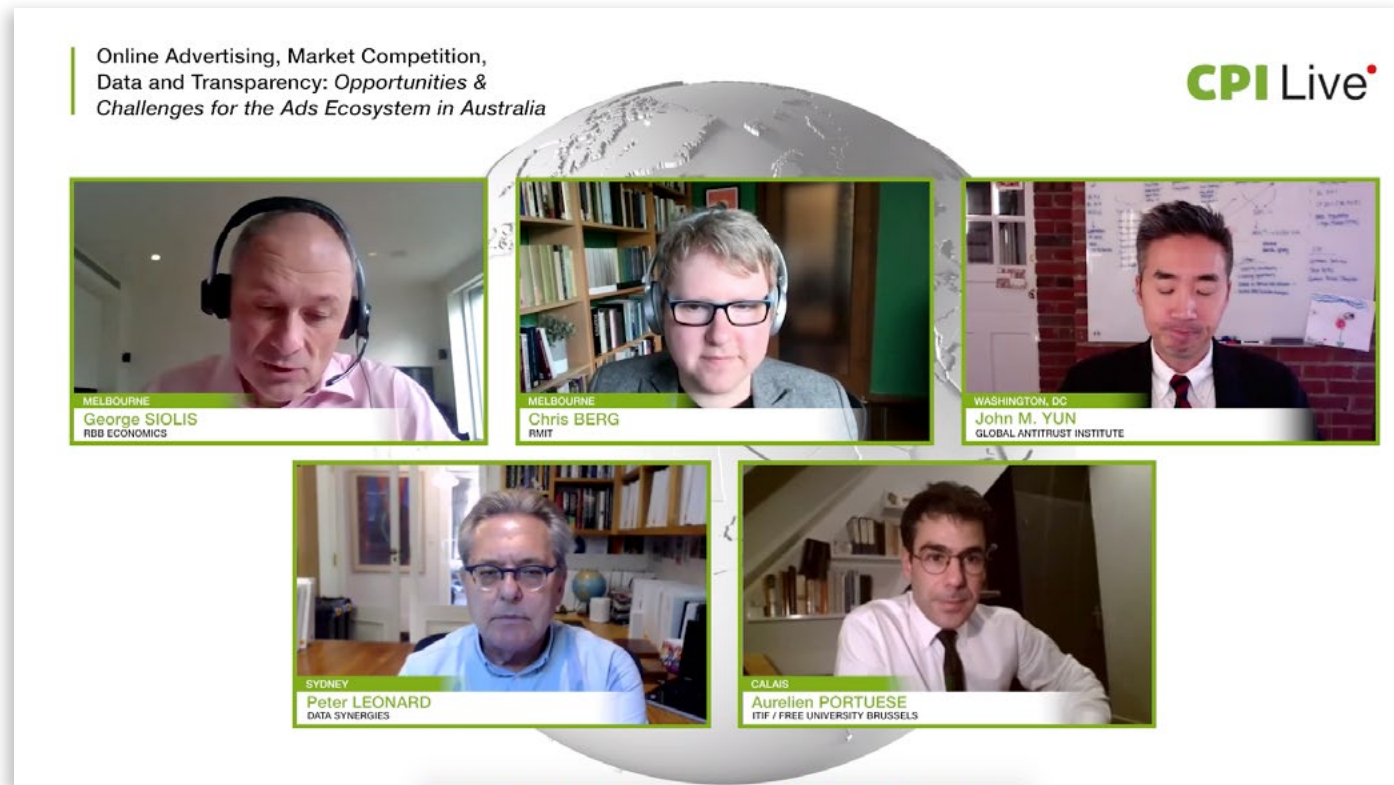


**The Future of Mobile Ecosystems:
Enabling a Choice for Market Players
& Consumers in Australia**
Opportunities & Challenges

AUSTRALIA CHAPTER



ONLINE ADVERTISING, MARKET COMPETITION, DATA AND TRANSPARENCY: OPPORTUNITIES & CHALLENGES FOR THE ADS ECOSYSTEM IN AUSTRALIA



Panel Summary

The Panel was moderated by **George Siolis** (RBB Economics) who highlighted that one of the peculiarities of the digital economy is that given zero pricing for services, consumers often pay for the services by way of their data, that gives rise to special type of competition concerns. He also noted the tendency of market power getting entrenched with few market players in the digital economy due to better harnessing of data and creation of entry barriers.

Chris Berg (RMIT Blockchain Innovation Hub) and **John Yun** (Global Antitrust Institute, Antonin Scalia Law School) discussed the peculiarities of the digital markets. While Chris Berg noted that there is certain difficulty in defining consumer harms because of zero pricing model followed in many a multisided markets, John Yun remarked that holding market power or consumer data alone does not accord market power and that there is need to understand the business model of the platform and the role that data plays in it. In this context, he highlighted that analysis of big data is the key step in unlocking the value of data, and not mere possession of data.

The Panel discussed the merits and demerits of the News Media and Digital Platforms Mandatory Bargaining Code introduced by Australian Competition and Consumer Commission (ACCC) that determines the ad revenue share between Google and Facebook on one hand, and the local news publishers on the other.

Peter Leonard (Data Synergies) pointed out how the Code is essentially in the nature of a digital tax in response to shift of ad revenues from publishers to tech platforms and sets a bad precedent. **Aurelien Portuese** (ITIF) and Chris Berg agreed that competition law should not be used as a tool for managing / preserving journalistic quality.

On the role of data in the context of platform regulation, Peter Leonard noted that while data generation is inevitable and can potentially impact market power dynamics, privacy concerns should not be conflated with competition concerns. John Yun opined that any misuse of data, as determined by reference to a platform's privacy policy, should be dealt with harshly to create deterrence. An interesting observation was made by Chris Berg in relation to privacy viz. any regulatory standard with respect to privacy may not be reflective of the consumer understanding of privacy, which is definitionally subjective.

The role and nature of ACCC as competition regulator and a policy implementor, as well as the rolling mandate that the ACCC has with respect to the regulation digital markets (that results in effective and dynamic regulation instead of episodic interventions) was highlighted by Peter Leonard.

Key Talking Points | Aurelien Portuese

1. On the Code:

Good faith standard: The Code imports the (vague and imprecise) concept of 'good faith' (in respect of negotiations) from the Vienna Convention of the Sales of Goods. Placing obligation on a party to conduct good faith negotiations may not amount to much in reality. A contract where a party uses bargaining power to get a better deal may run afoul of the good faith principle. This is likely to create legal uncertainty and deter innovation.

Selective application: The Code only applies to Google and Facebook leaving out Instagram, Twitter, LinkedIn, Snapchat, and Apple News and thus creates an artificial duopoly.



Aurelien PORTUESE Director of Antitrust & Innovation Policy, (ITIF), (VUB)

Diminishes freedom to contract: The Code is an alternative to proceedings and places restriction on the freedom of contract as companies are forced to enter into contracts, thus implicitly extending the essential facilities status to these companies, without demonstrating the reasons therefor. There is a sort of obligation on tech companies to negotiate and enter into contract with news publishers, which can be viewed as a tax imposition.

Ex ante regulation: The Code amounts to ex ante regulation that seeks to regulate conduct before it happens and this approach may be counterproductive for innovation.

Background Note:

- December 2020: The Australian Competition and Consumer Commission (ACCC) has introduced The News Media and Digital Platforms Mandatory Bargaining Code ("Code")¹ to govern negotiations between digital platforms publishers regarding the payment terms for news content. The stated purpose of the Code is "ensure that news media businesses are fairly remunerated for the content they generate, helping to sustain public interest journalism in Australia".
- April 2020: French Snippet case and Google – French publishers complained to the regulator regarding low ad revenues from Google. Google decided to stop showing news snippets from European publications to its French users. The French courts ruled that Google must pay the French publishers for re-using their content.

Participants:

-  **Peter LEONARD** | Principal & Director, Data Synergies
-  **Chris BERG** | Senior Research Fellow, RMIT Blockchain Innovation Hub
-  **John M. YUN** | Associate Professor of Law and Director of Economic Education, Global Antitrust Institute
-  **Aurelien PORTUESE** | Director of Antitrust & Innovation Policy, Information Technology and Innovation Foundation (ITIF) Professor of law, Free University Brussels (VUB)

Moderator:

-  **George SIOLIS** | Partner, RBB Economics

¹ Available at <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/news-media-and-digital-platforms-mandatory-bargaining>

Overlooks business realities: The Code ignores reciprocity and assumes that Google and Facebook are freeriding. It does not factor in the possibility that they may be driving traffic to the news publishers or that news publisher may be free riding Google and Facebook to derive traffic from snippets on Google and Facebook.

2. On Media Diversity & Journalistic Quality:

Competition laws should not be used as a tool for protecting and fostering media diversity.

There is a tendency to equate traditional news publishers with journalistic quality and to assume that that digital platforms and news aggregator is promote bad journalistic quality. This tantamount to imposing one's own preferences over the consumers and is antithetical to core competition law principles. The onus of improving journalistic quality cannot be on the news aggregators.

“...The danger is when you dislike consumer preferences and you want to put the regulators preferences at the expense of the consumers preferences, and of course, this is very opposite to competition law, because it will overtly harm consumer welfare, but it's also dangerous...”

Aurelien Portuese

Key Talking Points | Chris Berg

1. Difficulty in Defining Consumer Harm in Digital Market:

There is a need to recognise that multi-sided market platform require different policy approach compared to that applied to traditional markets (especially, the consumer harm metric), given the zero pricing model followed on many platforms. There may instead be harm to privacy and data. Consumer's attention, as suggested severally, cannot be said to the price for a service

“...we are observing that there are big companies, so therefore they must be harming. And we're trying to squeeze that into a regulatory framework that has not been designed for these organization...” **Chris Berg**

2. Players and Not Consumer Harm in Focus:

Big tech platforms have been singled out and are being watched keenly. There appears to be a presumption of consumer harm, which is misapplication of traditional product market regulation to tech platforms.



Chris BERG Senior Research Fellow, RMIT Blockchain Innovation Hub

3. Role of Data:

Market power of tech platforms arises from network effects and externalities. Data is a by-product of the nature of the market and not a competition issue per se.

There is a tendency to conspiracize (sic) how tech companies harness user data. Data is co-created by users and the platforms together (such as Reels or Facebook graphs) and this creates complex ownership issues.

“...there's a bit of magical thinking about data: that these organizations, these firms seem like black boxes to which we share everything in the world, and then somehow they manage to monetize that, somehow they manage to onsell that...”

Chris Berg

4. On the Code:

The Code is a ill thought out rent seeking political intervention, more than a competition related intervention, in favour of the public broadcasters viz. ABC and SBS. The Code deals with requiring firms to pay for the right to link to content of other firms. If cross linking content on the internet is viewed as expropriation and brought within the realm of contracts, then the legislature should amend the property rights framework in Australia to govern the capacity to link to other people's websites.

Competition policy cannot be tool for regulating journalistic quality.

Key Talking Points | Peter Leonard

1. Rolling Thunder of the ACCC:

The ACCC is a vertically and horizontally integrated regulator, policy maker and policy implementer that may lead to confusion between the role of the ACCC in competition regulation, and its role in consumer protection regulation.

The ACCC is funded on a rolling ongoing basis from 2021 to 2025 to review activity in the digital services and digital platform sector; where reports are put out every six months. This puts the pressure on the market participants to remain compliant on an ongoing basis and is contrast to the episodic approach of regulators in other countries.



Peter LEONARD Principal & Director, Data Synergies

2. Role of Data:

Data is significant in creating power imbalances. There is a shift of user data from media publishers to the digital platforms that has created power imbalance that merits regulatory intervention. Media publishers do not have sufficient negotiation power vis a vis digital platforms since the latter have data on users and can control where the eyeballs go.

Data gets inevitably collected as a by-product of being in the digital space. Digital platforms also need to be credited with unlocking value from such data.

The European proposal to disable the use of third party cookies may create a power imbalance in advertising data ecosystems as vertically and horizontally integrated parties (read big tech) who don't want to share cookies or cookie data with third parties will have much more user data compared to other players who are denied third party cookies.

Privacy debates that are outside the realm of competition policy are often dressed up as competition debates under ACCC.

“...To actually, in essence, treat data privacy solely as a consumer protection and competition issue is to completely misunderstand the proper role of data privacy and freedom from surveillance in a modern digital economy...” **Peter Leonard**

3. On The Code:

The Code is an instance of ex ante precautionary regulatory intervention that has mechanism for a baseball determination by way of arbitration if the parties don't agree on a price (i.e. the arbitrator decides between the price points posited by the parties). This is far from an application of conventional competition analysis.

The Code is in the nature of a digital services tax on the digital platforms. This is a response to the dislocation of advertising dollars, from where they formerly resided (i.e. Australian news media), to global digital platforms.

“...Advertising has moved from one location to another, and we've now decided to come in and tax the owners of the new real estate and dress it under a veneer of competition law...”

Peter Leonard

Key Talking Points | John Yun

1. Market Power in the Digital Space:

Market power by itself isn't an antitrust violation at least in most jurisdictions. All disparities in market power do not merit competition intervention.

High switching costs or switching constraints on a user, problems in data portability of users are a cause of concern.

Analysis of big data, a skill and cost intensive task (and not mere collection or possession of data), gives rise to market power.

2. Need to Understand Business Organisation:

There is a need to understand business organization of the platforms, their multi sided nature and their market power over advertisers and the users. It must be recognised that advertisers follow users and not vice versa.

While data can be used to make service offerings better, enhance consumer welfare, it must be recognised that using data relies on inputs from other industries such as research and development, patents, facilities, infrastructure, etc.

3. Misuse of Data to Be Dealt with Harshly:

There are privacy concerns around data misuse by the tech platforms. Users should know how the data will be used once collected and the purpose of its collection. Tech platforms need to be held strictly accountable to their privacy policy and representations made to their users (and not being held to a vague legal standard of privacy). Penalties for misuse of data should be almost higher than the actual harm caused to deter future deviations.



John M. YUN Senior Research Fellow, RMIT Blockchain Innovation Hub

4. On The Code:

Sometimes, regulation can have unintended consequences as seen in case of GDPR where emergent research suggests that larger firms with greater vertical integration are benefiting from the GDPR implementation. In respect of the Code, unintended consequences remain to be seen, such as impact on smaller publishers and platforms in situations where the platforms and publishers are aligned. The Code may inadvertently favour bigger players.

The Code is also a harmful precedent of involvement of state with media and that of the state subsidizing the local media.

“...we go from collection of data, to the unlocking of value from data, and there’s what we would, in economics, call ‘cost step’ ” **John Yun**

GEORGE SIOLIS



George joined the Melbourne office as a Partner when RBB Economics was established in Australia in 2009, and since then he has advised clients on a number of contentious mergers before the ACCC as well as a variety of behavioural matters involving the alleged misuse of market power. He is a member of the Consumer and Competition Committee of the Business Law Section of the Australian Law Council and is listed in Who’s Who Legal of Competition Lawyers and Economists.

Chris BERG



Chris Berg is a Senior 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.

Dr 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.

Peter LEONARD



Peter Leonard is a data, content and technology business consultant and lawyer. He is principal of Data Synergies, a business and legal consultancy for data driven businesses, Professor of Practice at UNSW Business School and consultant to Gilbert + Tobin Lawyers. He focuses on business transactions with significant data, regulatory and cross-border complexities, often working as counsel assisting other law firms, consultancies and in-house counsel to plan, structure and manage complex deals and projects.

John YUN



John M. Yun is an Associate Professor of Law and the Director of Economic Education at the Global Antitrust Institute (GAI). Prior to joining the GAI, he was the Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission. Also at the FTC, he has served as the Economic Advisor to Commissioner Joshua D. Wright, as well as a staff economist

Aurelien PORTUESE



Dr. Aurelien Portuese is professor of law at the Brussels School of Governance of the Free University Brussels (VUB), and adjunct professor of law at the Global Antitrust Institute of George Mason University. As an expert in US antitrust and EU competition law & economics, Aurelien Portuese has published extensively on these issues and has presented its research at international conferences