

'Learning from each other's experiences' - a review of the ICN Merger Workshop on cross-border cooperation

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'Workshops of this kind will give us an immense opportunity to learn from each other's experiences,' the Hon. Arun Jaitley, Indian Finance Minister, remarked in his welcome address at the 2014 ICN Merger Workshop, which took place in Delhi in December and was hosted by the Competition Commission of India.

The workshop, which brought together dozens of representatives from member agencies and NGAs, focused on how co-operation could be achieved in merger control, particularly concerning cross-border transactions. Facilitation of effective international cooperation for the benefit of member agencies forms part of ICN's mission, and the workshop helped fulfil a key aspect of the Merger Working Group's current strategic plan.

On the first day of the workshop delegates discussed their practical experience with cross-border co-operation – How does it work? What are the best practices? What sorts of problems do new agencies face, and how can outreach mitigate them? How should agencies approach information exchange in multi-jurisdictional filings?

The discussions recognized the potential costs to business of multi-jurisdictional reviews created, for example, by differences in merger review periods. There was general agreement that communication among agencies reviewing the same transaction can help reduce such costs. Co-operation among reviewing agencies may also help agencies better target their limited resources by sharing information about competitive concerns. However, there are some areas where increased co-operation may not always be desirable. For example, there may be transactions where agencies will only need very minimal contact to coordinate, or where there are particular sensitivities about the exchange of confidential information pursuant to waivers.

Delegates also considered the topic of merger remedies, drawing on practical examples of cross-border transactions and lessons from ex-post remedy analysis. In addition, agencies and NGAs shared views on the technical aspects of remedy design, such as the use of behavioral remedies and trustees, market testing, and how best to monitor remedies.

A hypothetical case was used to guide the second day of the workshop. By giving delegates a chance to put theoretical discussions into practice, it provided the most useful insight into some of the challenges agencies face when designing remedies on cross-border deals.

Delegates reviewed a hypothetical transaction involving two pharmaceutical companies – Rilin and Nutrinia. Groups were split into two jurisdictions – Republic A and B Land. The main areas of substantive concern to both Republic A and B Land were the overlaps between the parties in the supply of cough treatments and the development (or ‘future market’) of home blood-clotting test kits, though the market structure in each jurisdiction, and the remedies offered by the parties, differed.

In lively discussions, delegates considered whether differences in market structure should affect the evaluation of remedy proposals, and whether it was desirable to agree on a common purchaser of the divestment businesses in each jurisdiction.

Though delegates failed to reach a consensus on whether to accept or reject the proposed remedies in the hypothetical case, there clearly was more agreement on the benefits of cooperation in cross-border reviews. The exercise also highlighted the important fact that convergence in decision-making is not the inevitable consequence of increased co-operation.

A simple way the ICN’s recent Merger Workshop is likely to facilitate future cooperation between agencies is through the mere act of bringing together representatives to meet face-to-face.

In that respect, the Hon. Arun Jaitley’s welcoming remarks at the Delhi Workshop are likely to be proven correct.