

# Towards a Competition Enabling Framework in Asia Pacific: *Opportunities and Challenges*

ENSURING INTERNATIONAL ALIGNMENT  
OF NATIONAL COMPETITION POLICY INITIATIVES



# ENSURING INTERNATIONAL ALIGNMENT OF NATIONAL COMPETITION POLICY INITIATIVES

Ensuring international alignment  
of national competition policy initiatives

**CPI Live**



and along with a number of  
other topics in antitrust.

## Background Note:

- This Panel explores matters of convergence of competition policies internationally, with a particular focus on initiatives in the Asia-Pacific region.
- The Panel touched on alignment issues from a contemporary and historical perspective, with a particular focus on recent initiatives in the technology sector.
- In particular, the panel touched on the factual differences that are salient to the analysis of similar antitrust issues in different jurisdictions, taking into account the economic and cultural context in each country (e.g. the salience of data) and recent policy initiatives in individual countries (e.g. the push for “national champions”).
- Other issues to be discussed include the risks of protectionism (e.g. through “national champions”) and regulatory capture as new rules are being formulated, particularly in the tech sector.

## Participants:



**Vivek GHOSAL** | Professor and Head of the Department of Economics, Rensselaer Polytechnic Institute



**Geeta GOURI** | Former Commissioner, CCI



**Deborah ELMS** | Founder and Executive Director, Asian Trade Centre



**Christopher YOO** | Professor, University of Pennsylvania



**Arun SUNDARARAJAN** | Professor, New York University

## Moderator:



**David S. EVANS** | Chairman, Global Economics Group

## Panel Summary

The Panel was chaired by **David Evans** of CPI. The Panel included **Debbie ELMS**, executive director at the Asian Trade Center who works closely with businesses and governments in the Asia region; **Geeta GOURI**, former member of the Competition Commission of India; **Vivek GHOSAL** professor of economics at Rensselaer Polytech Institute; **Arun SUNDARARAJAN**, professor of entrepreneurship and technology and operations and statistics at New York University; and **Christopher YOO**, John H. Chestnut Professor of Law at University of Pennsylvania.

**David EVANS** queried whether where countries are dealing with similar issues, are they dealing with them in similar ways? Are there inconsistent results? Has this become better or worse in the last decade or so?

**Vivek GHOSAL** opened by focusing on the question of timing:

### Key Talking Points | Vivek GHOSAL

- The major issue of our times is dealing with technology and related areas, and particularly big data and which countries have it. Also there is the question of certain companies potentially giving preferential treatment to their own services, to want their own portals compared to rivals. In the technology area, the U.S. typically has had a somewhat different, much more laissez-faire, innovation-first approach.
- While certain cases have been bubbling up against large tech companies in other countries, this has come later in the U.S.
- Looking at alignment issues, a key question is whether different jurisdictions are treating similar issues the same way in the same timeframe.



**Vivek GHOSAL** | Professor and Head of the Department of Economics, Rensselaer Polytechnic Institute

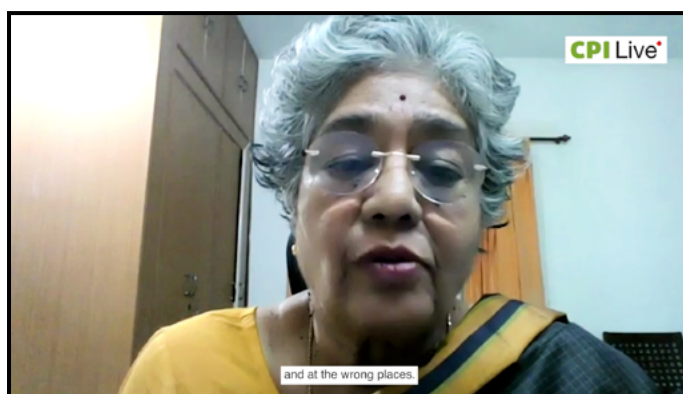
**Geeta GOURI** noted that there are certain things that are culturally peculiar to a country:

### Key Talking Points | Geeta GOURI

- This is true for e.g. data network effects (as distinct from normal network effects). Until recently, these were not considered as part of competition law at all. They can have positive and negative effects in terms of economies of scale.
- We seem to be quite taken in by the European Union approach to data, but this may not be appropriate for every country, e.g. India, where people may be less sensitive about sharing certain data. Studies have to be done to understand what is the data that is crucial for each country.

Competition policy in a country like India, which is gradually moving towards accepting markets, market forces, has been mixed up with a very strange feeling of nationalist feeling nationalism (a . Our own country, our own gatekeeper, our own commerce. As a result, there seems to be a lot of contradictions that are pervading, but these are our problems. It has to be sorted out. It's a sort of a political economy question).

- I think, Arun, what you said right in the beginning, even in terms of markets, it's still not accepted. As a competition policy and as a competition authority, it is always often secondary to government policies and government involvement. Their politics and what they would like to fly high. I think this is where the sort of contradictions that are going to come up will have to get sorted up. This was there even when in traditional arguments on e.g. trade and protection and taxation, for instance. This can go against global convergence.



**Geeta GOURI** | Former Commissioner, CCI



**Deborah ELMS** noted that there is a lack of a consistent international approach to many key competition issues:

### Key Talking Points | Deborah ELMS

- We have consistency on a certain competition policy questions, (especially those relating to traditional enterprises dating back to the breaking up of the railroads and Standard Oil, and so forth). What we don't have is a lot of consistency about how those competition rules or that competition approach should be handled in the digital age.
- Concerning digital markets, there are inconsistencies building up in the way that different jurisdictions or different governments manage competition in the digital space, and some of those issues are likely to deepen and increase compliance costs, which could undermine the promise of the digital economy.
- Asian enforcers appear to be trying to use competition policy to achieve different objectives. The approach is very muddled. This leads to a challenge in digital: It's not just big multinationals that pay the price for that, but also consumers and small businesses because small businesses can't possibly compete when they have such inconsistent rules in different markets. It is important to have a better discussion.



**Deborah ELMS** | Founder and Executive Director, Asian Trade Centre

**Christopher YOO** noted that there is a fair amount of alignment in a lot of areas of law. For example, in cartel policy and certain aspects of a merger policy, but there are some divergences concerning single firm conduct:

### Key Talking Points | Christopher YOO

- A certain amount of variation is healthy and is how we learn (as in the 1970s when there was a divergence

with regard to the U.S. adopting a more economic approach). There can be a certain amount of optimal experimentation, which is really positive.

- There are, however, variations. It can be less healthy if you disagree on the goals of antitrust, and the ability of firms to predict the law and plan their behavior. For example, if countries adopt different priorities in terms of willingness to protect privacy and data, or to interfere in stock and exchange markets more generally, which can produce different types of inconsistencies.



**Christopher YOO** | Professor, University of Pennsylvania

**Arun SUNDARARAJAN** agreed that there's a degree of alignment on certain aspects (e.g. cartels), but less in other areas (monopoly power and predatory pricing, and tech regulation):

### Key Talking Points | Arun SUNDARARAJAN

- Concerning tech, the U.S., the EU, China, etc. are at very different points in their economic evolution and countries have different political and social philosophies. Divergence is natural, but every best of breed approach should have at least three characteristics:
  - That it be evidence and fact-based.
  - That it consider the unintended consequences of regulation carefully
  - That it rely actively on economic analysis.
- Concerning network effects, it is important to consider whether the benefits of network effects it is important to consider their benefits and harms are direct or indirect, localized or global. One might argue that the more localized the benefits and power from network effects, the stronger the case for best of breed competition policy, and that alignment is more important when network effects are global.

- There is a lot of common ground in some areas like price fixing and cartel behavior, but predatory pricing and monopoly power alignment might be different, might be more difficult, because of different philosophies on what constitutes a dominant market position and what behavior is unacceptable.
- The global span of power of tech companies means there can be more benefits from alignment. Although network effects may be localized, the span of operations of a big tech company is naturally larger. Localization of rules can be good for the countries because of their different stage of evolution that the economy might be in. But on the other hand, it can be a challenge for the big tech companies.



**Arun SUNDARARAJAN** | Professor, New York University

**Christopher YOO** noted that here is a global search for national champions and the attempt to graft on industrial policy and other dimensions to this:

### Key Talking Points | Christopher YOO

- Protection of national industry and competition policy can conflict. For example, the ACCC digital markets inquiry did not only focus on competition policy industry, but also saving domestic media industries.
- The debate over neo-Brandeisian antitrust is similar to the '60 and the '70s. There were multivariate, multi-dimensional goals of antitrust, and we rejected them for a lot of different reasons. One is you can't optimize multiple things at the same time.
- Contestable markets imply that large market shares do not inevitably lead to anticompetitive conduct. There's an awareness of the economies of scale that were important back then, that are probably more important now.
- We can't expect one area of law to do all things to all people. Income redistribution or industrial policy can

be achieved through specialized tools. But to build that into antitrust law is essentially to put that on the back of consumers in a non-transparent, non-democratic way that is also not good for fundamental values such as economic growth and prosperity.

**David EVANS** queried whether the variety of views and approaches that we've seen in digital is really fundamentally different than those other areas or is this just more of the same kind of divergence?

**Vivek GHOSAL** opined that it is the same kind of divergence:

### Key Talking Points | Vivek GHOSAL

- Part of what policymakers and others are grappling with is how to define markets in this new era. Concerning data for example, regulators must look at the quantity, useful lifespan, and potential uses of the data, as well as what kind of behaviors regulators seek to demonstrate with it.
- There is also the issue of why certain companies are held to different standards. In retail, Amazon is criticized for AmazonBasics but own-brands are not deemed to be problematic in e.g. the pharmaceutical sector. This is similar to Bork's critique of Alcoa. Dealing with questions such as this is even more complex in the presence of complex data.
- There is an analogy with the evolution of rules on cartels. Originally the US was stricter on cartels, then the EU became stricter (e.g. on fines). The US then, in turn "piggybacked" on this trend to become stricter itself.

**Christopher YOO** noted that digital players are particularly flexible in terms of how they can adapt their services to local markets:

### Key Talking Points | Christopher YOO

- For example, in the 1970s, Ford tried to make a "world car", but couldn't adapt it to local preferences. This has only become possible now due to advances in computerized braking, etc. Digital services can achieve this effect with even greater ease. This raises costs, and may have an impact on small and medium-sized enterprises. But there is some great ability to customize.
- It is interesting to note that the traditional distinction between per se illegality and rule of reason is being un-

dermined. The rules traditionally say don't make things per se illegal unless you have experience and understand the phenomenon. The irony is the proposals in Europe and the US are going to make certain things per se illegal without that level of understanding.

**David EVANS** queried whether the Panel believes that there has been any recent shift in the dialogue between EU and US regulators? Or is it just a change in personnel?



**David S. EVANS** | Chairman, Global Economics Group

**Christopher YOO** emphasized the continuity in coordination, but also its inherent limits:

### Key Talking Points | Christopher YOO

- There's always been a healthy coordination dialogue between the two, and I think the more simpatico the different enforcement officials are, the better.
- However, the degree of coordination will be constrained by differences in enforcement structure. The EU follows an administrative system with deferential review by the Courts. In the U.S., the FTC must convince courts in the first instance, and they remain bound by U.S. Supreme Court decisions until they are reversed.
- Coordination will remain limited to information sharing, coordinating theories, and the like, that may be doing something important, but in terms of actual enforcement decisions, the U.S. and Europe will likely take radically different paths, at least for the foreseeable future.
- The DMA thresholds are designed to make sure that at least some European companies are included for appearances sake. Not because there's a principled basis behind the numbers, but because otherwise it looks like they're targeting U.S. companies.
- The U.S. statute is also getting a lot of criticism because the thresholds, which are absolute, not market share thresholds (i.e. they only depend on size). This ex-

cludes, e.g. Walmart and Target, which is ironic because Amazon perceives Walmart as its biggest competitor.

- It is striking that much of the impetus for antitrust reform in the U.S. is coming out of content moderation reform. In the absence of Section 230 reform, politicians are falling back on antitrust, which is not a good way to make policy. Just hitting a company because you have another cudgel in another arena isn't helpful.
- It is also remarkable that certain global companies can force convergence, e.g. Apple was hugely influential in defining 4G bands in Europe.

**Arun SUNDARARAJAN** concurred, and raised the EU Digital Markets Act, among other issues:

### Key Talking Points | Arun SUNDARARAJAN

- The DMA, due to its proposed thresholds, proposes to place restrictions on integration and expansion on primarily U.S. companies. Is it possible to get greater alignment on tech competition policy between the EU and the U.S. with such an extensive set of restrictions on companies that are primarily from the United States?
- One side might argue that it helps smaller competition. It helps smaller competitors when one blocks platforms from integrating services across different verticals, but people on the other side could make the case that impeding integration could hurt consumer value, especially in the digital space, while not really promoting competition.
- While the EU policy may not be explicitly anti-American by design, alignment is going to be harder and harder because digital leadership is increasingly central to global power, and techno-politics in many ways is as important as geopolitics today.
- Different jurisdictions are sort of balancing what is typically the focus of antitrust policy, consumers and competition, they're conflating in other issues like, as many of the panelists have brought up, worker considerations, income inequality, content moderation, but they're also balancing that with the EU's place, China's place, the U.S.'s place on the global stage. This may be a detriment to policy alignment over the next decade.
- What makes this an even more complex issue is that digital platforms that may be headquartered in one country are increasingly having government-like roles in society in other countries. They shape information access, IP, they provide ID, they back currency, etc. This poses a novel challenge for competition policy.



**Vivek GHOSAL** added that coordination is not new, but that things have shifted due to the recent focus on digital:

### Key Talking Points | Vivek GHOSAL

- There has always been extensive dialogue on various issues such as mail (Deutsche Post), international trade, aircraft, excessive collaboration, energy (nuclear). What is new is that we are now in the digital world, and also the new administration has a different mandate and is seeking to look at income inequality for example.
- However, the way to address income inequality is fiscal policy, but antitrust has been thrown into this mix as trying to fix a problem. I think there's dialogue has been going on for a long time. What has changed in DC is who's in charge of the agencies now and almost a complete regime shift on priorities, and that's what's going on.

**Deborah ELMS** noted that it is important to remember that it's not just about U.S., European or Chinese companies, but that there are also other, very competitive, increasingly large global tech companies:

### Key Talking Points | Deborah ELMS

- There's a lot of competition policy happening outside of the US and the EU that should be an area of focus as well. We can't just focus on e.g. Amazon.
- Recently, the Korean government said that platforms needed to allow additional payment companies to be listed on platforms. This ended up being a protectionist measure for a Korean payments company.
- Often, at least in Asia, a national champion firm or a well-connected firm, depending on the country, manages for competition reasons to end up with a policy outcome that they desire. We need to look beyond the U.S and the EU and look at how other governments are using "competition" as a mechanism to achieve outcomes that may or may not be justified.

**David EVANS** raised the issue of protectionism. Is there a risk that as we move towards national and global regulation that it could actually turn out to be protectionist and potentially beneficial to some of the large tech firms? And is there something competition authorities and regulators should do about that?

**Deborah ELMS** noted that given the churn in the tech space at present, it's relatively easy, still, for firms to be

very successful and then go completely out of business in short order. Perhaps, down the line, a tech firm that will be older than 20 years and we will be able to say something about this question more meaningfully.

**Vivek GHOSAL** discussed the risk of regulatory capture.

### Key Talking Points | Vivek GHOSAL

- History is replete with industries, industry regulators, such as in telecommunications, energy, electricity, where there was regulatory capture.
- For example, this was the case with AT&T. Eventually AT&T got broken up by an antitrust action. The greater concern would be if there were a technology regulatory body and then that was where the capture was.
- But if intervention is based on competition law enforcement and antitrust there is less concern about captured protection of incumbents, because as we've seen through history, antitrust competition law and law enforcement is something that can break the regulatory capture.

**Arun SUNDARARAJAN** agreed that regulatory capture is a valid concern to have at this point:

### Key Talking Points | Arun SUNDARARAJAN

- The focus of competition policy should be evidence and fact based, avoiding unintended consequences, and economic analysis. But it's critical that we approach it with pragmatism.
- In an extremely fast moving digital landscape, it is hard to imagine regulation and the formulation of effective policy, whether it be competition policy or other dimensions of digital policy, being developed without the active involvement of platforms given the broad role that they have in society, and given that they are in fact going to be the enforcers of a lot of the regulation.
- Pragmatically, it's hard to imagine policy being formulated effectively without active collaboration with the stakeholders.

## SPEAKERS



### Vivek GHOSAL

Dr. Ghosal is the Head of the Department of Economics and the Virginia and Lloyd W. Rittenhouse Professor of Humanities and Social Sciences at Rensselaer Polytechnic Institute. His current research and policy interests include: firm strategy related to innovation, M&As, and pricing; biopharmaceuticals markets focusing on innovation, pricing and FDA regulations; firms' decision-making under uncertainty; antitrust laws and enforcement; and regulatory reform to enhance competition and innovation.

Before joining Rensselaer in 2016, he was a professor at Georgia Institute of Technology, as well as the Director of the M.S. and Ph.D. Programs.

Prior to Georgia Tech, he was an economist at U.S. Department of Justice (1998-2001). There, he worked on mergers and acquisitions, horizontal and vertical market power, tying agreements, joint ventures, regulatory reform, and innovation and efficiency.

### Deborah ELMS



Dr Deborah Elms is the Founder and Executive Director of the Asian Trade Centre. The Asian Trade Centre works with governments and companies to design better trade policies for the region. Dr. Elms is President of the Asia Business Trade Association (ABTA). She served on the Trade and Investment Council of the World Economic Forum from 2017-2019, on the International Technical Advisory Committee of the Global Trade Professionals Alliance and was Chair of the Working Group on Trade Policy and Law. She was also a senior fellow in the Singapore Ministry of Trade and Industry's Trade Academy. Previously, Dr Elms was head of the Temasek Foundation Centre for Trade & Negotiations (TFCTN) and Senior Fellow of International Political Economy at the S. Rajaratnam School of International Studies at Nanyang Technological University, Singapore. Dr. Elms received a PhD in political science from the University of Washington, a MA in international relations from the University of Southern California, and bachelor's degrees from Boston University.

### Christopher YOO



Christopher S. Yoo is the John H. Chestnut Professor of Law, Communication, and Computer & Information Science and the Founding Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania, and the author of over one hundred scholarly works. He has taught at over a dozen universities around the world.

His major research projects include comparing due process in antitrust enforcement practices in China, Europe, and the U.S.; analyzing these jurisdictions' responses to big data; assessing antitrust liability for high-tech platforms; and analyzing the technical determinants of optimal interoperability.

Before entering the academy, Professor Yoo clerked for Justice Anthony M. Kennedy of the Supreme Court of the United States and practiced law with the predecessor firm to Hogan Lovells under the supervision of now-Chief Justice John G. Roberts, Jr.

### Arun SUNDARARAJAN



Arun Sundararajan is the Harold Price Professor of Entrepreneurship and Professor of Technology, Operations and Statistics at New York University's (NYU) Stern School of Business, and an affiliated faculty member at many of NYU's interdisciplinary research centers, including the Center for Data Science. His best-selling and award-winning book, "The Sharing Economy," was published by the MIT Press in 2016, and has been translated into Mandarin Chinese, Japanese, Korean, Portuguese and Vietnamese.

Professor Sundararajan's research studies how digital technologies transform business, government and civil society. His current focus is on the future of capitalism, artificial intelligence and platform-enabled change, antitrust policy in tech, and the digital future of work. He has published over 50 scientific papers in peer-reviewed academic journals and conferences, and over 40 op-eds in outlets that include The New York Times, The Financial Times, The Guardian, Wired, Le Monde, Bloomberg View, Fortune, Entrepreneur, The Economic Times, Harvard Business Review and Quartz. His scholarship has been recognized by seven Best Paper awards, two Google Faculty awards, an Axiom Best Business Books Award, and a Thinkers50 Radar Thinker Award. He has given hundreds of keynote, plenary and invited talks at industry, government and academic forums internationally.

### Geeta GOURI



Geeta Gouri, former Member of the CCI, is an economist with 15 years of experience working as a Regulatory Economist. She served as Member (Economics) at the CCI for 5 years and prior to that as Director (Tariffs) at the Andhra Pradesh Electricity Regulatory Commission.

### David S. EVANS



David S. Evans, is the Chairman of the Global Economics Group in the firm's Boston office, and has broad experience in the economics of antitrust, intellectual property, and financial regulation. Dr. Evans has an international practice and has worked on matters in the United States, the European Union, China, Brazil, Australia, and other jurisdictions. He has provided economic advice on a wide range of industries but has special expertise in financial services, internet-based, media, and information-technology based businesses. He is one of the world's leading authorities on platform-based ("two-sided market") businesses.