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Changing Competition Law in a Changing European Union
The Constitutional Challenges of Competition Law*Anna Gerbrandy**

Abstract

I. INTRODUCTION

Competition law is part of the economic constitutional set-up of the European Treaty. It has been incorporated in the treaty-texts since the inception of the European Economic Community and is one of the important building blocks of the internal market, the foundation on which the European integration project (still) rests. Certainly, it sometimes creates constitutional challenges for the European Union – remember the ‘coup de Sarkozy’, which led to the repeal of Article 3(1)(g) EC, removing ‘competition law’ as a policy goal from the general aims of the European Union, relegating its importance to Protocol 27 to the Lisbon Treaty? But European competition law can, perhaps, now also be part of providing answers to current challenges besetting the European Union. These are the result of global challenges – globalization, digitalization, sustainability – to which also the European Union needs to respond. These are also challenges for European competition law, relevant in light of the overall theme of this bundle of articles: in answering to these challenges the European constitutional context is important. This makes the European competition law challenges constitutional challenges.

My aim in this article is to try to show that European competition law is entering a new period of change – in a different direction than the previous fundamental change of economisation and modernisation – this time under the pressure of these societal challenges and the current inadequacy of competition law to address them. To have a full grasp of that change, and how to move forward, I suggest a reconsideration of the place of European competition law in the EU’s constitution. The proposition that Europe’s (constitutional) challenges cannot be isolated from the greater challenges that confront our world today seems difficult to contest. But if that is true, then the question should be asked why European competition law could isolate itself from these societal challenges.

* Professor of competition law at Utrecht University School of Law. She would like to thank Giancarlo Piscitelli, student of the Legal Research Master of the School of Law for his invaluable research assistance. This article is the result of a key note delivered at the CLaSF conference in Amsterdam, 2017. It incorporates some of the helpful comments of the participants to that conference, for which thanks is owed.

II. GLOBAL CHALLENGES, EU-CHALLENGES AND COMPETITION LAW CHALLENGES

a. Challenges, challenges everywhere!

I am not stating anything new in pointing out that there are several confronting global challenges. The United Nations Sustainable Development Goals (SDGs)¹ sum these up in handy little blocks: from combating poverty to improving health, providing clean energy, having access to decent work, having sustainable cities and providing peace and justice.² It is very difficult to find fault with these goals, though one might very well have heated discussions on how to reach them and the SDG's provide a stark reminder as to where improvements are to be obtained. Others have conceptualized the global challenges in a different way, and for the purpose of this article the red-thread will be Friedman's three challenges to the world: globalisation, digitisation, sustainability – also labelled as the three accelerations, of 'Market', 'Moore's law', and 'Mother Nature'.³

'Globalization' is both a period of time, and a metaphor. It covers the period from the 'discovery' of America to contemporary times. Metaphorically the world, during that time, progressively shrank. First from a large geographical space to a more medium-sized one at the hands of imperial conquest; then from a medium sized space to a small one, due to globalization of markets and labour. And now, as of the early 2000, it shrinks further from small to tiny: ever more diverse groups of individuals project and interconnect their knowledge and themselves on a global stage. Globalisation 'flattens' our world.⁴ It also makes for a competitive space which is global: a global market place in which geographical distance is increasingly irrelevant.

'Digitization', or digitalization, or datafication (or whatever other label one would like to use) pertains to the sharp global investment in and development of technological advancements and the continuously and growing impact of these technological advancements on us, human beings, in our societal and economic relations and interactions. In the early stages of digitization these facilitated the decreasing price of computing power and software, followed by the explosion of mail software and search engines. Now, we live a 'platform society'.⁵ Again, digitization makes our world smaller: its promise is to create a smooth level playing field in which firms and individuals alike are able to *compete* equally and horizontally, again virtually unfettered by geographical

¹ General Assembly, United Nations Sustainable Development Goals (SDGs) (2015), available at: <http://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf>.

² These are mentioned in particular in SDG's no. 1, on the eradication of poverty; 3, on the protection of health and well-being; 6 & 7, on the preservation of clean waters and sanitation, as well as affordable and clean energy; 8, on decent work and economic growth; 11, on sustainable cities and communities; 16, on peace, justice and strong institutions.

³ Thomas L. Friedman, *Thank you for being late* (2016). The argument in this book builds on previous work, such as Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-first Century* (Farrar Straus and Giroux, 2005).

⁴ And logically, humans being human who boldly go where no-one has gone before, the aim to *enlarge* our world – to include other planets, moonlets, space – is back on the agenda of some individuals, some companies, and some governments.

⁵ Van Dijck, *The Platform Society* (OUP, 2018).

constraints. Digitization is, I would add, in its infancy – it is not very clear which way it is headed, but that it will hugely impact the way we live, work, do business, and compete seems blindingly obvious. For competition law its impact has been the topic of quite a few studies – too many to even keep up with reading for a normal academic juggling many tasks and responsibilities. We do not precisely know which way digitalization leads us, though, and it is difficult to predict the exact consequences.

Lastly, sustainability. In answer to a planet under threat from self-destruction by its human inhabitants, the notion of ‘sustainability’ denotes a policy-goal, describing the efforts, on the part of governments, its citizens (and, increasingly so, private firms) to preserve the ecological equilibrium of the biosphere, by reversing or edging the negative effects of climate change, pollution of air and waters, erosion of soil, industrial livestock farming and extinction of animal species. This last agent also flattens our world: the effects of climate change, naturally, do not discretely respect the division of territorial borders, therefore demanding both local and regional collective forms of action, but – and increasingly so - also supranational action.⁶ But sustainability is also a challenge to the market mechanism itself, and thus to the global level playing field that is promised by globalization and digitization, as it questions the paradigms of profit and economic growth.

These ‘accelerations’ are obviously reshaping our world, both allowing us to think of the world as a single common (market) space, and at the same time threatening its continued existence. As global challenges these are also, necessarily so, challenges for the European Union. The global market place is enshrined in the many international trade agreements (and the basis of the free market-notion in general); dealing with digitalization and sustainability is high on the EU’s agenda. However, there are additional challenges confronting the European Union. Some run in parallel to the challenges of globalization, digitization and sustainability, others are highly particular. A complete overview is not useful here, but at very least it must be mentioned that (also) the European Union is still dealing with the effects of the 2008 economic crisis – tied to the globalization of markets - which linger on even though markets seem to do well. Wages are not rising. In response, also perhaps, to globalization (and digitization), nationalistic sentiments have been revamped, with discontent towards the push for deepening integration – at the moment of writing illustrated by the ‘gilets jaunes’ protesting in France and the looming Brexit - while at the same time there is talk of a new round of adding new member states into the European Union’s fold. Simultaneously, though perhaps less pressing on the minds of many, the EU institutions’ democratic accountability remains unsatisfactory, as perhaps is its ability to tackle the threats to the rule of law in some of its member states. As such, the EU is partly stronger and partly weaker than even a year ago, but it needs constant guarding of its legitimacy, its direction and its integration path. Both the global challenges

⁶ John Gray, ‘The Green American Dreamer’ (The Guardian, 5th October 2008), available at: <<https://www.theguardian.com/books/2008/oct/05/politics>>, and Thomas L Friedman, ‘Stuff Happens to the Environment, Like Climate Change’ (The New York Times, 7th October 2015), available at: <<https://www.nytimes.com/2015/10/07/opinion/thomas-friedman-stuff-happens-to-the-environment-like-climate-change.html>>. See also: S Dresner, *The Principles of Sustainability* (Routledge, 2002), 4 and GH Brundtland, *Our Common Future: The World Commission on Environment and Development* (Oxford University Press, 1987).

and their specific European incarnations are thus also challenges to the legitimacy of the European project. This makes them constitutional challenges.

b. The flexibility of European competition law

If these challenges are indeed also challenges for European competition law, as I will try to show below, I suggest that European competition law will (and needs to) respond to the resulting changing economic and socio-political landscape. It is good news then, that European competition law itself is quite flexible. Its main emphasis has changed before (and without altering its Treaty-enshrined provisions). Without doing all the complexities of gradual change and adaptations full justice, these changes can be broadly sketched as follows. Most importantly, as is well documented and will be well-known to the readers of this article, the impetus of *economization* brought a new foundation to European competition law, somewhere in the nineties of the last century. From its (more or less) ordoliberal roots in which notions as economic freedom and the process of competition were important building blocks, this process of economization brought a certain rationalization to the foundation of European competition law. Its basis lies in economic theory, following developments in the United States. Under the influence of the Chicago school of economics this meant that the concept of well-functioning markets, bringing greatest efficiencies and economic welfare, were placed at the center of competition policy.⁷

This change means a shifting emphasis, specifically in the enforcement effort of the European Commission. Before, European competition law was conceptualized mostly as a limb of the internal market regime, sharing the same general objective as the free movement rules in providing an internal market in which the flow of goods and services would be un-hindered. Competition law, in addition to these internal market-based objectives, was furthermore to protect the (individual) economic freedom of economic actors: to enable them to freely enter the market place, to compete fairly, to gain a competitive edge, because such a process of competition was held to be beneficial to the overall welfare of society. This conception has clear defects: it is never quite certain when a limitation on economic freedom – and any agreement inherently limits the freedom of economic action of both the parties to that agreement and those not part of the agreement – is caught by the competition rules, nor was there agreement on what was meant by protecting the process of competition. The Court – in the mid 70s – brought forward the notion of ‘workable’ competition (cases *Metro & Saba*),⁸ which seemed a welcomed clarification: not ‘full competition’, but ‘workable competition’ was the aim of competition law. But this notion did not have a successful career either.

Up until the 1990s it was still possible for companies (and their legal advisors) to notify an agreement to the European Commission for an assessment of its eligibility for exemption. Article 101(3) TFEU (or, at that time, Article 85(3) EC) could only be applied by the European Commission. Though the Commission had adopted block exemptions,

⁷ For a general overview, see R Whish & D Bailey, *Competition Law* (OUP, 2018).

⁸ Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities* [1986] ECR 3021 and Case 26-76 *Metro SB-Großmärkte GmbH & Co KG v Commission of the European Communities* [1977] ECR 1875.

which had direct effect, and lessened the administrative burden, undertakings still made use of the notification possibility in huge numbers - and with good reason: as long as the Commission did not grant exemption, the companies involved were immune from fines (later this was limited; clearly anti-competitive agreements could not benefit from immunity from fines).⁹ It is not surprising that the Commission wanted to change this situation. The solution came in the form of a procedural and institutional change: to have Article 101(3) have direct effect, get rid of the notification-exemption scheme, and have undertakings (and their legal advisors) do a self-assessment of their agreements. Such a self-assessment, however, is difficult if there is no clear guidance or no clear legal test.¹⁰

For the purpose of this article, focusing on the possible response to competition law to societal changes, including its political setting, it should be recalled that this refocusing of competition policy took place within the context of a growing influence of economics on government policy in general. This shift to more economics-based policies produced visible results, such as the move towards liberalization and privatization of (more or less) publicly provided services. Some of this was led by European law, by way of directives primarily; but many member states went beyond that, and of course the incoming member states were expected to do so, before accession could be contemplated. Likewise, the growth of a market-like mindset in the public sector brought about changes in the way exclusively public services are run by the state itself, such as the widely-discussed new public management in the early 1980s, and steered more attention to the policies of the World Bank, the IMF and other major players on the international level.¹¹ Economics also came to provide the theoretical foundation for European competition law. This offered a much needed clarification for undertakings' self-assessment, it was expected. The changes in competition policy and competition law, as proposed by the

⁹ EEC Council, Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L13/204, although the regulation does not impose an obligation to notify (potentially) anti-competitive agreements to the European Commission, undertakings still made use of the notification system in large numbers due to its suspensory effect. This effect was mitigated by the introduction of 'black-listed' or 'hardcore' clauses (such as price-fixing behaviour) to which block exemptions do not apply. See to that effect Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21, art 10; replaced by: Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1, art 10.

¹⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. Moreover, Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC) partly help solve these problems relating to the legal certainty of art.101(3) TFEU, but, given their non-binding nature, do not solve the problem completely.

¹¹ Steven Van de Walle and Gerhard Hammerschmid, 'The Impact of the New Public Management: Challenges for Coordination and Cohesion in European Public Sectors' (2011) 12(2) *Halduskultuur* 190; Christopher Pollitt and Sorin Dan, 'The Impacts of the New Public Management in Europe: a Meta-Analysis' (2011) COCOPS Working Paper No.3, available at: <http://www.cocops.eu/wp-content/uploads/2011/09/COCOPS_workingpaper_No31.pdf>. On the privatisation practices fostered by the World Bank and IMF, see especially the report by Philip Alston, 'Extreme Poverty and Human Rights' (26th September 2018), GA of the UN, 73rd session, Agenda item 74(b), available at: <<http://undocs.org/A/73/396>>, who aggressively criticized the promotion of privatization of public goods by the World Bank and the IMF, "systematically eliminating human rights protections and further marginalising those living in poverty".

European Commission, were therefore welcomed and embraced. Not only because the legal test (or legal-economic) would provide for more certainty, but also because the Commission provided guidance on the substantive interpretation. In this way, economization made way across the full board of competition law: from vertical agreements and merger control, to the cartel prohibition more in general, to (finally) abuse of dominance. Also, in this decade national competition authorities – if they did not exist before – were set up in all member states, decentralizing the enforcement process. These national authorities have to apply EU competition law, not as a result of their national legislation, but by way of EU obligation. In the network of competition authorities that was set up, the Commission would be able to provide guidance, also to the national authorities. The result is that since then the enforcement of European competition law, especially by the European Commission and (many) national authorities, has come to rest firmly on (neo-liberal) economic theory, in which economic efficiencies and consumer welfare are central concepts, guiding the enforcement efforts of competition agencies.

In this context it is interesting – also from the somewhat startling perspective of realizing one’s own age – to note that for many of the younger generation of competition lawyers the idea that a competition policy that rests on economic notions of efficiencies and consumer welfare has not *forever* been in place, and that, furthermore, this idea can be questioned, is surprising. But that it is *difficult* to imagine a competition law which is – perhaps only in some instances, or perhaps more fundamentally – different, departing from the well-known and the familiar, does not mean that we ought to stick with what we know if there are good reasons to advocate for change. One of the most persuasive arguments for reconsidering the shape of competition law (again) is that its societal context has changed (again). Obviously, not all changing contexts lead to having to change the foundation of this system of legal rules – it would be impossible, fickle and thoughtless, to do so. This means that the guiding (normative) question of this contribution is whether the current global challenges present such a fundamentally important changed socio-political context that the shape of competition law needs to be reconsidered.

III. CONSTITUTIONAL CHALLENGES FOR EUROPEAN COMPETITION LAW

In this section I will sketch some of the more fundamental impacts of the global challenges identified above. Globalization stays as somewhat of a background-noise in this section as it is entwined with digitalization and sustainability.

a. Sustainability and European competition law

Sustainability poses several dilemmas in competition law, both when thinking about traditional for-profit undertakings and their interaction and when thinking about social sustainability, where traditionally public sectors (including healthcare) have been – in many member states – subject to introduction of market principles. This interaction between the increasing interest of companies for a sustainability-strategy, and how that interest finds place under (European) competition law is more than a very interesting thought experiment. It is of practical importance: to companies who pursue responsible business conduct seriously, companies who respond to a call for self-regulation and

companies who pursue such a strategy jointly. More fundamentally, the growing importance of sustainability-focused agreements is a phenomenon largely concomitant with an increasingly environmentally aware society. It raises questions for the applicability of the prohibition on anti-competitive agreements. This also links to circular economic thinking, as a new form of economic order.¹² A shift towards a circular economy implies ‘reducing waste to a minimum as well as reusing, repairing, refurbishing and recycling existing materials and products’.¹³ While the goal of sustainability does not, in and of itself, imply an alteration of market structures or the market mechanism and the values on which it is based (competition, individualism, profit-making), it could lead to questioning these very foundations. At minimum it envisions *cooperation* as a fundamental starting point, including cooperation between undertakings to achieve such goals.

This raises the question whether – in response to the global challenges of sustainability – competition law also needs adapting, whether it should structure itself in such a way to allow for private sustainability initiatives, which might provide a sustainability benefit, but at the same time might lower consumer welfare by way of higher production costs, or which might limit competition because of increased transparency. So far, competition law has been fairly incapable of keeping pace (creating, what I have labeled elsewhere, a ‘sustainability deficit’).¹⁴ The tension between competition law and sustainability surfaces specifically in the application of Article 101 TFEU. The Fairtrade organization has recently published a study which provides an indication that Article 101 TFEU has a chilling effect on cooperation towards providing a living income (farm-gate pricing) in producing countries.¹⁵ This is not surprising when considering the few cases that have in recent year actually been brought to the attention of national authorities. This was the case, for instance, in the infamous ‘Kip van Morgen’ (“The Chicken of Tomorrow”) in the Netherlands.¹⁶ This case, which followed a case on closing of coal fired electricity-production plants which was negatively assessed for raising production (and thus consumer) costs, concerns a review of a government-brokered sectoral agreement to improve animal welfare, saw the Dutch ACM (Authority for Consumers and Markets)

¹² See the 2018 European Commission Circular Economy Package, available at: <http://ec.europa.eu/environment/circular-economy/index_en.htm>, which entails Europe-wide measures concerning the disposal of plastics, the interface between chemical, product and waste legislation, a monitoring of the progress towards a circular economy in the member states, and a report on critical raw materials and the circular economy.

¹³ Didier Bourguignon, ‘Closing the loop: New Circular Economy Package’ (European Parliament January 2016) Briefing European Parliamentary Research Service, available at: <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573899/EPRS_BRI\(2016\)573899_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573899/EPRS_BRI(2016)573899_EN.pdf)> provides an accessible and thorough account of circular economy and its relation to sustainability.

¹⁴ Anna Gerbrandy, ‘Solving a Sustainability-Deficit in European Competition Law’ (2017) 40(4) World Competition, 539.

¹⁵ Fairtrade Foundation, ‘No Retailer Wants to Go First to Raise Low Farmer Prices, Finds Fairtrade Report’ (29 January 2019), available at: < <http://www.fairtrade.org.uk/Media-Centre/News/January-2019/No-Retailer-Wants-to-go-First-to-Raise-Low-Farmer-Prices-Finds-Fairtrade-Report> >; for the report, see: Fairtrade Foundation, ‘Competition Law and Sustainability: A Study of Industry Attitudes towards Multi-Stakeholder Collaboration in the UK Grocery Sector’ (January 2019), available at: < <http://www.fairtrade.org.uk/~media/FairtradeUK/Resources%20Library/Researching/Documents/Competition%20Law%20and%20Sustainability%20-%20Fairtrade%20Report.pdf> >.

¹⁶ Anna Gerbrandy, ‘De Kip als Symptoom’ (2016) Markt&Mededinging

attach a monetary value to chickens produced in a more environmentally friendly manner (in terms of consumers' willingness to pay) to weigh that against the regular price effects. The Dutch competition authority reduced the non-economic interests at stake to quantifiable economic terms. This circumvents the problem of weighing non-economic vs economic interests, but also somewhat proves the point that competition law has difficulties dealing with these types of agreements. This discussion is, of course, also linked to normative questions of what aims competition law pursues,¹⁷ and it is, ultimately, a re-questioning of the economization of its application. In terms of these goals – a stripped-down version suffices here – the efficiencies/maximization of consumer welfare in the short term normative foundation of competition law, is at odds with initiatives and policies (also) aimed to contribute to non-economic, environmental or social concerns which take a much more long-term vision, and a much more inclusive vision, of society.¹⁸ These values may clash (not always, but often). It raises constitutional questions as to how these values should be weighed and balanced. European competition law sees non-economic values (such as sustainability) to be mostly irrelevant when assessing the anti-competitiveness of an agreement and assessing whether it merits saving by way of conforming to the exception-clauses.¹⁹ In practice of course, not everything is bleak and local initiatives guaranteeing, say, more environmentally friendly conditions for livestock (resulting in a higher price), may fall outside the scope of competition law for reasons of their negligible effect.²⁰ However, where sustainability-driven agreements take place amongst large multinationals the uncertainty under competition law may discourage these undertakings from taking responsibility in producing societally beneficial agreements.²¹ Thus, the conflict at the level of values translates into a reality at the level of application of competition law. European competition law is, in principle, capable of addressing this sustainability challenge within the existing framework of competition law (for example under the first and third paragraph of Article 101 TFEU, or using other doctrines in existence in the competition law realm).²² I have argued elsewhere that such a solution is also necessary, especially in situations where legislative action is not possible or feasible. This means, in the language I have used above, that the weight of answering to the challenge of sustainability is such that it merits European competition law to change (again).²³ This position is, for an important part, based on a constitutional reading

¹⁷ See T. Prosser, *The Limits of Competition Law, Markets and Public Services* (OUP 2005). A Gerbrandy, 'Competition Law and Private-Sector Sustainability Initiatives' in ALB Colombi Ciacchi, MA Heldeweg, MBJ van der Meulen & AR Neerhof (eds), *Law & Governance. Beyond the Public-Private Law Divide?* (The Hague: Eleven International Publishing 2013), 5 et seq.

¹⁸ Gerbrandy (n 15).

¹⁹ Gerbrandy (n 14) 8.

²⁰ Gerbrandy (n 14) 8 et seq.

²¹ See the Fairtrade Foundation, which fosters "better prices, decent working conditions, local sustainability, and fair terms of trade for farmers and workers in the developing world. By requiring companies to pay sustainable prices (which must never fall lower than the market price), Fairtrade addresses the injustices of conventional trade, which traditionally discriminates against the poorest, weakest producers. It enables them to improve their position and have more control over their lives.", <<https://www.fairtrade.org.uk/What-is-Fairtrade>>.

²² Gerbrandy (n 14).

²³ *Ibid*, which refers to all the possible solutions to the sustainability deficit (pp. 545 et seq). These include: a tweaking of art.101(3) TFEU, adapting existing legal doctrines and the economic and legal context, and

of European competition law, including its setting within the Treaties, which also encompass (higher-order) values and principles, including the value of sustainability. On this constitutional setting, more below.

b. Digitalization part I: ‘Modern Bigness’

It is obvious that the global challenge of digitalization is an issue for competition law. It is, however, not very clear what that *means*: does European competition law need to change a bit, to adapt somewhat? Does it need new *instruments* or, more fundamentally a new *foundation* in the sense of a new conceptualization? I suggest that of course it needs to change – possibly also fundamentally - but that we can only understand in which direction this change ought to take by understanding the challenges of digitalization well. In this article, I focus on only one of the many aspects of the digital revolution, precisely because I expect this aspect to be quite fundamental: I focus on the power of the Big Tech companies.

The power of Big Tech companies - companies based on the digital economy, operating pivotal platforms and having built an ecosystem around such platforms, companies with a tremendous stock-market value, companies pursuing an aggressive strategy of take-over of startups and branching out into other data-driven services (and accompanying goods) - manifests not only in the economic realm of markets, competition and consumers, but also beyond it. This ‘beyond’, for now, I will label as ‘democracy’. This is a catch-all label for covering Big Tech companies’ impacts on fundamental rights and freedoms of citizens and consumers (such as privacy), on the delineation between the market and government, on the face of news and the shape of media,²⁴ on the political process, e.g. by political hypernudging,²⁵ and the impact of algorithmic decision-making processes,²⁶ and on the ordering of social structures such labor, and with it, pensions and social security schemes. This heaping together under one label is not to say that the response of competition law to each of these separate elements of ‘impact on democracy’ needs to be the same but merely that for reasons of brevity, and without compromising the line

revisiting the fundamentals of competition law. See also: Christopher Townley, ‘Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer’ (2017) 10 Cambridge Yearbook of European Legal Studies 345.

²⁴ Frederik Zuiderveen Borgesius, Damian Trilling, Judith Moeller, Balázs Bodó, Claes H. de Vreese, ‘Should We Worry About Filter Bubbles?’ (2016) 5(1) Internet Policy Review.

²⁵ Karen Yeung, ‘“Hypernudge”: Big Data as a Mode of Regulation by Design’ (2016) 20(1) Information, Communication & Society 118.

²⁶ On the dangers to democracy, equality and competition: Barak Orbach & Grace Campbell Rebling, ‘The Antitrust Curse of Bigness’ (2015) 85 Arizona Legal Studies Discussion Paper 11; Zephyr Teachout & Lina Khan, ‘Market Structure and Political Law: A Taxonomy of Power’ (2015) 9(1) Duke Journal of Constitutional Law and Public Policy; Jonathan B Baker & Steven C Salop, ‘Antitrust, Competition Policy, and Inequality’ (2015) 104 Georgetown Law Faculty Publications and Other Works 1; Lina Khan & Sandeep Vaheesan, ‘Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents’ (2016) 11 Harvard Law & Policy Review 236. On the impact of the digital economy on democratic processes and fundamental rights, see Michael Vaele, Reuben Binns, Jef Ausloos, ‘When Data Protection by Design and Data Subject Rights Clash’ (2018) 8(2) International Data Privacy law 105. See also: A Ezzachi & M E Stucke, ‘Algorithmic Collusion: Problems and Counter-Measures’ (2017) Note for the OECD, Directorate for Financial and Enterprise Affairs Competition Committee, available at: <<https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2925&docLanguage=En>>.

of reasoning that follows, there is no need for a further demarcation: the point is that Big Tech's power reaches both the market and the non-market sphere of our societies. Digital technology integrates into very diverse aspects of private and economic lives.

Both in American antitrust and in ordoliberal thinking a conceptual link between market freedoms and the democratic structures of society was conceived.²⁷ This link – and it may have been more present in enforcement in the USA and more conceptual and thus more tenuous in the EU – does not readily exist within a mostly economics-based approach to competition law. The result is that market impacts are isolated from non-market challenges even where the two may not be very distinct in their *origin*. This origin rests, in the case of Big Tech, for a large part on the amassing of big data and building a company structure around that. As a result European competition law is not easily inclined to deal with these impacts on democracy.²⁸ So the question becomes, as it is in relation to the challenge of sustainability, how European competition law should react: should the connection between market freedom and democracy be revived?

I am not certain yet how to answer that question. But I have started by trying to grasp the phenomenon better. To do so I coined the legal neologism 'Modern Bigness'.²⁹ It uses the (old) competition/anti-trust law notion of Bigness, but modernizes it to entail a combination of 'bigness-as-size', 'bigness-as-economic-power', and 'bigness-as-digital-power'. Both as to this combination of aspects of power and as to its diverse impacts, Modern Bigness seems qualitatively different from the traditional forms of bigness.³⁰ Its power is not limited to market shares and economic dominance, but stems from the staggering amount of amassed (personal) data as well as the indispensability of digital platforms to their users – both companies, consumers and citizens – lives.³¹ Clearly, here the challenges of digitization and globalization are linked: some of these companies, the 'Big Five' specifically, have been labelled as "emergent transnational sovereigns".³² Indeed, their reach is global, spanning the world's economy. Take that power seriously,

²⁷ Elias Deutscher and Stavros Makris, 'Exploring the Ordoliberal Paradigm: the Competition-Democracy Nexus' (2017) EUI Working Paper, available at: <http://cadmus.eui.eu/bitstream/handle/1814/45291/LAW_2017_03.pdf?sequence=2&isAllowed=y>; Flavio Felice and Massimiliano Vatiere, 'Ordo and European Competition Law', in Luca Fiorito (ed), *A Research Annual (Research in the History of Economic Thought and Methodology)* (Emerald Group Publishing 2015).

²⁸ At the very last stage before this article went off to final editing, the Bundeskartellamt made its decision known in the Facebook-case (see, for a summary of the decision (6th February 2019) published by the Bundeskartellamt: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3>. Though in the text above I label 'European competition law' together, it is, of course more complex and made up of enforcement on both the European Commission and the national levels. The German Facebook-case shows, perhaps, a willingness of at least the BKa – functioning in the German constitutional setting – to include also 'democracy' in its competition law framework. Though the language used by the BKa seems to obfuscate that fact a bit. See also my editorial in Markt & Mededinging (2019) on the line of cases in the digital economy.

²⁹ A. Gerbrandy, Conceptualizing Big Tech as 'Modern Bigness' and its implications for European Competition Law: <http://ec.europa.eu/competition/scp19/contributions/anna_gerbrandy.pdf>.

³⁰ See Case-85/76 where market power is defined as "the ability to behave independently of competitors, customers, suppliers and, ultimately, the final consumer".

³¹ Van Dijck (n 5).

³² Julie E Cohen, 'Law and the Platform Economy' (2017) 51(133) UC Davies Law Review 1.

I suggest, raises a need to seriously consider how European competition law – and yes, of course, as only one element of a regulatory system - ought to respond.

It is important to note that even in its current incarnation competition law can respond to power. Article 102 TFEU is an instrument, equipped to combat traditional forms of abuse of market power, also applicable in the technical-digital realm.³³ Google can certainly witness to this.³⁴ However, my point is that these more traditional market challenges seem inextricably entangled with non-market challenges to ‘democracy’.³⁵ By way of example, consider *hypernudging*. Hypernudging is an advanced digital version of a nudge (a ‘choice architecture’) which arises in the context of Modern Bigness, and which is used to influence users in a highly personalized manner. More specifically, a traditional ‘nudge’ exerts a soft form of power onto users by leaving them the choice of pre-determined courses of actions (i.e. options), while still creating architectural constraints in a digital form (‘choice architecture’). Hypernudging instead exponentially amplifies this phenomenon with ‘selection optimization’: search engines, for example, can target specific users by displaying results ranked by an algorithmically determined relevance, and although users can theoretically click on any link, the ‘choice architecture’ of the given results will bias their behavior, therefore ‘nudging’ clicks in a specific direction.³⁶ Moreover, hypernudging allows for reconfigurations of the choice architecture based on the feedback of the users’ behavior.³⁷ Simply put, with nudging, architecture shapes behavior; with hypernudging, architecture re-configures itself to exert a dynamic influence on behavior.

The question is how to normatively judge hypernudging. It could be lauded as providing, for example, an optimal price or an optimal choice for a specific user-consumer, in theory optimizing consumer-welfare. But of course, it can also be frowned upon: is such behavior pricing-discrimination, a practice that might constitute an abuse of dominant position? Is it limiting the choice of the user-consumer? Beyond this influence on consumer behaviour also user-citizens can be nudged, for example in their voting behaviour. Hypernudging can be viewed as a potent form of *surveillance*, influencing users’ behavior and autonomous decision-making. If autonomy defines humanity, how far can such an impact reach before it ought to be stopped? This philosophical question is perhaps relevant also for European competition law. One reason is that both (say) price-

³³ See article 102 TFEU.

³⁴ ‘With record antitrust fine, Europe lands blow against Google’ (Politico, 18th July 2018), available at: <<https://www.politico.eu/article/google-to-be-fined-e4-3-billion-in-android-antitrust-decision-2/>>.

³⁵ On the dangers to democracy, equality and competition: Barak Orbach & Grace Campbell Rebling, ‘The Antitrust Curse of Bigness’ (2015) 85 Arizona Legal Studies Discussion Paper 11; Zephyr Teachout & Lina Khan, ‘Market Structure and Political Law: A Taxonomy of Power’ (2015) 9(1) Duke Journal of Constitutional Law and Public Policy; Jonathan B Baker & Steven C Salop, ‘Antitrust, Competition Policy, and Inequality’ (2015) 104 Georgetown Law Faculty Publications and Other Works 1; Lina Khan & Sandeep Vaheesan, ‘Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents’ (2016) 11 Harvard Law & Policy Review 236. On the impact of the digital economy on democratic processes and fundamental rights, see Michael Vaele, Reuben Binns, Jef Ausloos, ‘When Data Protection by Design and Data Subject Rights Clash’ (2018) 8(2) International Data Privacy law 105.

³⁶ Yeung (n 25).

³⁷ Ibid.

discrimination and (say) voter-influence are linked conceptually in their limiting of autonomy. Another reason is that if hypernudging arises from the same private power-structure, and competition law is, traditionally, equipped with scrutinizing consequences of private power, the question to be asked is whether it should also reach towards combatting negative effects of that power beyond the market-domain.

I suspect that an answer to this question depends both on the conceptualization of the power-structure and on a normative evaluation of the weight and importance of the impact of, in the case of hypernudging, on autonomous human decision-making. That normative evaluation, in the European Union's setting, like any evaluation that has the potential to redefine the scope of action of its competition rules, cannot ignore the EU's legal-constitutional framework and the position of competition law therein.

c. Digitalization Part II: merger control

The global challenge of digitalization is as relevant for merger control as it is for the prohibition on abuse of dominance, though it raises slightly different questions. As with the anti-trust provisions of European competition law, European merger control has seen several incarnations. It has wrestled with different conceptions of its rules, and, a familiar theme, the discussion has revolved quite a bit around the normative basis.³⁸ The chief justification of introducing a merger control regime (by way of adopting a Regulation), at the time, was found in the Harvard structure-conduct-performance-paradigm, with consumer welfare as ultimate indicator of performance, but starting the analysis by considering the structure of a market.³⁹ As a structural change resulting from a merger may lead to a situation of market power, a merger may drive up prices, reduce quality and stifle innovation (as compared to pre-merger) and marginalize competitors. Mergers can shift welfare from consumers to producers,⁴⁰ which warrants regulatory intervention.⁴¹ The rationale is provided, primarily, by consumer welfare. But inherent in this notion is a fairly static conception of competition, only emphasizing short-term effects on price outputs and other indicators of consumer welfare.⁴² As is well known, the substantive test for merger control in the EU was changed with the adoption of Regulation 139/2004. Among the reasons for change,⁴³ were the 'gap' between the

³⁸ For an overview of the normative economic bases of the merger control, see: Alistair Lindsay and Alison Berridge, *The EU Merger Regulation: Substantive Issues* (4th edn, Sweet & Maxwell 2012). Also, Catalin Stefan Rusu, *European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience* (Kluwer International Law 2010).

³⁹ *Ibid.*, 11 et seq. On the causation chain literature, see: JS Bain, *Barriers to New Competition* (Cambridge, Harvard University Press 1956).

⁴⁰ *Ibid.*, 23; on the concept of merger and control, see Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1 art 3.

⁴¹ To that end, see the working paper of Lars-Hendrik Röller, former Chief Competition Economist at the DG COMP, EH Röller, J Stennek and F Verboven, 'Efficiency Gains from Mergers', The Research Institute of Industrial Economics, Working Paper No 543, 2000.

⁴² EC, Carles Esteva Mosso, Deputy Director for Mergers, DG for Comp EC. Innovation in EU Merger Control.

⁴³ The extent to which these two limbs are independently applied from one another was the first subject of contention (Rusu n 38) either the two stages indistinctly collapse in a single broad-brush interpretation by the European Commission, or a multi-pronged test is applied, whereby the creation or strengthening of a

normative goals to catch mergers which distort market performance and the suitability of the concept of ‘dominance’ as a tool to detect them, and whether the test actually necessitated taking consumer welfare effects into account.⁴⁴ The new test – the significant impediment of effective competition test – widened the scope of intervention of merger control.⁴⁵ It is more flexible, de-emphasizing the importance of findings of dominance and market shares, and emphasizing buyer power and barriers to entry.⁴⁶

Questions, in relation to the challenge of digitalization are whether this flexibility also extends towards including an appraisal of dynamic competition, to include the role (and power-structure) of data in mergers and whether the fact that at least one of the parties is a large company pursuing a strategy of branching out in new market involving creating (or strengthening) a platform-ecosystem ought to play a role.⁴⁷ Consider, as an example the recent mega-merger between Bayer and Monsanto. It has given rise to vehement criticisms (e.g. coining the term “Baysanto”).⁴⁸ Both industrial agricultural giants had expanded considerably through acquiring smaller agricultural firms and, later, software developing firms. Both are pioneers in the optimization of agricultural yields through advanced chemistry and genetic engineering. Both are involved in ‘smart farming’ which is based on digitalization (and datafication) of agricultural processes. Thus the merger,

dominant position does not necessarily imply an impediment to competition (*rudu*). The latter interpretation grants the Commission broader margins of appreciation, as it allows it to de-emphasise the importance of dominance in its assessment. However, neither option is ideal, since the very usefulness of dominance as a guiding concept in Merger Control is disputed. See Rusu (n 38), 24.

⁴⁴ In fact, a concentration may damage the competitive conditions of the market, without there being a strengthening of a dominant position – as such, even a very liberal interpretation of the concept of “dominance” as entailing substantial market power is unable to catch all anti-competitive mergers. Stretching the interpretation of dominance in merger control, to make the exercise of powers of the European Commission may lead to a cross-contamination of Art 102 TFEU: a liberal interpretation in merger control has the potential to spill-over and result in a more liberal interpretation of abuse of dominant position under Art 102 TFEU as well. The alternative to a dominance test, being considered by the commission in the lead-up to regulation 139/2004 was the Anglo-American SLC test, which has an emphasis on the structural aspects of concentration. To that end, see Rusu (n 38) 28 et seq.

⁴⁵ EUMR Art 2(2) and 2(3). The approach of the Commission in conducting this assessment is supplemented by the Notice of Horizontal Mergers and the Notice on Non-Horizontal Mergers respectively. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5 and Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6. See also: *Nestlé/Pierré* (IV/M.190) Commission Decision of 22 July 1992 [1992] OJ L356/1 where it is stated that even if consumer welfare is still substantial after the occurrence of the merger, the merger might still be prevented if it does not protect smaller consumers. See also: *SCA/Metsä Tissue* (COMP/M.2097) Commission Decision of 31/01/2001 [2001] OJ L238. On the goals of merger control within the EU more generally, see Catilin Stefan Rusu, *European Merger Control: the Challenges Raised by Twenty Years of Enforcement Experience* (Kluwer Law International 2010).

⁴⁶ Rusu (n 38).

⁴⁷ *Ibid.*

⁴⁸ On the academic community side, see Ioannis Lianos and Dmitry Katalovsky, ‘Merger Activity in the Factors of Production Segments of the Food Value Chain: - A Critical Assessment of the Bayer/Monsanto merger’ CLES Centre for Law, Economics and Society UCL Policy Paper Series 2017/1

with horizontal,⁴⁹ vertical⁵⁰ and conglomerate aspects,⁵¹ led to the creation of a merging entity occupying a dominant position on the global stage in “smart farming”, consisting of production of agro-chemicals and IT platforms,⁵² as well as to “the reduction of independent centres of innovation activity in the industry and consequently of innovation, due to reduced competition”.⁵³ As in Dow/Dupont,⁵⁴ the merger would reduce innovation competition, in this case for pesticides. The Commission, however, gave the green light. This decision is amenable to numerous criticisms from the agricultural community and beyond; but from a static vs dynamic vision of competition, it has been held objectionable, as one commenter states, because “one should not take a static picture of the level of concentration of the market, but should aim to understand the competitive dynamics of the capitalist agricultural production”.⁵⁵ The Facebook/Whatsapp takeover is an illustration of the data-power assessment problem.⁵⁶ The takeover was cleared on the grounds that the horizontal activities of the parties did not (substantially) overlap.⁵⁷ However – and here a link can be found between this section and the previous one on Modern Bigness - if such a merger would have been scrutinized from the perspective of gathering (more) data, and amassing data-power, the outcome might have been different. Relevant here is both a new conception of power and a rethink of what the *market* is (and thus where impacts are felt). The relevant difference between ‘normal’ economic power and Modern Bigness is precisely that it is based on data, befitting the increased datafication of our societies. So, should merger control not (also) be concerned with investigating whether heaping more (differentiated) data in the hands of companies, already having amassed and conquered vast data to reap economic benefits has negative effects on competition? As to branching out of Big Tech companies into a

⁴⁹ The horizontal nature of the merger derives from the fact that both industries are active in the seeds sector for various crops, being completely “head-to-head” in seeds for cotton and soybeans, as well as having considerable overlaps with various pesticides segments of the value chain.

⁵⁰ The vertical dimension relates to the ability of the merged firm to foreclose competitors in upstream and downstream markets in the various stages of the value chain. The Commission is historically less strict on horizontal mergers.

⁵¹ The conglomerate nature of the merger, which relates to a merger between companies active in completely distinct markets. In the Bayer-Monsanto merger, Big Data and software development, especially in light of Monsanto’s acquisition of Climate Corporation does not put the two undertakings in direct competition against each other. Rather, the merger is motivated by the resulting possibility of integrating seeds, crop-protection and digital agriculture in a new value chain, to “provide an inclusive package of services to farmers

⁵² Ibid 1.

⁵³ Ibid.

⁵⁴ See, for a summary: Summary of Commission Decision of 27 March 2017 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.7932 — Dow/DuPont) (notified under document C(2017) 1946) (Text with EEA relevance).

⁵⁵ Lianos (n 48).

⁵⁶ Prior notification of a concentration (Case M.7217 — Facebook / WhatsApp) Text with EEA relevance OJ C297/13.

⁵⁷ As noted in: European Commission, CASE M.8228 - FACEBOOK / WHATSAPP (17.05.2017), para.25, available at: <http://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf>, where it states that: “The Commission noted that the Transaction would not give rise to any horizontal overlaps in the market for online advertising or any sub-segment of that market as WhatsApp Inc. was not active in that market”.

many-headed portfolio of (data-based) activities, which strengthen platform-ecologies, again a static conceptualization of markets can be questioned. Should merger control take into account that acquiring a small startup by one of the dominating platform-ecosystems is, indeed, different from having that same start up acquired by a lesser god? A step in this direction is taken by changes in the merger control thresholds in Austria and Germany) so as to at very least be able to scrutinize these mergers (which would not reach the take-over thresholds).⁵⁸

Answering these questions however, does not – or does not necessarily so – change the nature of merger control fundamentally. However, suppose a certain merger might lead to a controlling news-position,⁵⁹ or the (increasingly data-based) educational system, or to another aspect of the loosely labeled ‘democracy’-concerns, should these non-economic concerns be a part of an assessment of the merger? As with an Article 101(3) TFEU assessment, in the history of European competition law, sometimes such further-removed-from-consumer-welfare aspects have played a role,⁶⁰ but less so today. To do so would, indeed, change the normative foundation of merger control, increasing the already complex assessment of what the future impact of a merger might entail. It would be easier to just ‘break up’ the tech-giants for fear of their hydra-like power, wouldn’t it? But of course, even though the Commissioner for competition has hinted that she would consider such a move,⁶¹ that would even more fundamentally change the both instruments and foundations of European competition law.

d. Competition law’s constitutional home

Not all questions posed above can be answered here. But I would like propose that these questions can only be addressed by assessing the bigger picture. The challenges are the result of *global* challenges facing us; these global challenges are also *European* challenges, and, for sustainability and digitalization at least, challenges for its competition law. These questions are also *constitutional*: to answer them the normative foundations of the system and grounding of European legal rules need to be taken into account. European competition law itself is part of the constitutional set-up of European integration, part of its foundational core. Thus, the question of how competition law should react to global challenges of globalization, digitalization and sustainability can only be answered by seeing competition law not merely as a system of economic-legal rules which are based

⁵⁸ Juliane Scholl, ‘Why the New Merger Control Thresholds in Germany?’ (2017) 8(4) Journal of European Competition Law & Practice 219. The author connects very clearly the amendment of merger control thresholds to the rise of the digital economy.

⁵⁹ However, see EUMR Art 21(4), which provides several public interest grounds that the member states can notify to the European Commission to block mergers – amongst these grounds, there is “public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph”. The specificity with which the legislator mentions ‘plurality of the media’ would lead to believe that, a contrario, no other grounds of justifications are allowed. A narrow reading of these justification grounds is corroborated by the merger clearance practice of the European Commission.

⁶⁰ Case T-62/98 *Volkswagen AG v Commission of the European Communities* [2000] ECR II-2707.

⁶¹ Joe Somerland, ‘Google Threatened with Break Up by EU over Monopoly Fears’ (The Independent, 26 March 2018), available at: <<https://www.independent.co.uk/life-style/gadgets-and-tech/news/google-eu-competiton-commission-threat-margrethe-vestager-search-monopoly-anti-trust-laws-a8273961.html>>

on a given set of (economics-informed) axioms. Ultimately, the answer is also about what we deem important in this changing world.

From a European *legal* perspective then, the constitutional context of the European Union gives a direction – or at least a normative space – in which answers can be developed.⁶² It is in this constitutional context that European competition law functions. One way of conceptualizing this is by building upon the notion of the economic constitution. The economic constitution is a more familiar concept in some member states' traditions than in others, but in the EU's setting it encompasses at very least the internal market provisions. Taken together, and including in this concept also the aims and goals enshrined in the general provisions of the Treaties, their integration clauses, and their foundational inspiration in providing peace and well-being to the European peoples, the economic constitution normatively includes a *balance* between economic values and social values, in the sense that the one cannot exist without the other; markets cannot exist outside a societal context. Building upon this notion it can be brought forward that each subsystem of the provisions of the economic constitution should be responsive to arising societal challenges. For competition law, the particular challenge is that this might mean moving away from considering consumer welfare as the pivotal principle guiding the application of its provisions;⁶³ accepting a multitude of goals at it might pursue, including non-market goals such as freedom and fairness.⁶⁴ A competition law that is part of the wider EU legal context might thus include in its analyses non-market values such as democracy and rule of law.⁶⁵

It is not theoretically inconceivable that competition law moves away from a single focus on economic efficiencies and consumer welfare, nor is it very difficult to follow the arguments that such a move away would fit within the European constitutional context. But it is precisely at this point - much more even than in sketching where the global challenges impact competition law, though there are different opinions on that too - where divergence of viewpoints *really* starts: there are fundamentally opposing views on whether such a move is useful, necessary, or even something to think about in the first place. Different arguments play a role in this normative debate. Relevant is that competition law is, of course, not the only regulatory instrument in existence; not on the European level, nor on national levels. It might be brought forward that including all sorts of evils in its scope of combat might (or will) ruin its effectiveness. Such an opening up goes against competition law's economics-informed basis and will be a return to vagueness. It will lead to legal uncertainty. Furthermore, competition authorities in the member states do not carry the legitimacy in making judgments regarding conflicting values (which would be the result of such a widening). None of these arguments is irrelevant. Ultimately, even within this European constitutional context, the answer

⁶² Of course, we can also question whether the constitutional set-up contains the correct set of norms, taking us outside the legal constitutional realm of thought altogether. Depending on the changing circumstances this might, of course, be necessary too.

⁶³ See European Commission, White Paper on the Modernisation of Rules Implementing Articles 85 and 86 of the EC Treaty (1999).

⁶⁴ See Yeung (n 25).

⁶⁵ Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis* (Cambridge University Press, 2014).

depends on an evaluation of values, on a person's or people's perceptions and expectations of both the future and of what is a necessary course of action in light of these global challenges.⁶⁶

No clarity, yet, therefore. But it might help to realize that answers might also be *different* as to the different challenges posed at European competition law. For example, Modern Bigness is a different phenomenon than answering to the need, in instances where that is necessary, for companies being able to agree to market-limiting sustainability agreements. Agreeing that *sometimes* sustainability initiatives are necessary, e.g. to solve a collective action problem, and then allowing a wider range of benefits under the exception of article 101 (3) TFEU is a relatively small change. It is a narrowly-focused change, especially in comparison to stretching the abuse of dominance prohibition towards including protection of 'democracy' in all its many constituting elements. In the same vein, changing merger control thresholds is relatively simple, and even including dynamic competition in a merger control analysis to reflect realities in the digital economy is not such a fundamental shift. This is different from, for example, changing our conception of *power* itself. That, I believe, would have much wider ramifications, across the board for competition law, including pondering the question of breaking up power itself. In all these intricacies, however, I would propose that the combined global challenges of globalization, digitalization and sustainability must lead to considering these fundamental changes carefully, and evaluate whether these are, possibly, necessary.

IV. CONCLUDING REMARKS

Delivering a key-note address at a conference is one thing (and a fun-thing!), writing it up in a coherent fashion is another. I have left out several thoughts: institutional challenges in the enforcement of European competition law, the challenges of a growing European Union for the coherence of competition law, the challenges to the fabric of the rule of law in some of the EU's member states as challenges to the judicial review in competition law. Important challenges, but more specifically European than global. The global challenges of sustainability, digitalization and globalization are, however, also challenges for European competition law, which will change competition law as we know it. This change is already visible and competition law is very much in the spotlight of many debates. So, *noblesse oblige*: competition law academia and practice needs to consider how to answer. Whether this means a fundamental shift – away from a consumer welfare standard to a system that encompasses protection of democracy (in whatever sense) as well as consumer welfare – remains to be seen. But European competition law is inherently flexible and it would not be surprising when, in a decade from now we look back, to note that indeed, competition law has gained a new shape.

⁶⁶ For a discussion of some of these arguments (in relation to sustainability) see also A Gerbrandy, *Futureproof Competition Law* (Eleven International Publishing, 2018).