

Towards a Competition Enabling Framework in Asia Pacific:



MERGERS & ACQUISITION IN THE DIGITAL ECONOMY: STRIKING THE RIGHT BALANCE

Background Note:

- The panel explored the topic of mergers and acquisitions in the digital economy, and whether current enforcement practice is striking the right balance. Specifically, the Panel addressed whether there is a need to recalibrate merger policies in the digital economy.
- Recent years have seen discussions in multiple jurisdictions as to how merger rules should be adapted (if at all) to mergers and acquisitions in digital markets and whether they raise concerns distinct from traditional bricks-and-mortar models.
- The discussion spanned cryptocurrencies/blockchain, platform economics, and recent reform proposals worldwide, as they apply specifically to merger control law and economics. In particular, the question of whether different merger rules should apply to “large” tech companies acquiring potential or nascent competitors was discussed.

Participants:



Chris BERG | Co-Founder and Co-Director, RMIT Blockchain Innovation Hub at RMIT University



Sean ENNIS | Professor, University of East Anglia



Rob NICHOLLS | Associate Professor, University of New South Wales



John YUN | Associate Professor, George Mason University

Moderator:



Kirsten WEBB | Partner, Clayton Utz

Panel Summary

The Panel was chaired by **Kirsten WEBB**, partner at Clayton Utz, Sydney. The Panel included **Chris BERG**, senior research fellow at RMIT Blockchain Innovation Hub; **John YUN**, associate professor of law and director of economic education with the Global Antitrust Institute; **Sean ENNIS**, professor of competition policy at Norwich Business School at the University of East Anglia; and **Rob NICHOLLS**, associate professor at the University of New South Wales.

In summary, the key points raised by the panelists were as follows:

Chris BERG noted that there is a need to rebalance the way we think about competition in digital markets, particularly concerning blockchain and the crypto economy. Many of the assumptions that have been applied to traditional industrial economic organization don't apply and don't make sense in the crypto and blockchain space.

This concern replicates itself across the economy as we move from the factory organization of the economy to platform network de-hierarchical organizations that we're now seeing. This necessitates a fairly deep rethinking about what anti-competitive conduct looks like and how to realize consumer protection.

Key Talking Points | Chris Berg

- The crypto economy raises interesting problems from a traditional mergers perspective. Communities decide whether or not to merge cryptocurrencies. Competition regulators haven't gone into this yet. We are blurring the boundaries between who owns the firm and who uses the firm's products. If a community decides to merge with another community, even if that might materially harm the competitive landscape of the crypto economy. Well, does that raise competition concerns?
- Concerning the acquisition of a new entrant, the possibility of exiting via a sale to a large or dominant competitor is often built into the capital structure of the original innovators themselves. A large part of the venture capital model is built around the notion that, that ultimately in five, 10 years, they can return funds to their liquidity providers.
- When we're thinking about regulating such exits, we're also going to be starting to implicitly regulate the entry. The risk is that certain reforms might end

up restructuring the venture market at the beginning.

- Sometimes mergers by tech companies can be very pro-competitive, e.g. Spotify solidifying its space in audio, podcasting vs. Apple, Google, etc.
- Some proposals would inherently mean that startups trade at a discount because regulations make quite risky one of the basic exit strategies. If you think about some of the tech acquisitions that haven't come to the attention of competition regulators in recent years, there aren't revenues, there's certainly not profits. Often, these are just acquisitions to buy a team.



Chris BERG | Co-Founder and Co-Director, RMIT Blockchain Innovation Hub at RMIT University

John YUN stated that this is a complicated concern, but that at least the objective of current policy is correct. Namely, modern antitrust and its evidence-based approach and the goal of economic efficiency is something that has been very good for antitrust. This does not mean that the enforcement towards that objective has been perfect. However, at least the objective is right.

Key Talking Points | John Yun

- The question concerning mergers is, essentially: is current enforcement getting the correct results? Does the digital sector present unique challenges that we need to incorporate specifically into the analysis, and are we deviating from what we consider to be good enforcement? In short, we just don't know. The evidence is mixed, and the analysis must be case by case. Absent extraordinary evidence, generally speaking, merger analysis is in a good place.

- Specifically with regard to *Facebook/Giphy*, the CMA, obviously has evidence that is not public and that we're not privy to, and so they might have good reasons for bringing that case. That said, for their theory of harm to work on a horizontal level Giphy needs to represent some differentiated product from others that are similarly situated. This can be identified in a couple of ways:
 - Have they differentiated their product in a way that's different from what they've developed previously? Because an eight year old company isn't quite nascent and potential anymore. They're a fairly established company.
 - How differentiated is Giphy from other sort of GIF type companies that offer a similar product? This is critical. Are their customers more closely aligned with Facebook users more than others? The vertical theory (that GIFs may be denied to other platforms) may be more worrying.
- Of all the exits in the U.S. from startups and venture capital firms, big tech represents 4 percent, but this is still significant and important.
- Nonetheless, potential competition and nascent competition should be regarded as separate doctrines. Potential competition is exemplified by e.g. beer cases in the U.S. in the 1970s (craft v. regular beer), whereas nascent competition is exemplified by e.g. Netscape's threat to Microsoft in the 1990s. There should be separate burdens of proof for each (lower burden of proof for nascent competition).
- There is a risk of producing "discriminatory antitrust" whereby acquisitions by large firms would be subject to prohibition (or a reverse burden of proof), but acquisitions by more modestly sized firms would be subject to a rule of reason. This would be a negative development.

Sean ENNIS noted that even if there are shortcomings, only a relatively modest percentage of mergers have been problematic in recent years. Some agencies have upped their game in this area and that shows that there is some ability to change the way they act without necessarily having a fundamental rethink of the broad system.

Key Talking Points | Sean Ennis

- It's commonly accepted in some countries that you might have a different standard for abuse of dominance based on size, but this is more difficult in merger analysis. It is difficult to understand why e.g. mergers by GAFAM should be treated differently from others. It is concerning to be moving away from generally applicable principles.
- There have been some proposals to both flip the standard of proof and reduce checks and balances on the competition authority. If you put those two together, that's a very dangerous combination, because effectively you might end up with the administrative authorities, the prosecutors, having both a stronger ability to stop deals and less control over themselves to make sure that they were acting in a reasoned way.
- A lot of tools do exist for competition authorities to deal with digital deals. There's a question of how large one has to be as a country in order to successfully address some of the international deals and to not to be ignored. There's a lot of opportunity for behavioral remedies that could be reasonable on a national level.
- At a national level, what matters is having the appropriate process and a fair ability of both firms and make sure the regulators or competition authorities get the right information and have an opportunity to input before there's any final decision.

John YUN | Associate Professor, George Mason University

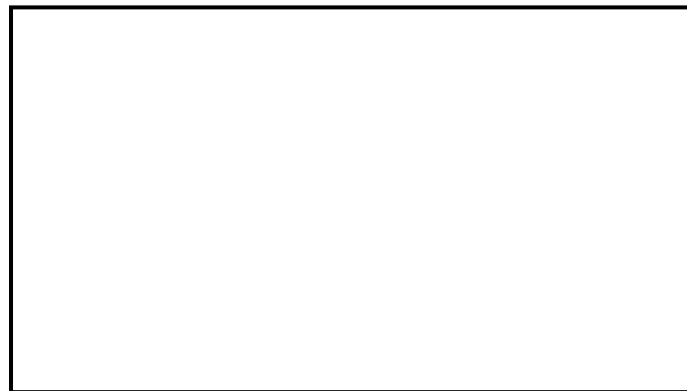
Sean ENNIS | Professor, University of East Anglia

Rob NICHOLLS stated that, ultimately the question of merger control boils down to consumer welfare issue as the driver. The question is whether there is something that's going wrong at the moment that justifies the drive for reform from different regulators.

Key Talking Points | Rob Nicholls

- If merger analysis posits that every potential acquisition by the GAFAM or some list of businesses has to be reviewed in a particular way, then there's a risk. There's a risk of stifling innovation in that, that exit process is no longer available.
- There needs to be a balance. Sometimes acquisitions of startups can be pro-competitive. Having a specific regime for certain companies (shifting the burden of proof) can be anti-competitive. There is a high risk is that there will be an ecosystem of innovation which is stifled.
- It important that any changes to merger control that are sector specific within the digital economy relating to a small number of businesses are certain not to stifle innovation. Innovation in the digital economy is the driver of innovation and the driver of productivity in national economies.

- Even though there is jurisdictionally specific legislation, there is the potential for coordination in merger analysis and merger control at least among the OECD countries and the ICN.
- Having an informal body such as the ICN may be the preferable approach. It will allow jurisdictionally specific legislative changes without a formal process. The consensus that you can get through the ICN has the potential for leading to much more efficient outcomes, because the economic rationale can be agreed, but on an informal basis.



Rob NICHOLLS | Associate Professor, University of New South Wales

SPEAKERS



Chris BERG

Chris Berg is a Principal Research Fellow and Co-Director of the RMIT Blockchain Innovation Hub, the world's first dedicated social science research centre studying blockchain technology, based at RMIT University, Melbourne.

Associate Professor Berg is one of Australia's most prominent voices for free markets and individual liberty, and a leading authority on regulation, technological change, and civil liberties.

Berg is a Research Fellow with the University College London Centre for Blockchain Technologies, a Founding Board Member of the Worldwide Blockchain Innovation Association and the International Society for the Study of Decentralised Governance, is an Academic Fellow with the Australian Taxpayers' Alliance, and is on the Academic Board of the Samuel Griffiths Society.



Sean ENNIS

Sean Ennis is the Director of the Centre for Competition Policy and Professor of Competition Policy at Norwich Business School. He has extensive experience in government work and competition law and policy.

In the past, he was a Senior Economist in the Competition Division of the OECD. While there, he developed and led the competition assessment program. Prior to that, he worked as an economist at the European Commission's DG Competition and at the US Department of Justice's Antitrust Division, developing economic analyses for competition law investigations. Sean has published research studies and reports and provided capacity building related to a broad range of business activities (including digitalization, communications, healthcare, financial and professional services).

He has co-authored or overseen reports for regulatory and government agencies in Australia, Greece, Mexico, Romania, the United Kingdom and the United States. He has been involved in competition law and regulatory proceedings including with the European Commission, the U.S. Department of Justice and the U.S. Federal Communications Commission.



Rob NICHOLLS

Dr Rob Nicholls is an associate professor in regulation and governance at the UNSW Business School and a visiting professional fellow at UTS Sydney Law. His research interests focus on competition law and the regulation of networked industries with a focus on the intersection of technology and regulation. His first degree was in electronics and communications engineering from the University of Birmingham, and he was awarded his PhD and MA by UNSW Sydney. Before moving to academia, he had a thirty-year career including working for law firms and the ACCC. Rob is an accredited mediator and from 2012 to 2020 was Australia's Independent Telecommunications Adjudicator.



John YUN

John M. Yun is an Associate Professor of Law at the Antonin Scalia Law School, George Mason University, and the Deputy Executive Director at the Global Antitrust Institute (GAI).

Prior to joining Scalia Law, he was an Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission (FTC). Also at the FTC, he has served as the Economic Advisor to Commissioner Joshua D. Wright, as well as a staff economist. His experience includes the analysis of horizontal mergers, vertical restraints, and exclusionary conduct.

Over an eighteen year career at the FTC, he has presided over numerous high-profile matters and investigations into various industries including consumer products, retail, intermediate goods, and digital markets. His research interests include law and economics, antitrust, regulatory policy, and industrial organization, and he has published in academic journals including the *International Journal of Industrial Organization*, *Economic Inquiry*, *International Review of Law and Economics*, and the *Review of Industrial Organization*. He has also taught economics at Georgetown University, Emory University, and Georgia Tech. He received his BA in economics at UCLA and his PhD in economics at Emory University.



Kirsten WEBB

Kirsten Webb is a partner at Clayton Utz where she practices in all aspects of competition law including complex anti-trust litigation, merger clearance, investigations and enforcement action by the ACCC and other regulators.

She also advises on marketing and other consumer protection issues for retail clients and has devised and implemented trade practices compliance programs.

Kirsten has a particular interest in regulated industries and third party access in water and wastewater, telecommunications, energy and rail.