

# **DYNAMIC COMPETITION IN DYNAMIC MARKETS:** *A PATH FORWARD*

**2022 Conference**

**August 2<sup>nd</sup>, 2022**

Woodward Conference Center  
Melbourne Law School



**POST-CONFERENCE SUMMARY**



# Program



## DYNAMIC COMPETITION IN DYNAMIC MARKETS: A PATH FORWARD 2022 Conference Melbourne Law School

8:30 - 9:00 am

### REGISTRATION & BREAKFAST

9:00 - 9:10 am

### OPENING REMARKS

**Julie CLARKE**, Professor in Competition Law, Melbourne Law School

9:10 - 9:30 am

### CPI TALKS TO...

**Frédéric JENNY**, Chairman, OECD Competition Committee; Professor, ESSEC Paris Business School

9:30 - 10:30 am

### INNOVATION, ENTREPRENEURSHIP & COMPETITION: HOW DO WE PRESERVE VALUE?

**Giuseppe COLANGELO**, Jean Monnet Chair in European Innovation Policy and Associate Professor of Law and Economics, University of Basilicata

**Beth WEBSTER**, Pro Vice-Chancellor (Research Impact and Translation), Swinburne University of Technology

**Jason TABARIAS**, Director, Accenture

**Aaron LANE**, Senior Lecturer in RMIT's Graduate School of Business and Law; Senior Research Fellow in the RMIT Blockchain Innovation Hub

**Moderator: Rhonda SMITH**, Senior Lecturer, Melbourne Law School; Faculty of Business and Economics

10:30 - 10:45 am

### COFFEE BREAK

10:45 am - 11:45 am

### PRIVACY & COMPETITION: IS THERE TENSION?

**Christopher YOO**, John H. Chestnut Professor of Law, Communication, and Computer & Information Science, University of Pennsylvania

**Stephen KING**, John H. Chestnut Professor of Law, Communication, and Computer & Information Science, University of Pennsylvania

**Douglas RATHBUN**, Public Policy, Meta

**Wayne LEACH**, Partner, King & Wood Mallesons

**Moderator: Kirsten WEBB**, Partner, Clayton Utz

12:00 - 1:00 pm

### LUNCHEON DISCUSSION WITH...

**Tom LEUNER**, Executive General Manager, Mergers, Exemptions and Digital Division, ACCC

1:00 - 2:00 pm

### BIG DATA: UNDERSTANDING AND ANALYZING ITS COMPETITIVE EFFECT

**John M. YUN**, Associate Professor of Law & Deputy Executive Director at the Global Antitrust Institute

**Adam TRIGGS**, Director, Accenture

**Niloufer SELVADURAI**, Professor of Technology Law, Macquarie University

**Chris HART**, Principal, RBB Economics

**Moderator: Lisa HUETT**, Partner, King & Wood Mallesons

2:00 - 2:15 pm

### COFFEE BREAK

2:15 - 3:15 pm

### THE ROLE OF M&A IN INNOVATION ECOSYSTEMS

**Simon WILKIE**, Head of Monash Business School, Monash University

**Daniel SOKOL**, Professor of Law, USC Marshall School of Business

**Louise KLAMKA**, Partner, Gilbert + Tobin

**Rajat SOOD**, Competition Economist, ACCC

**Moderator: Julie CLARKE**, Professor in Competition Law, Melbourne Law School

3:15 - 3:30 pm

### WRAP-UP

3:30 - 4:00 pm

### COCKTAIL RECEPTION



# Panels



## Program Open

# CPI TALKS WITH...

### Frédéric Jenny

Chair, OECD Competition Committee  
and Professor of Economics, ESSEC



Video recording of Frédéric Jenny, Chair, OECD Competition Committee and Professor of Economics, ESSEC - filmed for the conference in advance.

**What role does competition policy play in ensuring dynamic competition in digital markets works best for consumers? And what lessons can the APAC region take away from the EU/US experience?**

**Frédéric Jenny:** Competition policy and enforcement play an important role in the technology sector. Technology sector is inherently innovative and involves a unique set of competition mechanisms including networking effect, tipping, etc...which might give rise to concentration in the digital sector. There is a procedural concern over the pace in which competition pol-

icy is keeping up with the evolving tech sector, which hints at the takeaway that ex ante regulation and ex post enforcement should complement each other to implement an effective competition policy. Regulation comes in different forms but the one that works best is the one that is the most adaptable to the specific situation.

**How can competition policy help secure an open internet that benefits consumers, developers, as well as innovation?**

**Frédéric Jenny:** At the substantive level, we have to adapt our competition law instruments. Competition in the digital sectors is unique on its own. Competition between digital "ecosystems", or platforms, proves to be a unique subject matter due to the multi-layered difficulty that goes into the compet-



itive analysis of the sector. The first layer lies in the contradiction that restricting competition within a platform will advance its competition with other platforms. The second layer is in that a single platform is not confined to one relevant market. The third difficulty targets the fact that firms in the technology sector attain their competitive edge by differentiating rather than imitating, which seems to be against the traditional economic analysis. Fourth, firms do not compete on prices but rather on services. Last, access to data can be a barrier to entry and a barrier to innovation, but it is not an absolute necessity. There are cases in the digital sector where new platforms have displaced existing platforms without access to data.

**What role does M&A play in the digital economy? How can M&A help spur innovation in the digital markets?**

**Frédéric Jenny:** M&A in the digital sector can play three roles. One, they can allow innovations access to the market, which is predicated on better innovation, network effect, and a sound business model. Many innovators with great products do not have access to the latter two factors. Thanks to M&A, many budding innovations that otherwise could not have reached the market will be able to tap into the market. Two, M&A allows large platforms to increase their innovative portfolio. Three, M&A can eliminate competitive threats. In other words, the incumbent firms could preclude competition from new innovations. The difficulty is in the counterfactual analysis in the M&A situation, which is still in its early stage of development and lacks sufficient empirics to reach a comprehensive assessment of the so-called killer M&A.

*“...at the substantive level, we have to adapt our competition law instruments. Competition in the digital sectors is unique on its own...”*



## Panel 1

# INNOVATION, ENTREPRENEURSHIP & COMPETITION: HOW DO WE PRESERVE VALUE?



### Speakers:

Giuseppe Colangelo (Jean Monnet Chair in European Innovation Policy; Associate Professor of Law and Economics, University of Basilicata); Beth Webster (Pro Vice-Chancellor (Research Impact and Translation), Swinburne University of Technology); Jason Tabarias (Director, Accenture); Aaron Lane (Senior Lecturer in RMIT's Graduate School of Business and Law; Senior Research Fellow in the RMIT Blockchain Innovator Hub)

### Moderator:

Rhonda Smith, Senior Lecturer, Melbourne Law School, Faculty of Business and Economics

Rhonda Smith opened with the following question:

**What are the measures of preserving the value of the digital platforms? What kind of competition are these measures intended to promote and how may they impact the way in which ecosystems generate value?**

**Giuseppe Colangelo** notes a wide array of options in Europe. There are three major approaches. The DMA adopts a sector-specific regulation which is a rule-based regulation and does not allow efficiency-based justification. The UK model is a principle-based approach that applies separate codes of conduct to different sets of platforms. The German approach introduces rebuttable presumption and allows efficient defense. The DMA is the most robust approach as it allows no defense.

**Given the named provisions and obligations, how might they affect the platform governance?**

**Giuseppe Colangelo** points to the long list of prohibition under the DMA regime that regulates business models and market strategy such as self-preferencing and parity clauses. Self-preferencing is not necessarily anticompetitive, which makes a case-by-case analysis preferable over issuing an overbroad ban.

**What have you discovered about how clusters form?**

**Beth Webster** remarks that her discovery is not confined to the digital economy but rather across-the-board. A cluster is when a group of similar or complementary businesses locate together in a given area. Clusters often have superior performance, but clusters form in different ways. Firms may form a cluster by moving together due to geographical proximity or product similarity. Some firms might also survive longer and grow into a cluster. Firms are also more likely to spring up in a cluster so that it is self-perpetuating. Bio-tech clusters in Australia are successful in both researching and funding the research but

are quite unsuccessful in commercialization. This is attributed to the limited availability of commercial pharmaceutical companies in Australia with which the clusters could team up to access the market. Physical proximity is also pivotal for those clusters to establish a robust relationship with the investors whereas remote business conferences fail to deliver.

### **In a competitive-neutral environment, is there a role for industry policy?**

**Jason Tabarias** echoes with **Beth Webster** and emphasizes the importance of anchor organizations within the cluster context. The discourse is in effect about ways for the government to intervene and create an environment for anchors either by providing subsidy or tax breaks, which is not competitive-neutral. The policy reason is that the government seeks to establish clusters as they provide a congenial environment for nascent industries to grow. Competition is only one aspect of the industry policy, which begs the question - who are the beneficiaries of competition and how do we count the benefits from competition? We have focused on supply-side considerations, e.g., employment, research, production, and it is very difficult to net-off the consumer benefits with those considerations.

### **What would it mean if we moved beyond a structural view of the market competition? Would it be in the public interest?**

**Jason Tabarias** starts by examining ways of measuring the consumer values. This is a frontier for practitioners as it is difficult to capture the value and to compare consumer values in a small market with the values at large.

### **What impact does collaborative conduct have in the post-COVID world?**

**Aaron Lane** opens by noting that policy makers in the COVID-world are preoccupied with the concept of freezing the economy, which is largely achieved by de-regulating the industries. But COVID has already changed the economic patterns that will surface when the economy is thawed out. Competition policy focused a lot on welfare and concentration, but we need to take

a broader view of the implication of competition policies and consider what parts of the de-regulation could stay in the post-COVID economy. Competition policy should also consider the anticompetitive government intervention.

### **Blockchain has the potential to be pro competitive and anticompetitive. How will competition authorities deal with blockchain?**

**Aaron Lane** thinks the discussion of blockchain and competition has progressed. It has moved past the stage where lawyers focus on how the technology may facilitate new collusive schemes. The difficulty now for the enforcers is one about jurisdiction, as the asset is intangible and will prove difficult for the authorities to implement injunctions or remedies. Different regulatory approaches come at different costs and a tradeoff is necessary. Blockchain and competition are aiming at the same goal of decentralizing the economy though in different ways.

## **AUDIENCE QUESTIONS**

### **You mentioned earlier about how sweeping bans against parity clauses will inhibit competition. Prosperity clauses have been banned in several European jurisdictions. How effective are those bans?**

**Giuseppe Colangelo** clarifies that he focuses on the narrow version of the parity clause. Narrow parity clause is forbidden in Germany whether it is in the gatekeeper scenario and prohibited in DMA for gatekeeper. The EU Commission has expressed support for the narrow parity clause and finds it procompetitive. The real difficulty is in the examination of the broad parity clause where the competitive effects are ambiguous.

### **Could you share more about self-governance and substitute competition policy?**

**Aaron Lane** states blockchain is a governance technology. For instance, music copyright is impeded by public regulations as royalty fees are calculated without transparency. Blockchain companies are developing a private solution to this problem.





## Panel 2

# PRIVACY & COMPETITION: IS THERE TENSION?



### Speakers:

Christopher Yoo (Professor of Law, Communication, and Computer & Information science, University of Pennsylvania); Stephen King (Commissioner, Productivity Commission); Douglas Rathbun (Public Policy, Meta); Wayne Leach (Partner, King & Wood Malleson)

### Moderator:

Kirsten Webb, Partner, Clayton Utz

### What does privacy mean? What are definitions of privacy that matter more to competition policy?

**Douglas Rathbun** points out that privacy, particularly with the way people are talking about it today, is relatively new and relatively young. However, when it comes to competition law and policy, privacy is a clearer idea. Even practitioners or scholars might argue about that over the margins, they certainly agree on what the parameters are and what the goals are. He continues to explain that privacy in competition law and policy is about decision-making. Each individual makes a decision that in many ways is very personal. Today, privacy is intertwined with data and platforms—platforms that are creating tools helping people make decisions of increasing complexity.

**Christopher Yoo** emphasizes that it is very hard to pin down one particular definition of privacy. Disclosure is an important aspect of privacy, and control is another consideration with respect to

privacy. He notes that privacy is about individual harm, and competition laws are about social harm and systematic harm to the market. Disclosure of improper facts about a person is an individual violation, but almost certainly by itself is not a competition law violation. Therefore, he notes it is critical to understand there are two different regimes aimed at very different things, and aimed at very different values. The original generation of privacy laws was mostly about disclosure to third parties. Gradually there emerge different modes such as targeting third-party release or transfer of data for use in the data subject. Those are aiming at addressing different harms and they have very different reasons. Therefore, it is important to consider the goals and values of the two regimes.

**Stephen King** agrees that the problem with privacy is that it is poorly defined. Privacy often relates to data. Data has often failed to be recognized as a very unusual economic good because data is often excludable but non-rivalrous. He suggests

that when individuals are dealing with banks, insurance companies, Google, or Amazon, they are engaged in an economic transaction. Google or other companies should take into account the fact a person does not want to hand over data. He notes that the only way to understand privacy at more than an individual level is to think about it from the rights that different parties have over data. He also stresses that privacy, something that is poorly defined, should not be viewed as an absolute right of ownership over data by certain people in the economy. Such a view might hurt both consumers and competition.

**Wayne Leach** states that people in the privacy world talk about privacy as a human right. In the context of competition, the question is how to weigh something that is a human right against the costs of competition. Another question to consider is what is the impact of that balancing test on the long-term benefits to society of competition. He agrees with Stephen King that privacy should not be held up as unimpeachable with respect to competition analysis.

**There might be a general assumption that privacy regulation is to the benefit of consumers, but what are the circumstances that privacy regulation or protections may harm consumers?**

**Stephen King** notes a few examples. First, the failure to recognize that the data collected by the business can be valuable to consumers is harmful to consumers because lower prices can be offered to consumers. The second case is general consumer gain, despite individual opposition to data collection. For instance, mandatory credit report sharing by banks benefits consumers and helps them get loans. Third, regulatory rules that are established without thinking about how that may affect incentives to collect and add value to that data, are problematic to consumers.

**Christopher Yoo** adds that there is burgeoning literature now looking at the impact of GDPR and CCPA which show they have an adverse impact on consumers. Another literature studies the impact across San Francisco Bay communities, where they began issuing ordinances that require an opt-in instead of opt-out consent before financial data can be shared. The result shows that more restrictive privacy regulations led to a systematic increase in mortgage pricing. This is because with worse quality information, banks could not access risks accurately, so they had to increase premiums for uncertain risks and liabilities. Another layer of restrictive privacy regulations' harmful impact is the compliance costs. Some sectors and big companies are used to compliance, but other small businesses and actors who have never had compliance regimes are having difficulty absorbing the compliance costs. Christopher Yoo highlights that on a very pragmatic empirical basis, there is a very large compliance training cost overhead. Meanwhile, there is also a so-called privacy paradox where people claim they value privacy, but apparently give it away for \$1 discount at a local grocery store. Therefore, some privacy regulations are actually not worth the cost they imposed on society for the benefits that create.

**Douglas Rathbun** touches on how people's sense of how much consumers care about data might change very quickly depending on how much they know about what data is, how data is collected, and what data is going to be used for. Different individ-

uals also have drastically different reactions to data collection. On the one hand, one may be delighted to see a customized advertisement that helps to expedite the shopping experience. On the other hand, another person is unsettled by a personalized ad for a product that the person was just talking about 10 minutes ago. Additionally, some data regulations are adversely affecting innovations and limiting businesses' ability to use the collected data. One study demonstrates that existing apps shrunk by about a third and entry of new apps decreased by about a half because of GDPR.

**Wayne Leach** states that it is fairly uncontroversial that poorly calibrated laws and overly intrusive regulation can restrict competition. There are frequent calls from all ends of the political spectrum to get less red tape, get rid of unnecessary regulation and, open up competition. He also points out there are quite a number of industries where it is societally accepted to be highly regulated. This may include banks, airlines, insurance companies, etc. For such industries, the society agrees it is important to impose significant compliance costs on the participants to ensure the safety of millions of lives, even if that means there are going to be fewer participants. There are similar types of trade-offs made by privacy regulations.

**What are circumstances in which either complying with privacy regulation or breaching privacy regulation could breach competition laws?**

**Wayne Leach** observes that compliance or breach of privacy regulations has different impacts on the compliance with competition laws. Greater privacy protection in some markets can come at the cost of competition. Companies may rely on the access to data to entrench their dominance and prevent emerging companies from entering. Under Australian competition law, Section 46 provides that showing of abuse of market power is not required though conduct with a significant anti-competitive purpose is still prohibited. There is always a problem with forward looking tests, but it is magnified in the digital market. The key question is whether the firm is doing more than reasonable to protect the users' privacy to the extent that it restrains competition. Judges and regulators cannot assertively answer that question and make the determination of "how much privacy is too much."

**Christopher Yoo** explains that this issue is often posed the other way — should we impose access to data? The underlying debates are whether data is a separate market, and what is the relationship between the use of data and consumer welfare? This is an important but hard question to answer which brings out the five-part analysis for consumer harms. The analysis examines whether data of the merging parties overlaps. Data serves different purposes. For example, structured and unstructured data are vastly different. Availability of alternative sources of the research on data is the second factor which often boils down to specific assets owned by individual firms. Actual or potential competition in the final product market is another input. Efficiency is also considered in the analysis. In the end, traditional ex post analysis is still the best option for competition authorities to protect the consumers.

**Douglas Rathbun** agrees and adds that the fundamental question is whether companies do compete on the parameters of privacy. It is observed that companies have entered the digital

market offering more privacy but the difficulty for competition authorities remains in gauging how companies compete.

**Steven King** notes that the confusion is caused by the lack of guidance on "who can do what with which data when." As of now, firms mainly navigate on assumptions while trying to find the frontiers of the competition law and privacy law.

## AUDIENCE QUESTIONS

**More on the question of "who can do what with which data when," does the question not expose the solution that is so complex in itself?**

**Steven King** responds by noting that the solution will be complex and slow. Regarding consumer data rights in the banking system, Steven remarks that the government is taking a conservative approach by limiting the scope of the review of data. Nevertheless, it is a start. He dismisses the notion that regulating data privacy imposes a cost greater than the benefits. Looking at the history of Australia, the problem of squatters is eventually resolved by government interjection, but the tradeoff between the cost of imposing a legal regime and the benefits from it was the least concern of the government. What matters is that the government reaches the right regime in the end. This is equally applicable to privacy regulations.

**Christopher Yoo** notes that data collection and privacy have always been a source of great concern for the large platforms.

**Would we get more benefit by accelerating and expanding the data regulation to other sectors?**

**Stephen King** notes that there are many ongoing experiments of regulating data in various sectors of the economy while warning against the hasty advancement of data privacy re-

gime in traditional sectors as it might interfere with the proper functioning of those sectors. For instance, hospitals will be deterred from transferring a patient's medical history due to a broad data privacy regulation, which might delay the efficient treatment.

**How do we reconcile data acquisition and privacy regulation and what is the optimal mechanism for data acquisition to advance social welfare?**

**Christopher Yoo** answers that compulsory access to data is reminiscent of essential facility doctrine. If the data is not de facto monopolized and the entry possible, then the compelled access to the data will deter future firms from acquiring and developing data that otherwise will be made freely available under compulsory access.

**Douglas Rathbun** remarks that answering the "who can do what with which data when" question requires determining the competitive significance of the data. With the aid of the available regulatory tools, competition authority can reach a determination though it may take time.

**Christopher Yoo** echoes Stephen King's earlier point that people have different types of privacy and treat privacies differently whereas authorities treat privacies the same. Accessing data also poses a problem to regulators as mandatory structure of data portability is hard to implement.

*“...The underlying debates are whether data is a separate market, and what is the relationship between the use of data and consumer welfare?...”*



# LUNCHEON DISCUSSION WITH...

## Tom Leuner

Executive General Manager, Exemptions  
and Digital Division, ACCC



**Tom Leuner** opens the discussion by recounting the key themes from the works on digital platforms including large economies of scale, network effects, vertical integration, expanding ecosystems, and importance of data. The key point is that the platforms serve as gatekeepers for businesses and for people to interact. The harms arising from the market power as gatekeepers are nevertheless traditional harms: higher prices, reduced choice, quality, and innovation. One of the problems with the current antitrust enforcement is the lack of agility. A problem can take years to resolve and "by that time the problem might have moved on."

*"...another problem is the whack-a-mole style of enforcement. Dark patents are also overlooked by the current anti-trust regime..."*

Another problem is the whack-a-mole style of enforcement. Dark patents are also overlooked by the current antitrust regime. M&A have also led to less competitive markets though authorities around the world are raising the scrutiny in the digital markets. "Whether Australia has the right tools to apply that attention properly and get to the right result is a real concern."

**Tom Leuner** moves on to discuss the key themes to design a new regulatory regime. Global coherence offers consistency and predictability around the world for firms to remain compliant. In addition, potential adverse impact on innovations should not inhibit regulations as all regulatory schemes have that potential. A regulatory reform should also weigh the tradeoffs between flexibility and fixed rules, general and specific rules, as well as enforcement and compliance activity. There are a myriad of possible solutions and it is likely that the proper tools will depend on the problems at hand. New regulatory obligations could be lowering barriers to entry, measures to address data



advantage, improve consumer protection rules, and require firms to deal fairly with consumers and users.

Other recommended obligations include requiring dominant platforms to facilitate switching to alternative services, data separation, sharing and portability measures to address data advantages, greater responsibility for platforms to deal with scams, fair trading obligations, effective dispute resolution schemes, and greater transparency.

## AUDIENCE QUESTIONS

**How do you assess the investigation processes in the digital market and how do you assess the adequacy of the tests?**

**Tom Leuner** remarks that international precedents are useful as the regimes are not so different and competition cases are examined in a similar light.

**In the tech sphere, what do you do with a deal that has gone ahead globally and there is nothing that the Australian authority can do to stop it.**

**Tom Leuner** refers to the Giphy example in the UK as a reference for blocking a global M&A. The remedy could also be more than just divestiture, including data separation and monetary fines.

*“...international precedents are useful as the regimes are not so different and competition cases are examined in a similar light...”*



## Panel 3

# BIG DATA: UNDERSTANDING AND ANALYZING ITS COMPETITIVE EFFECTS



### Speakers:

John M. Yun (Associate Professor of Law & Deputy Executive Director, Global Antitrust Institute); Adam Triggs (Director, Accenture); Niloufer Selvadurai (Professor of Technology Law, Macquarie University); Chris Hart (Principal, RBB Economics)

### Moderator:

Lisa Huett, Partner, King & Wood Mallesons

**Lisa Huett** opens by previewing the discussion on the definition of big data and its implications in the M&A and competition in the digital economy.

### What is big data? What are the characteristics and circumstances that we look for in big data?

**Niloufer Selvadurai** notes that big data is “a rustic term for nuanced concept.” Big data has been defined as large volumes and different types of data generated at speed from multiple sources. Big data is not homogenous. Big data that is cleaned, processed and verifiable has a higher value. Data produced in real-time is also more valuable. The focus of the discussion is not big data but big platforms, and the mercurial characteristics of big data makes big platforms difficult to regulate. The concept of dynamic data and how it interacts with competition are also noteworthy.

**John M. Yun** notes the sense of nefarious use of big data in competition. Outside of competition law, the notion that data is scarce is surprising. It is not the data that is scarce but the method to unlock and interpret the data. Competition agencies routinely use the traditional theories of harm in reviewing digital platforms from which an inference can be drawn that data surely plays a role in competition. But data does not guarantee success or failure in competition, a point which is often overlooked by the enforcers.

**Chris Hart** agrees that data is a highly heterogeneous thing, which is significant in a competition analysis.

### How might we approach the task of examining whether there is a relationship between big data and market power?

**Chris Hart** regards the analysis as twofold. One, data is a source of market power. Two, data is a consequence of market power.

er. Data could be viewed as an asset. Traditional concepts of market power and entry barrier could be thus applied to data. But data is not the only input as to why a firm has been able to maintain market power and it is important to disentangle data from other factors. It is also noteworthy to characterize data as an essential facility or just a competitive advantage. To illustrate, one firm offers a better search engine than the other, which could be attributed to data only. Alternatively, it could also be attributed to the design effort and manpower put into the development of the engine.

**John M. Yun** adds that the causal link between market power and data is the data-driven network effect theory - more data improves service and attracts more users, thereby forming a snowball. The issue with that theory is that it is premised on principles that are questionable. One, improved results of data are not necessarily beneficial. Two, data is not the universal explanation for improved product and service. Three, the presumption that more data means better results is questionable.

**Adam Triggs** calls for a nuanced approach in thinking about data as a barrier to entry. It is often the case that one unique data set has substitutes though in different degrees and it is worth recognizing the existence of close substitutes in the competition analysis.

#### **How might the issue of big data and market power arise in the realm of artificial intelligence?**

**Niloufer Selvadurai** notes it is a threshold issue that AI and machine learning are hungry for data and require real time verification. The huge demand for data begs the question "who holds the data" which requires a nuanced competition analysis that has to account for the varying qualities of the data. As a practical matter, competition laws have come to the point where the need for technical collaboration is at a new height for lawyers.

#### **What other theories of harm might arise from the accumulation and use of big data?**

**Adam Triggs** makes an introductory comment that entry barrier is a major theory of harm for big data. Another theory is the symmetric information derived from big data that may expedite cartel formations. A case study on the petrol industry in Perth has revealed that a well-intentioned government regulation that requires gas stations to publicize their gas prices turned out facilitating a tacit collusion among the market leaders, in which several firms follow the pricing arrangement of the dominant firm. Common ownership is another theory of harm which shifts the focus away from competition to overlapping ownership of the competitors.

**John M. Yun** agrees while adding that the entry barrier is not necessarily harmful in itself but opens up the channel for other harms to competition. Courts often use the entry barrier in a casual sense where the barrier is treated as barring entrants from replicating the incumbent's success but that analysis "does not take us too far." It is questionable to treat barriers indiscriminately as harm to consumer welfare because economy of scale and patents are also barriers to entry yet nevertheless enhance welfare. Similarly, big data might make it harder to replicate success but it is unclear whether the dynamic use of data is ultimately welfare-reducing.

**Chris Hart** introduces non-price exploitative behaviors. The theory of harm involving exploitation does not necessarily involve price. One suggestion would be that exploitation happens when users do not get enough service from their data. But the lack of empirical analysis makes it difficult to quantify the value of the services received by the users. Another topic would be how competition authorities would respond if large platforms start paying users for their data and whether the conduct can be characterized as predation. It is also important to distinguish in exploitation cases where consumers have a choice versus when conditions are forced on the consumers.

#### **Are there ways for big data to strengthen competition?**

**Niloufer Selvadurai** remarks that data can enhance competition by challenging entrenched market power where companies have proprietary data as their main asset. In the FinTech industry, startups could couple rudimentary data with advanced algorithms and challenge established institutions with large proprietary data sets.

#### **What are the competing interests in the development of competition laws in big data?**

**John M. Yun** comments that digital services do not always mean that consumers are paying with their data and privacy. Like wearable gadgets, many services would be useless without personal data and consumers are making that informed tradeoff. A past research on the app store of a large platform reveals that apps that have more market power are often the ones offering better privacy policy. This should not come off as surprising as it is over simplistic to assign market power with poor privacy policy.

#### **What are the different policy approaches in regulating big data?**

**Chris Hart** states that the DMA is the rigid ex ante formalistic approach whereas DMU is a more flexible ex post assessment. The DMA might have unintended consequences of impairing innovation. Under that approach, it is possible that a firm will be compelled to provide access to data to its rivals, which might disincentivize other firms from developing their own data set into copying others via compulsory shared access.

#### **Should big data be regulated as an essential facility?**

**Adam Triggs** states that COVID responses have taught the competition community a lot with regards to the merits of big data in offering quick solutions. However, COVID has also revealed the challenges in harnessing big data. It is up to the government to level the playing field of big data. Competition policy needs to value incentives and develop a proper cost-and-benefit framework. It is inconceivable to treat data as utility whereas data portability is under deliberation in Australia.

*“...Big data is not homogenous. Big data that is cleaned, processed and verifiable has a higher value...”*

## AUDIENCE QUESTIONS

**To what extent can big data be used by regulators in competition analysis?**

**Chris Hart** notes the wide array of choices available to competition authorities to utilize data to improve their analysis. It might be overwhelming to run experiments with large amounts of data but the downside of not trying is worse.

**I want to raise the question of deidentified data and identifiable data. Should the government do more to release the deidentified data?**

**Adam Triggs** shares his early experience working with a credit check firm and points out that the balance between privacy and benefits in big data needs to be readjusted. It is impossible for private firms to legally triangulate the anonymized data to identify the users or pose serious privacy threats whereas enormous benefits could be derived from the big data with minimal threat to privacy.

**Niloufer Selvadurai** adds that though deidentified data could be difficult to identify using triangulation, deidentified data could always be re-identified as long as investment is available. It is recommended to stay up-to-date with the evolving technology in identifying anonymized data.

**Shouldn't the competition authority really divert their attention to the analytics of big tech platforms instead of their data only?**

**Niloufer Selvadurai** responds that when the discourse moves past the big data in its raw stage and into the field of algorithms, copyright law and IP law come into play and may be the better tools in addressing the concern relating to data analytics.

*“...Adam Triggs shares his early experience working with a credit check firm and points out that the balance between privacy and benefits in big data needs to be readjusted...”*





## Panel 4

# THE ROLE OF M&A IN INNOVATION ECOSYSTEMS



### Speakers:

Simon Wilkie (Head of Monash Business School, Monash University); Daniel Sokol (Professor of Law, USC Marshall School of Business); Louise Klamka (Partner, Gilbert + Tobin)

### Moderator:

Julie Clarke, Professor in Competition Law, Melbourne Law School, the University of Melbourne

### What do you consider to be an innovation ecosystem and what roles do M&A play in it?

**Daniel Sokol** notes that the innovation ecosystem is where startups scale with financial backing. The majority of the exists are also through M&A, which is building and replenishing the economic system. To illustrate, for UberEATS to deliver alcohol products, it would be much more efficient to simply acquire a company that already possesses all the necessary licenses. The complementary assets of the two companies are integrated through M&A to attain synergy, which could not be achieved by conglomerates in traditional industries.

### Is there a risk in the larger ecosystem given that exit strategies encourage innovations to exit through the dominant platforms?

**Daniel Sokol** notes that this business model is not unique in the digital economy. The competition is still alive across the ecosystems for the same innovation. It is also worth examining innovations in the post-acquisition stage. There are simply not sufficient empirics to come to a definitive conclusion of the competitive effects of those M&A deals.

### Where do you agree or what are your additional concerns?

**Louise Klamka** adds on to the two phases of innovation. The pre-acquisition phase is partly motivated by potential to exit. An acquisition by a large company will give the startup the access to the sophistication and expertise of the large company. The post-acquisition phase provides the benefits of the net-

work effects of the large platform. Both phases need to be considered in the impact of M&A on innovation in an ecosystem.

**Simon Wilkie** contextualizes the discussion by the reference of cloud technology which enables cheap scalable computing and eliminates the sunk cost of entry. However, only a few companies have the capacity to develop cloud computing which are large firms such as Google and Amazon. However, the absolute size of a dominant firm is not dispositive of the competition landscape in the tech sector as we have observed small firms with marginal technology displace a large dominant firm. The real difficulty in the analysis comes with the rise of the plethora of new firms in the digital economy as it is impossible to predict which startup will succeed in displacing the dominant firms. The data and algorithm generate value for consumers by making better predictions and matching, but the harms come from bundling which creates barriers not only to entry but to exit as well and this is where traditional market analysis fails.

### Do you agree that traditional tools cannot capture the value from M&A? If so, how do we intervene?

**Daniel Sokol** thinks this is an especially tough question. Many antitrust agencies do not possess the expertise in the cutting-edge technologies they are regulating. In the realm of the digital economy, the gross majority of technology startups end up in total loss with few firms surviving with spectacular returns. If the experts in the field cannot capture the value from M&A, then it is at least questionable that antitrust enforcers could.

**Louise Klamka** adds that digital industries are not the only sophisticated markets. Competition is driven by innovation rather than price wars. Australia has a flexible system for merger reviews that accounts for a non-exhaustive list of factors based on evidence collection and rigorous data analysis. The challenge is to find a definitive set of rules as the market is not static.

**Julie Clarke** adds that Section 50 Subsection 3 takes into account a long list of factors in merger reviews. But as the list grows longer, its pragmatic relevance remains a question.

**Most would agree blanket bans are bad. Is the bar still too high given the inherent uncertainty? Is it worth the few more false positives to test the waters?**

**Louise Klamka** observes that "we do not know if there is a problem." The complexity in the market will remain the problem to be resolved regardless of the antitrust regime. It has been hinted that Australia will revise the rules relating to merger control. Louise also expresses concerns over the current reform proposals that focus primarily on mergers of large digital platforms and do not address the main purpose of the reform which is to recapture the mergers that are shown to be anticompetitive but initially fell below the reporting threshold.

**Daniel Sokol** adds that digital transformation is already occurring across the economy. The concerns we create over anticompetitive conduct exist across the industries. If we are concerned, we should be concerned more broadly. Daniel recommends limiting the anticompetitive concerns to characteristics unique in the digital economy as opposed to those shared with traditional industries. On the flipside, there are many concerns over the digital sector that are not inherently antitrust concerns, such as identity theft and data privacy, and will be better resolved by policies and laws beyond the scope of competition law.

## AUDIENCE QUESTIONS

**Blanket bans are not ideal, but the default is doing nothing, which seems like an even worse option.**

**Louise Klamka** remarks that the alternative to blanket bans is not "do nothing" but to apply the tools available. Merger cases are hard to prove in court in any market. The notion of low-probability high-impact M&A in the technology sector is questionable. The CMA blocking of the acquisition of Giphy is global, but that deal does not concern wholesale consumer harms or high barriers. The key is not to tailor the merger review process to

the digital sector but to ensure that merger analysis is "correct across all mergers."

**Daniel Sokol** emphasizes that the mechanism of M&A reporting threshold implies the tradeoff between low probability and anticompetitive harms. Agencies have been comfortable making the tradeoff and have decades of experience.

**Simon Wilkie** refers to the U.S. telecom industry where dual reviews are applied to license transfers. The legal standard for such transfers is different and the applicants are required to show the deal is in the public interest. But it is difficult to show that the digital economy warrants that type of different treatment.

**One of the common concerns is that the vast amount of data needed to analyze the merger is always held by the merging parties. Do you sympathize with the proposal for a compulsory regime compelling notification?**

**Louise Klamka** recognizes the attractiveness of a compulsory regime but sees no reason to limit it to the digital sector, as the problems are not unique in the digital economy. The agency may utilize Section 155 power to access data but data is meaningless unless it is collected for a particular purpose.

**Daniel Sokol** adds that familiarity with data analytics by the enforcers is pivotal to an effective merger enforcement. The litigation and discovery processes take long and can be easily "optimized" by offering more streamlined guidelines for merging parties.

**What do you think of the decision to force Microsoft to include Netscape? Was that the right decision?**

**Simon Wilkie** thinks it is probably the right decision. It slowly changed the culture within Microsoft, which eventually expanded its legal team to 1000 lawyers.

**Daniel Sokol** thinks the case stood the test of time with firm legal foundations and traditional theory of harms. Robert Bork was the expert in Netscape at the time yet refused to testify in support of Microsoft because he did not buy into Microsoft's argument. Good cases do exist.

**Louise Klamka** states it is difficult to assess the future state of digital markets but the competition problems are not different. The existing tools enable the enforcers to assess the competition problems in not only the digital market but other markets that are equipped with digital technology.



# CLOSING

## Julie Clarke

Professor in Competition Law, Melbourne Law School, the University of Melbourne

**Julie Clarke** presents the recap of the conference. Professor Jenny expressed his views that we have to adapt competition laws to deal with unique market characteristics existing in digital ecosystems. The panels have differed in the scope and degree of the difference in characteristics of the digital economy. Effective clusters need "buzz and gossip" which requires proximity though some might disagree.

For the session on privacy, Julie notes the debate tradeoff between the convenience of algorithms and the intrusion into private life as manifested in the large platform's handling of user data. The panels have revisited the importance and implications of data in competition analysis. The M&A issues relating to digital markets are the most challenging. There is a clear consensus that we do not fully understand the digital markets and a better

understanding of distinct aspects of digital ecosystems would help. It is clear that there will be changes and events like this help us frame and influence the discussion that helps address the concerns of stakeholders and consumers alike.

*“...the debate tradeoff between the convenience of algorithms and the intrusion into private life as manifested in the large platform's handling of user data...”*





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**“ As a competition economist, I gained a lot from this conference”**

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**“ An excellent discussion of critical issues by leading experts with an engaged audience”**

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**“ This was a great conference, I learnt a lot! Highly recommend attending any similar future events”**

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