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Democracy or Domination

The Role of Competition Law in the Face of Oligarchy



Competition law, given its history and potential as a tool of anti-domination, is a natural fit to protect and revitalise European democracies from the threats posed by excessive concentrations of private power. Yet, competition law is often seen as a limited tool, capable of playing only a marginal role in Europe's response to the emerging plutocracy.¹ Historically, competition has always been fundamental to liberal democracy. Law, in turn, is central to maintaining competition because it protects against the winners locking-in their gains by subverting the competitive process and saving themselves from having to compete in the future.² Just as free speech law protects cultural competition and electoral law protects political competition, competition law protects economic competition.

However, the protection of democracy is habitually said to fall outside the proper scope of competition enforcement, which has been placed on a "thin diet of consumer welfare" since its "economic turn" two decades ago.³ Since then, competition law has been disempowered and under-enforced. Its narrow implementation has contributed to widespread economic inequality,⁴ the rise of ultra-dominant Tech oligarchs, and the decline of economic democracy in Europe.

This version of competition law has proven especially powerless in the face of a new generation of oligarchs who pursue value capture over value creation in the belief that "competition is for losers"⁵, seeking to opt-out of competitive constraint wherever possible. Having amassed huge amounts of wealth by placing themselves at strategic chokepoints in the economy, they have shown themselves to be adept at converting economic power into political⁶ and cultural⁷ power, and then back again.⁸

Today's narrow approach to competition law and its enforcement has helped lay the groundwork for the emergence of pluto-

cracy. Now, however, competition law must also be part of any attempt to reverse the trend, and should look to protect and reinvigorate democracy in Europe going forward. As we argue in a recent paper,⁹ the discipline must rediscover a conception of democracy that extends beyond the thinner objectives which currently dominate the competition-democracy landscape. Any attempt to arrest the current vicious circle of private power accumulation will require a holistic, systemic approach to understanding exactly what “democracy” competition law can protect, and how.

The competition-democracy nexus

As Elias Deutscher shows in his recent book,¹⁰ democracy has been a core value underpinning competition law from its very inception, through Ordoliberal thought in Europe and the antimonopoly tradition in the United States. This democratic function, known as the competition-democracy nexus,¹¹ has waxed and waned over the history of competition law. In recent decades, a broad neoliberal consensus and the supposed end of antitrust history has reduced competition law to a predominantly technocratic instrument, constituting a low water-mark for the nexus.¹²

In this context, courts and scholars have developed a minimalist conception of the competition-democracy nexus. This view gives democracy an *ad hoc* role in competition enforcement, operative in only certain individual and often politically salient cases. But this piecemeal approach overlooks the structural role that competition law can play in enabling either the conditions for economic and political democracy, or as it currently does, the foundations of plutocracy. Although we agree with Viktoria H. S. E. Robertson’s contribution on many points, we see aspects of the minimalist approach in her writing.¹³

Our view is that competition law has a deeper, quasi-constitutional role in the EU's liberal democratic order.¹⁴ Competition law structures the political economy of Europe, both in obvious ways, like through its market integration imperative,¹⁵ but also more subtly by defining which forms of economic relations are permissible and which are not.¹⁶ Countering the current threat of oligarchy – rooted first and foremost in drastically unequal economic relations – therefore entails an understanding of competition law's systemic role. Such a view focuses not on the immediate impact of legal rulings, but rather on the higher order effects they have on the structure of the European political economy.¹⁷ While competition law cannot, alone, address excessive accumulations of private power, it must be a core pillar of any effective and integrated approach to tackling the foundations of oligarchic power through law.

This effort should be sustained through the notion of “republican liberty”, a conception of liberty where freedom is understood as the state of non-domination; not being subject to the “arbitrary power of someone else”.¹⁸ The main way in which competition law can foster republican liberty on markets is by cultivating their contestability; underwriting the freedom of businesses to compete with incumbents, and thereby ensuring that consumer-citizens have a meaningful choice of which market participants to transact with. By doing so, powerful economic entities are prevented from dominating smaller trading partners or coercing them into undesirable business arrangements. Instead, in a competitive market, these smaller partners can freely choose to do business with a competitor. By preventing domination in this way, markets can serve as institutions of antipower.¹⁹

A systemic approach to economic democracy

In a recent paper,²⁰ we show how these ideas, which have lain dormant in competition policy, can be operationalised into legal doctrine. We put forward three ways in which competition law and sector-specific competition regulation – which together make up the competition regime – can further democratic values.

First, we argue that the bar for competition intervention should be lowered. Currently, strict legal tests must be met for competition intervention to pass muster under the courts. Yet such tests were crafted using a time of heady optimism about the functioning of markets which has shown itself to be ill-founded. Unfortunately, where markets did not “naturally” function well, and failed to self-correct, competition law has struggled to attend to the consequent abuses of economic power,²¹ which should under the logic of republican liberty, not have accumulated in the first place.

Second, we stress the critical importance of fostering choice and contestability in markets. Where economic democracy is concerned, choice is a key source of legitimacy in markets, since consumers are free to switch to a competitor when dissatisfied. It also ensures that markets are directed by the needs of consumers from the bottom-up, rather than by the whims of oligarchs from the top-down. As Cory Doctorow has emphasised, where consumers are denied choice, firms are able to slowly “enshittify” their products to extract more value from consumers.²²

Third, we emphasise the potential to “shape” markets using competition tools. This perspective is not new. Karel van Miert, Competition Commissioner from 1993 to 1999 eloquently wrote on how under his leadership, the Commission took an “engineering” approach to market competition.²³ This approach should be re-

vived, not least as a way to ensure that markets are in line with the values expressed in the European Treaties. Competition law is conceptually agile enough to do so.²⁴

The stakes

The debate over how, and whether, Big Tech firms should be regulated is not merely an academic exercise. The increasing digitisation of society, combined with the market dominance of Big Tech firms – both in terms of their market position, the perception of their technical expertise,²⁵ and their centrality to many aspects of modern life²⁶ – has led to some scholars remarking that the contemporary political economy might be characterised as “the Big Techification of Everything”²⁷. The gravity of Big Tech’s centrality to modern life is compounded by their ability to exercise power not only through “traditional” means, such as by virtue of a dominant market position or through industry lobbies, but also as a result of the rule-making power of software and its ability to function as an infrastructure of control, first embodied in Lessig’s assertion that “Code is Law”.²⁸

At the same time, Big Tech firms themselves are controlled by a tiny elite, in the words of Julie Cohen, “a small group of very powerful and extremely wealthy men” who “wield unprecedented informational, sociotechnical, and political power”.²⁹ A significant minority of this group works to undermine³⁰ the institutions of liberal democracy,³¹ instead seeking to replace it with a form of authoritarian techno-solutionism.³² Historically, such projects have not fared well.³³

In this light, the goals of the New Platform Regulations – fairness, contestability, and the freedom to compete – become ever more salient to liberal democracy. These new regulations serve to

limit the ways in which Big Tech firms can use software as an infrastructure of control with which to coordinate whether actors are able to participate in the chain of economic production.³⁴ In effect, the New Platform Regulations constitute “rules about the rules”, which seek to prevent Big Tech firms from using their architectural power to exclude competitors. In doing so, tools like the DMA underwrite the ability of markets, by means of entry and merit-based competition, to check the ability of Big Tech firms to extract wealth from consumers and competitors without meaningful constraints.

Going forward

The urgency of Europe’s creep towards plutocracy calls for a similarly urgent response. Competition law, given its history and potential as a tool of anti-domination, is a natural fit to protect and revitalise democracy in Europe from the threats posed by excessive concentrations of private power. For it to be effective for that purpose, competition scholars must clearly articulate which democratic values, like non-domination, competition law should seek to pursue, and clear-mindedly design mechanisms through which to channel them.

Today, the competition regime is undergoing transformational change. It is being augmented by new regulatory tools which are animated by an expanded set of values and objectives. As the extractive dynamics and wide harms of concentrated digital markets become clearer,³⁵ we think that these new tools present regulators with an opportunity to experiment, and incorporate democratic concerns – from the protection of consumer choice to non-domination – as part of a strategic set of competition interventions. In this manner, competition law can contribute to a whole-of-law approach to addressing the structural foundations of oligarchical

power, and shore up the foundations of European liberal democracy.

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