



ICN Merger Workshop 2020 – Melbourne

By Alexander Baker

(Fingleton)¹



Copyright © 2020

Competition Policy International, Inc. For more information visit [CompetitionPolicyInternational.com](https://www.CompetitionPolicyInternational.com)

April 2020

Are laws and competition authorities getting the balance right in merger control? Is there too much overenforcement (false positives) or too much underenforcement (false negatives)? These were questions posed to delegates from over 40 countries at the recent ICN Merger Workshop held in Melbourne, Australia and hosted by the Australian Competition and Consumer Commission (“ACCC”).

The background to the Merger Workshop included concerns there is an enforcement gap in digital markets given jurisdictional thresholds and the rapid pace of change in such industries; concerns that industries exhibit increasing concentration and mark-ups; and, the increasing focus by authorities across all markets on innovation and more novel theories of harm.

ACCC Commissioner Stephen Ridgeway opened the workshop by asking why innovation tends to occur more often in bedrooms and garages rather than in boardrooms, suggesting that international failure in regulation and a linked increase in concentration in markets may be a cause.

Panelists in several sessions discussed the challenges of assessing the impact of deals on potential competition given the uncertainties that exist in predicting the trajectory of firms and markets, while recognizing the importance of preserving and protecting incentives to innovate and the benefits such innovation brings.

The academic paper “Killer acquisitions” (Cunningham, Ederer & Ma (2019)) was frequently cited during the workshop, along with high-profile reports published on digital platforms by the UK Furman Review, the Stigler Centre and the European Commission. Differences between innovation theories of harm in pharmaceutical mergers and those in tech deals were explored, particularly in relation to the challenges agencies faced in reviewing such mergers and the evidence available to them on which to base a decision.

Delegates discussed whether existing merger laws needed modification so that the standard of proof was altered for mergers involving online platforms, and whether structural presumptions may be an effective tool for addressing concerns in fast moving markets. Isabelle de Silva, president of the Autorité de la Concurrence, highlighted the French agency’s recent calls for enhanced review powers. She felt that the Autorité had been too cautious in not prohibiting certain deals involving uncertainty, and said - even absent changes in the law - that a more thorough and demanding analysis of such mergers was required in the current framework.

For countries where authorities have to litigate to block deals, the practical implications of the differences in the way courts approach merger reviews compared to competition authorities was a key discussion point. Michael Moiseyev, the former head of the FTC’s Mergers I division, told delegates that US courts “apply a screen that you have to demonstrate that entry is probable before you even get into a discussion of anticompetitive effects.” He said this makes it harder to block transactions, which has an impact on the types of cases the agencies pursue.

In addition to the substantive concerns that arise from digital markets, a key theme of the conference was the importance of authorities in different jurisdictions cooperating on cross-border transactions and working together to share knowledge and best practice outside specific cases.

Delegates shared best practice in merger review on topics such as: procedural fairness; technology assisted document review; information and document requests; international cooperation on merger assessment and in remedy design. *Ex post* merger reviews in the U.S., Italy and the UK were viewed as an important tool for competition authorities to gain valuable information to adjust and improve their approach to the review of future deals.

In his keynote remarks at the conference, ACCC Chair Rod Sims told of his experience advising on mergers prior to becoming Chair of the ACCC. He told delegates, “my time spent advising companies on commercial strategy makes me keenly aware that mergers are often motivated by reducing competition to reduce the much harder task of ‘outrunning’ competitors.”

He went on to highlight the challenges enforcers face in predicting the effects of mergers, noting that such challenges are “even greater when the market environment is rapidly evolving and incumbents are acquiring emerging and innovative new players.”

Sims emphasized the importance of the merger control community coming together to discuss whether the right balance is being achieved and whether traditional approaches are able to meet these new challenges.

¹ Managing Director, Fingleton.