

Conceptualizing Big Tech as 'Modern Bigness' and its implications for European Competition Law

Submission in reaction to the Call for Contributions – Shaping competition policy in the era of digitalization

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Introduction

“Big Tech is a Big Problem”
“The data economy demands a new approach to antitrust rules”
“Is it time to break up Google?”¹

As academic I have been pondering the European competition law response to statements as the ones quoted above. Supporting the tenets of these statements – that competition law should *do* something about Big Tech, even though it is not always clear *what* exactly – might imply a move away from the basis of the Commission's current competition law enforcement.

Instead of focusing on the question whether the current *instruments of and enforcement practice of* European competition law is fit-for-21st-century-purposes, in this very brief paper I would like to focus on a more fundamental question: what is it, that makes 'Big Tech' so worrisome? Is the power of Big Tech a qualitatively **new phenomenon**, and if so, is it so fundamentally different from 'old' Bigness, that an overhaul of the foundations of competition law should be seriously considered?

My **hypothesis** is, indeed, that Big Tech is *not* a mere incarnation of 'old' 'Bigness'. Instead, it is something new, captured by the notion of 'Modern Bigness', which I will introduce below. It is only by conceptualizing Big Tech as Modern Bigness that the subsequent question how European competition law should respond can be properly addressed.

On the one hand, I would like to stress that this is not a fully formed academic paper. It will only outline the contours of a new theory, which might be relevant to answer the Commission's question on how competition policy should be shaped in the era of digitalization. On the other hand, my follow-up aim is to contribute to the academic literature relating to the interplay between competition law and the digital economy. This literature has focused on specific challenges of the digital economy and on whether the instruments of competition law are fit-for-purpose. It also relates to the ongoing debate on what competition law is for, but this is not always combined with providing a deep understanding of this new phenomenon. In this short contribution, I would like to provide the contours of a novel theory: a theory of Modern Bigness, and indicate why a further deepening of the theory might be a relevant endeavor.

Modern Bigness

The power and influence of large tech-firms and their platforms within society is undeniable. These include, of course, Google, Facebook, Apple, Microsoft and Amazon (the 'Big Five') but when considering influential, or pivotal, tech-firms, the analysis below is not necessary limited to these companies. 'Big Tech' is ubiquitous and integrated into our daily lives. But rapid technological developments and the combination of **economic and digital power** also presents new challenges. These are challenges for *society*, as large tech firms impact markets but also democracy, fundamental rights, and individual lives. These are also challenges for the *law*: ever since the digital economy has

¹ Project Syndicate (2018), Economist (2017), NYT (2017).

been identified as a challenge to existing legal rules, law is struggling to find an answer.

This is true also for **European competition law**. Competition law – both in the USA and in the EU – is, of course, concerned with the negative effects of *market power*. Though a sentiment of distrust of corporate 'Bigness' can be traced in its history, its current enforcement is informed by neo-classical economics. It centers on market-efficiencies and consumer-welfare. This does mean that, very apparent in the EU, it also sanctions anti-competitive behavior of 'Big Tech' in specific instances: witness the record-high fines on Google for abusing its *dominant position*. Nonetheless, there are doubts as to whether competition law can effectively deal with the *new* challenges posed by the powerful tech-entities. The academic, political and societal debate covers several aspects, including – in the academic debate – the question of competition law's possible response to effects that are felt **beyond the market**, such as challenges to economic freedom, fundamental rights and democracy. This concern, apparently, also informs the calls for 'breaking up Big Tech'. However, to include non-market values as protected by competition law, let alone breaking up a company for its power and size, would be a novel move for European competition law.

Clearly, in relation to powerful companies, this wider range of concerns – e.g. protecting individual freedom and democracy – can be traced throughout the history of both American antitrust and European competition law. Supreme Court Justice Brandeis famously denounced the 'curse of bigness' (Brandeis 1934); the power of the 19th century 'trusts' over the American economy and its political society provided a rationale for anti-trust rules (Sherman Act 1890). In Europe, the link between dispersed market power and democracy informed the *ordo-liberals'* distrust of German inter-war oligopolies, becoming one of the threads shaping European competition law (Deutscher & Makris 2017; Gerber 1994).

Today, this distrust of bigness has resurfaced, also in politics and specifically as to **the (digital) power of tech-companies** (USA: Warren 2016; EU: EP 2014). It seems tied to quite a number of factors. Of course, today's large tech-companies are not mere replicas of 19th century American trusts, nor of the Weimar Republic's *Konzerne*. Though the dangers of Bigness-of-old are present – capture, concentrated ownership, excluding competition – today's power is built on the **digital economy**. The digital economy reaches deeply into both the market *and* the non-market sphere; its users are both consumer *and* citizen; and digital power impacts *both* (Stucke & Ezrachi 2017; Helbing 2017; Balkin 2017). The depth, reach, and twinning of these impacts, it is hypothesized, gives rise to the qualitatively difference of Modern Bigness, resulting from the unprecedented amassing of (personal) data and the indispensability of 'infrastructural' platforms for market-transactions and for citizens' lives (Rysman & Kenney). It results from the 'platform society' (Van Dijck 2018) in which digital platforms are 'gatekeepers' (Lynskey 2017) and in which Big Tech reigns over the 'market for attention' (Wu 2016; 2017). Combined with the stock market value of the 'Big Five' and their aggressive conglomerate strategy (Economist 23 June 2018) this has led to their labeling as 'emergent transnational sovereigns' (Cohen 2017).

The **new conceptualization** of Modern Bigness starts from the observation that bigness 'is not a precise concept' (Edwards 1955), nor that its definition is limited to the law. Different disciplines provide different angles. In *business-literature*, it is seen as relating to *size* (absolute size, relative size, conglomerate size) (Edwards 1955). But 'bigness' also relates to *power* (Dougherty 1979). Power, as *social science*-concept, encompasses different dimensions (Lukes 2005). It ties-in with *economic power* (familiar to competition law): the power to 'intimidate and coerce others (...), in both political and industrial spheres' (Ayal 2013). This is akin to the '*corporate power*' to enact business standards (Danielsen 2005), 'the power of *governance*' to influence (also) the public sphere, and power over consumers and workers (Calo & Rosenblat 2017). In *European competition law*, the European Court of Justice defined *dominance* as 'the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer' (Case-85/76). This *market power*, of course, is criticized

as a useful standard in the *digital economy*. In that context, conceptualizations of 'platform power' (Mansell 2015; Cohen 2016; 2017), 'gatekeepers' power (Barzilai-Nahon 2008), or of 'systemic actors' (Lynskey 2017), in a market consisting of 'dataopolies' (Stucke 2018) of a 'mologopolistic' nature (Petit 2016) have all been brought forward.

The **challenges** arising from Modern Bigness seem manifold. General 'bigness'-literature identifies dangers to democracy, equality and competition (Dougherty 1979; Ayal 2013; Baker & Salop 2015; Khan & Vaheesan 2017; Orbach & Rebling 2012; Teachout & Khan 2014). The *digital economy* specifies and adds: impact (of algorithmic decision-making) on democratic processes and fundamental rights (House of Commons 2018, Binns 2017; O'Neil 2016); filter bubbles (Pariser 2011), fake news (Persily 2017; Zuiderveen-Borgesius 2016), 'digital butlers' (Ezrachi & Stucke 2017), and search engine manipulation (Bracha & Pasquale 2008). *Competition law and economics* more specifically challenges the continued relevance of the static-versus-dynamic conceptualizations of competition (Kerber 2017; Sidak & Teece 2009). It discusses new theories of harm (OECD 2017; Autorité & Bundeskartellamt 2016), such as predatory innovation (Schrepel 2017), access to big data and algorithms (Graef 2016), and the position of the consumer-user (Daly 2016).

Though in current European competition law the framework for evaluating whether a certain behavior is a competition law issue or not is provided by the dichotomy between market-values ('economic interests' - within its scope) and non-market values ('non-economic interests' - general outside its scope), with Modern Bigness this **distinction is expected to become increasingly blurred**. Where power arises from a combination of factors, and the roles of actor become increasingly blurred, it is difficult to disentangle the effect along the lines of the existing dichotomy. Take, for example, the impact of hypernudging on autonomy of *user-citizens*, which also might limit *consumer* choice. Or take, as another example, the discussion on access to platforms, which is equally important for *market-actors* – who might rely on the essential facilities doctrine, as for *user-citizens* as full participants in democracy, who cannot (but for whom conceptualization as public utility becomes relevant). Thus, such a conceptualization will also uncover the locus of the (mis)match in the mapping of challenges onto current European competition law practice.

Implications for European competition law

This is not the place to fully evaluate the **implications** for European competition law. But the general direction is clear: if Modern Bigness is, indeed, something qualitatively new, and its behavior impacts both market and non-market values in a way that their dividing line becomes increasingly blurred, how then, should competition law react? The two contrasting strands in the literature on the goals of competition are also relevant here. On the one hand, there is a fairly dominant strand that considers the welfare-approach, mostly by taking consumer welfare as (descriptive and normative) starting point (e.g.: Commission 2004). But others argue that there are, and should be, multiple, possibly conflicting goals, including non-market ('non-economic') goals as freedom, fairness, solidarity or sustainability (Prosser 2005; Townley 2009; Lianos 2013). The two strands also relate to the *digital economy*: competition law does not fundamentally need to be adapted and should not protect non-market values (Orbach & Rebling 2012) contrasts with 'hipster antitrust' which links democracy to markets (Ayal 2013; Khan 2017; Fox 2018).

If Modern Bigness, is, indeed, something new, the possible response of European competition law will be set within this literature. However, in the European context, any question about 'what competition law should do' cannot ignore the **European Union's legal constitutional framework**. This includes the values enshrined in European integration: market values, including integration and welfare, and non-market values, including democracy and rule of law (Tuori & Tuori 2014). It is theorized that the challenges of Modern Bigness make visible that here, markets, morality and society cannot realistically be separated (Moses 2013; Fourcade & Healy 2013). This is not (yet) sufficient for a normative

framework. Specifically relevant for Modern Bigness is the literature on the relationship between **technological development and regulation**, including the literature on the 'pacing problem' of when (it is possible) to intervene so as to prevent stifling innovation (Thierer 2018), integrating the occurrence of disruptive innovation in competition law (Christensen 1997; Streeck & Larouche 2015), and the difficult interplay between costs of over- versus under-enforcement in rapidly evolving (technology) markets will also be considered (Sluijs 2010; Wu 2012; Shelanski 2013).

The aim of this contribution is not to undertake an evaluation of the challenges of Modern Bigness, set against such a specific European normative framework. However, the combination of the conceptualization of the phenomenon of Big Tech in terms of a theory of Modern Bigness and the normative framework might help shape European competition policy in the era of digitalization.

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