japan, Korea, Spain, Italy and Portugal) to promote reforms consistent with the *Recommended Practices*, including a prior submission to the OCCP in 2011.

As described in greater detail below, the Group writes in connection with a question relating to the treatment of joint ventures under Polish merger control laws and, in

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<sup>1</sup> The current members of the Group are Accenture, Bosch, BHP Billiton, Chevron, Cisco, Danaher, GE, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

<sup>2</sup> International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>> [*Recommended Practices*].

particular, some ambiguity concerning the types of joint ventures for which mandatory pre-notification is required in Poland. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to the OCCP.

## **I. Scope Of Notification Requirements For Joint Ventures In Poland**

We understand, based on an English-language translation of the Act of 16 February 2007 (the "Act") that we have reviewed, and on the OCCP's own English-language translation of its *Guidelines on the Criteria and Procedure of Notifying the Intention of Concentration to the President of UOKiK* (the "OCCP Guidelines"), that the following types of transactions are subject to mandatory pre-notification in Poland (assuming the relevant turnover thresholds are met):

- A. "the combination of two or more independent undertakings, the so-called mergers;
- B. takeovers — by acquiring or taking up stocks, other securities, shares or in any other way — of direct or indirect control over one or more undertakings by one or more undertakings;
- C. the creation by undertakings of one joint undertaking; and
- D. the acquisition by the undertaking of a part of the assets of another undertaking (whole or a part of the enterprise) if the turnover generated by these assets in any of the two financial years preceding the notification exceeded the equivalent of EUR 10 million in the territory of Poland."<sup>3</sup>

The *OCCP Guidelines* also state that the above "*catalogue*" of types of notifiable transactions is "*closed*", and that consequently "*only the above-mentioned facts are subject to the notification to the President of UOKiK.*"<sup>4</sup> They also explicitly note that "*the following are not subject to the notification, for example: - so-called quasi concentrations consisting in acquisition or taking up shares or stocks which do not, however, lead to the acquisition of control (e.g. acquiring by undertaking A of a minority package of shares in company B which does not give undertaking A a possibility of having a decisive impact on undertaking B).*"<sup>5</sup>

The exclusion from mandatory notification of minority shareholding acquisitions that do not confer control on the acquiror is a sound and sensible practice that is reflected in nearly all merger control regimes around the world. For example, at the EU level, only minority

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<sup>3</sup> *OCCP Guidelines*, at 2.1 ("*Catalogue of forms of concentration*").

<sup>4</sup> *Ibid.* (emphasis added).

<sup>5</sup> *Ibid.* (emphasis added).

investments that convey “*decisive influence*” are potentially notifiable under the EC Merger Regulation.<sup>6</sup>

We note, however, that some ambiguity exists in the business and legal communities in respect of the acquisition of a non-controlling minority interest in a newly-created joint venture entity. The *OCCP Guidelines* state that:

*the obligation to notify the intention of concentration consisting in creation of the joint undertaking refers both to the situation where participants of concentration (founding undertakings) establish, for this purpose, a new joint undertaking and to the situation where, for example, in order to create the joint undertaking, one of participants will establish a new company and then other participants will purchase or take up its shares/stocks.*<sup>7</sup>

The above language suggests that the establishment of a new joint venture is a notifiable event in Polish merger control. It also suggests that where one joint venture partner establishes a new joint venture entity, and subsequently another joint venture partner purchases a stake in that joint venture entity, this is also a notifiable event. Both of these events presumably relate to the “*creation [...] of one joint undertaking*”, which is one of four types of notifiable transactions (*i.e.*, item I.C in the list set out above). We understand that there is a view in the business and legal communities that a minority investment in a newly-created joint venture entity may be a notifiable event in Poland.

However, in contrast, where a party to a joint venture acquires a non-controlling minority interest in an existing joint venture entity — *i.e.*, not a newly-created entity — we understand that the business and legal communities view this as a non-notifiable event, in reliance on the exemption for non-controlling minority investments, as set out in section 2.1 the *OCCP Guidelines*.<sup>8</sup>

In the Group’s respectful view, it is neither necessary nor desirable, from a competition policy and enforcement perspective, to maintain a notification obligation for non-controlling minority investments in newly-created joint ventures. As the *OCCP Guidelines* — and merger control regimes around the world — recognize, minority investments that do not convey control are unlikely to raise competition law concerns. Requiring *ex ante* notification of such transactions imposes significant burdens on acquirors to prepare filings and observe waiting periods in respect of them. It also imposes an unnecessary burden on the OCCP, requiring it to expend time and resources in reviewing transactions that are unlikely to raise any material competition law concerns in Poland. As the ICN *Recommended Practices* make clear, “[i]nitial

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<sup>6</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Article 3(2).

<sup>7</sup> *OCCP Guidelines*, at 2.4 (“*Creating by undertakings of the joint undertaking*”) (emphasis added).

<sup>8</sup> *Supra* note 4.

*notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions.*<sup>9</sup>

The imposition of differing notification standards based on an imprecise temporal distinction between new (or recently-formed) joint venture entities and existing joint venture entities also introduces elements of uncertainty and inconsistency into the Polish merger control regime, making it difficult for joint venture participants to assess their notification obligations in Poland.

The Group therefore respectfully requests that the OCCP clarify the existing ambiguity concerning notification requirements for joint ventures by communicating, whether by amendments to the *OCCP Guidelines* or otherwise, that **all** acquisitions of non-controlling minority shareholdings — whether in existing or newly-created joint venture entities — are outside the scope of mandatory merger notification in Poland. The Group believes that this could be accomplished with ease, by way of simple amendments to sections 2.1 and/or 2.4 of the *OCCP Guidelines*. Such amendments would provide important clarity to the business and legal communities, and bring Polish merger control into greater conformity with the ICN *Recommended Practices*, which stipulate that “*merger control laws should be applied with a high level of transparency*”<sup>10</sup> and which encourage competition law enforcers to avoid imposing unnecessary burdens on merging parties.<sup>11</sup>

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Thank you very much for considering the Group’s views. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,



A. Neil Campbell



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<sup>9</sup> *Recommended Practice V.B* (emphasis added).

<sup>10</sup> *Recommended Practice VIII.A*.

<sup>11</sup> *Supra* note 9.