GLOBAL CHALLENGES, BIG TECH AND LEGAL RESPONSES

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INTRODUCTION

Given that the theme of this volume is 'The Open Society and its Future' and that I am a lawyer, it is probably unsurprising that I will focus on the legal responses to the challenges regarding the open society [1]. However, as 'the law' is a vast body of principles, rules and practices, I am familiar with only a small segment. My contribution will therefore concentrate on a slice of the legal system and a slice of the many global challenges to that legal system (I use 'the legal system' and 'the law' somewhat interchangeably in this contribution to indicate the sum of legal principles, rules, legal institutions and legal practices). These challenges broadly reflect the challenges to open societies in general and to the European open societies in particular. The idea is that the findings related to this slice can be relevant to the legal system more generally. The conclusion at the end of this paper will be that there often seems to be a mismatch between the system of the law – with its focus on systematisation, classification, internal coherence and logic – and the questions that the global challenges pose to the law. As a result, the law is struggling to advance adequate legal responses, while its foundational principles are themselves under threat as well.

To arrive at that conclusion, this contribution follows a classical line of reasoning. I will briefly set out the theoretical context, which is found in the conceptual framework of Mark Bovens (see first article in this volume) but which I will tweak to focus on the legal system. I will also briefly set the scene of 'global challenges' (Section 2). The slice comes into focus in Section 3, where I will zoom in on the power of Big Tech firms and its ramifications for European competition law. Finally, I will zoom out again to see what can be learned more generally (Section 4).

PERSPECTIVES ON THE OPEN SOCIETY AND THE IMPLICATIONS FOR THE LAW

In his paper, Mark Bovens set out his reflections on the concept of 'Open Societies'. He used four perspectives to show how the Open Society can be conceptualised. In her contribution to this paper, José van Dijck added a fifth perspective (see the second paper in this volume).

1 Thanks are due to Giancarlo Piscitelli (student of the Legal Research Master's at Utrecht University School of Law) for research support and Bald de Vries (Associate Professor in Legal Theory at Utrecht University School of Law) for interesting as well as helpful discussions. This paper is part of a research project funded by a European Research Council Starting Grant.

These general perspectives are useful for understanding what we mean when we talk about open societies. They are also useful to zoom in on the function and conceptualisation of the law in an open society. Though it is not a perfect fit, the table below sketches these implications for the legal system:

Perspectives on Open Society & implications for perception of the legal system	
Philosophical perspective: Popperian/ liberal	A Popperian perspective to the Open Society implies that the legal system is never absolute. As rules are based on scientific insights and intellectual reasoning, they can be adapted and changed. It is a positivist perspective in the sense that the law is man-made: its validity depends on how we agree that the law is made by us. A liberal Open Society is explicitly based on the notion of the 'rule of law': the legal system at the very least protects fundamental rights and individual liberties, while it provides checks and balances for political power. It is also based on the notion of legality: the exercise of power is legitimised in law.
Socio-cultural perspective	This perspective implies that the legal system establishes and protects the public sphere. It includes the protection of freedom of press and freedom of speech, the freedom to gather and to protest, and the safeguarding of access to a plurality of voices in the media.
Socio-economic perspective	This perspective implies that the legal system establishes markets as a system for economic order, but it also provides socio-economic rights and equalisers.
Constitutional perspective	From a legal point of view, the constitutional perspective overlaps with the liberal perspective, though it may form a more fully developed democratic basis of the legal system. The legal (constitutional) system provides a model of governance based on the rule of law and democracy. How we make the law and how we determine who has power is based on these democratic processes. This fact means that legislation is based on and legitimised in its procedural embedding in democratic processes as well.

The constitutional perspective on open societies that Bovens provides seems to be the most complete 'legal' perspective. It provides a richer conceptualisation of the role of the legal system, but these four perspectives provide useful starting points for the next step in this paper's analysis: how do global challenges affect the legal system in an open society and how should legal systems respond, if at all?

At this point, it is perhaps useful to point out that my reasoning is partly based on the premise that an open society is the *better* alternative. This normative position can be justified from both an internal and an external perspective. For lawyers, the grounds for taking normative positions are often found within the setting and the coherence of the legal system itself. [2] However, equally often, the normative grounds come from an external perspective. One normative foundation for the position that the open society is the better alternative can be found in political philosophy: a liberal society is better than an illiberal society when considering human autonomy as a starting point for how societies should be shaped and governed. Another foundation is situated within the legal system itself, which reflects these notions of autonomy and liberty. In the Dutch and European legal context, the notions of constitutionality, rule of law as well as democracy are enshrined in foundational texts and principles, including in the European Treaties and the national constitution. [3] The implications of this normative position are at least twofold: first, the legal system should be geared towards constituting and protecting the tenets of an open society; second, if there are threats, they should be understood and countered.

2 I am aware that this may sound like a circular kind of reasoning, but it is a useful starting point for many legal analyses: if the goal of the specific rule is X (such as equal pay for men and women), which is based on the value of Y (non-discrimination, equality, inclusiveness) or Z (higher production, economic growth), it is a valid exercise to evaluate the application or enforcement of that rule in light of these goals.

3 For example, see the Treaty on the European Union, Article 2, which reads: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-diation, tolerance, justice, solidarity and equality between women and men prevail.'

However, at an abstract level, it is not always easy to know what it is that we should therefore guard *against.* What are the threats? I am mirroring Bovens' approach to sketch the look and feel of a legal system in *non-open* societies (whose characteristics can be considered to represent the threats: illiberal, dogmatic, traditional and totalitarian).

Perspectives on non-open society & the legal system	
Philosophical perspective: illiberal society	In an illiberal society, there is no protection of fundamental rights or individual liberties, while there are no checks and balances for power: the strong make and enforce the rules, but the weak are not protected.
Socio-cultural perspective: dogmatic society	In a dogmatic society, the law is absolute and is based on dogmas. Freedom of speech is limited or absent; media coverage that contradicts dogma is not tolerated. Dogma might be based on religion – which would imply a religious-fundamentalist society – or on a particular ideology, but not necessarily.
Socio-economic perspective: traditional society	In a traditional society, the law is based on tradition; it is not easily questioned or changed. This fact implies that the law protects vested corporate and political interests. For example, if inequality is inherent in 'how things are done' and full capitalism is the traditional basis for economic order, the law will not have an equalising function.
Constitutional perspective: totalitarian society	In a totalitarian society, there is no basis for governance in the rule of law, nor a protection of democratic processes for legislation.

In conclusion: *these* elements of non-open societies are what we are guarding against. Such threats are not new; they are the basis for the history of shaping liberal, open societies. However, the global challenges confront the open society with new questions, which raise new challenges for the legal system might as well.

The world today is faced with challenges, many of which are not confined to one country or even one region. We have come to call these familiar challenges global.

Examples are global warming and climate change, leading to the need for an energy transition; the subsequent displacement of people, leading to migration; rising inequality and populism; or the impact of digitalisation on society. These challenges have different roots, but their shared characteristics include that they are multifaceted and complex, that their roots and manifestations intersect, and that their solutions cannot be found only at the level of individual countries

Global challenges have repercussions for the legal system of open societies. On the one hand, the legal system in an open society itself might be under siege; for example, because of direct threats to the independence of the judiciary or to lawyers, or as a result of eroding trust in the legal system. On the other hand, even if there are no direct threats, the legal system may have difficulties shaping a timely response to these challenges. If it does respond, however, it can act as a bulwark against the threat to open societies.

There seem to be several general responses possible. First, the legal system can adapt to a changing societal context. The law mutates, it accommodates, it encompasses new situations into the existing tapestry of legal norms. Such adaptation is inherent in any legal system within an open society, because societies never really stay the same. The difference, however, is perhaps one of complexity and pace: the global challenges lead to rapid societal changes, with which the normal slow tempo of legal development cannot keep up (even though the reason for this slowness is consistency and legal certainty). This situation may uproot the system as a result of great leaps or fundamental changes that lead to discussions about the remit of the law.

Second, the legal system might react by non-accommodation. Its existing concepts, however broadly they might be construed within the boundaries of legal interpretation, cannot reasonably (legally, constitutionally) be stretched to cover these new situations or deal with these challenges. Legal actors might say that 'this issue is not for the law but for politics'. This response may lead to gaps in the legal system. The law cannot keep up; there are no rules, laws or legal concepts that can govern these new societal realities. That fact is not necessarily problematic in itself, unless politics is also gridlocked due to the exact complexities of the challenges involved. In this case, a third reaction is possible: the legal system itself adapts by deviating (slightly or greatly) from the principles of the rule of law. The debate on whether courts should take 'political' decisions or be the legislator is relevant here and some of the discussions in the European Union seem to be examples of exactly this tension.

BIG TECH AND COMPETITION LAW

To make the analysis more concrete, this section will attempt to apply the above to the intersection of one *slice* of the legal system – European competition law – with one *slice* of the many global challenges: the rise and dominance of Big Tech companies. At the end of this section, I will relate the analysis of this intersection to the legal perspectives of threats to the open society in a new table.

Global challenges confront the open society with new questions, which raise new challenges for the legal system as well.

The 'Big Tech' label is generally used to indicate the major technology companies Facebook, Google (more precisely, its mother company Alphabet), Amazon, Apple and Microsoft. We could quibble about whether other large companies that are just as important to our everyday lives should also be included. Examples include agri-food and chemical conglomerate DowDuPont as well as its recent spin-off companies Dow and DuPont resulting from the break-up of the giant (Root, 2019), or pharmaceutical giants the likes of Bayer, Pfizer and AstraZeneca. Indeed, these companies are becoming increasingly technology-based and embrace business models offering platform-based services. For now, the main difference is the Big Tech companies' basis in computing technologies and their direct relationship with consumer-users, generally by way of a multi-sided platform. The Big Tech companies, at least the Big Five, share another characteristic: they are indeed very big – in size, in reach, in market share, in global scope, in the development of countless interlocking services tied to the platform and perhaps also in ambition. Such big companies existed in the past, but these five seem worrisome. The question that I have been pondering is why. Is this 'bigness' something new and why or why not? If so, what does it mean for European competition law?

Competition law (it is called *antitrust law* in the USA) is concerned with markets and the free market mechanism. It is about how the competition process takes place and is organised, while it assumes that market-based competition will generally lead to higher economic welfare (and that growth in economic welfare is good). Competition law, in all jurisdictions where it exists, prohibits cartels.

Cartels lead to combined market shares and to higher prices than the market mechanism would produce, resulting in profits for companies at the expense of consumers' wallets. Competition law is generally concerned with monopolies as well; or, in the more precise language of European competition law, it is concerned with companies that have a dominant market position. Dominant companies often lack the restraining effects of competition, which will induce them to raise prices to 'monopoly prices' or neglect quality and innovation. European competition law prevents dominant positions from arising by way of an *ex ante* system to control mergers and acquisitions. It can fine dominant companies for *abusing* their dominance to the detriment of competition and consumers. In other words, competition law is concerned with the effects of market *power*.

Large companies of the past had market power through high market shares (they held a dominant position). They had deep pockets, were able to leverage market power from one market to another and could exclude rivals from entering the market or growing a sizeable market share. Competition law dealt, and deals, with these market effects. Large companies have been criticised for their lobbying power before as well (which was used in order to affect policies and legislation), for their intimate relations with the politically powerful and for the 'capture' of those that should enforce the competition rules against them. A century ago, in a setting where rising corporate conglomerate power was deeply entwined with political structures, this trend was called 'bigness' in the USA (Stoller, 2019). The concern about the effects of bigness on competition and markets (and thus consumers) but also on politics and legislation led to the famous break-up of 'trusts'. The effect of trusts on both the market and on democracy seems to have been what led to this distrust.

Today, there is a resurgence of large companies, at least in the tech markets. Apple, Amazon, Microsoft, Google and Facebook are present in almost every corner of the world and in the daily lives of millions of consumer-users. Though their exact businesses differ, they overlap in many segments of consumer tech markets. Their shared characteristics include size, market capitalisation (they have a lot of money) and their relentless quest for growth.

There is more to it, however, which has led me to positing that the power of Big Tech companies is something new. I have labelled it 'Modern Bigness', which refers to the old idea that powerful companies can be problematic not just from a perspective of competition and well-functioning markets, but also from the perspective of a well-functioning democracy. These combined concerns have resurfaced with Big Tech (Gerbrandy, 2018). From the perspective of protecting open societies, it might be their entwinedness that is indeed the most worrisome. The power of Modern Bigness, of course, is also built on having powerful market positions. These positions are founded on quickly developing technology, wonderful innovations as well as vast computing and processing power. In some consumer markets, one company rules (e.g. Google on the market for Internet searches); in many other markets, these companies function in oligopolies in differing combinations (e.g. cloud computing, online shopping). In terms of turnover, access to 'pocket' money and capitalisation, these companies are also shockingly large. By way of example, Google's revenue in the fiscal year of 2018 amounted to a whopping 160.74 billion USD, which is largely composed of advertising revenues.

For Big Tech companies, furthermore, the driving business model is based on 'stacking' layers of services (and sometimes hardware as well, in the form of devices). The result is an ecosystem in which users become 'locked in' and competitors can be 'fenced off'. It has become obvious that ubiquitous data-gathering, combined with data-processing and algorithmic capabilities, are important drivers for growth. Within these ecosystems, the companies have become 'gatekeepers', providing, guiding and guarding access to as well as between actors that generate content and applications. As a result, Google has become our access point to the Internet, Facebook has become an important curator of news and Amazon has become the 'everything store' – at least for the USA.

All these elements (and probably other ones) lead to enormously powerful positions; the *combined* elements of power are set to have effects well beyond the direct relationship between producer and consumer. For example, an aggressive strategy of buying start-ups has changed the incentives for innovation. The business model based on the 'platformisation' of services has influenced and changed societal arrangements for labour as well as insurance practices. It has changed how news is created and how misinformation is spreading, while it has also influenced business culture across the globe. Moreover, data aggregation and algorithms can now be used to recognise individuals and predict human behaviour. Used for good, they can allow humans to flourish, but they can also be used in a system of repression.

Of course, as the Cambridge Analytica affair has shown us, platform services can be misused as well to influence citizen's behaviour; for example, in voting.

The question is now: what is the legal response to all of the above? The answer can only be that the law is struggling, but there is hope that it will find its bearings through legal-conceptual development and politically driven legislative efforts.

From the perspective of European competition law, the response has been to keep the focus on market effects. One of the first lawsuits in the tech market was against Microsoft, while a more recent and currently more relevant case is that the European Commission (in charge of enforcing European Competition law) has fined Google several times.[4] Google abused its dominant position in Internet searches by hindering other companies from competing. It has also been fined for abusing its dominant position on the market for mobile operating systems (by way of its Android OS) to hinder access to competing mobile search services, as well as for abusing its dominant position in the market for advertising. The Commission has started investigations into Amazon (abusing its dominance through the use of sensitive data from independent retailers who sell on its marketplace),[5] Apple (for example, in a number of state aid cases which attracted the attention of the European Commission)[6] and Facebook (which was recently fined by the European Commission for having allegedly provided misleading information during the 2014 takeover of WhatsApp).[7]

4 Among other things, see the most relevant antitrust cases against Google such as the recent European Commission cases Google Search (Shopping) (CASE AT.39740) of June 2017 or Google Android (CASE AT.40099) of July 2018 and the very recent Google Search (AdSense), of which a press release is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

5 A press release of 17 July 2019 on the Amazon investigation is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291.

6 For example, see European Commission, Aid to Apple (State Aid SA.38373 – Ireland).

7 A press releasee of 18 May 2017 on the Facebook investigation is available at https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369.

These cases are all examples of business-as-usual competition law: existing doctrines and concepts are used for new situations, to which they are adapted (and sometimes stretched).
One of the main problems, however, is that these procedures take a long time to finish: the investigations at the Commission (and their national counterparts) may take years, while legal recourse to the European Union Courts adds to the duration.

As a result, though the answer of the law might be satisfactory from a substantive point of view, the legal response is indeed slow. This slowness is an issue in the fast-moving markets in which Big Tech companies are active.

More fundamentally, European competition law has no answer to the effects of the power of Modern Bigness companies if they are felt elsewhere, outside the market relationship of business and consumers. That 'elsewhere' could be labelled as the public domain, the domain of democratic interaction and of public discourse. There are more questions here than answers. For example, if the effects of newsfeed curation or social media consumption are indeed that users are contained in an echo chamber or filter bubble, what does it mean for the notion that democracy is based on open debate, diverse news sources and an exchange of opinion in the shared public domain – which is dependent on the pluralism of voices in media, among other things? What if algorithms, which are based on gathering and combining many 'data points', are used to nudge a person into voting instead of not voting, or towards a certain preference in voting? What does that situation mean for our democratic processes? If there is a causal relationship between polarisation and the rise of populism on the one hand and the workings of the algorithms on social platforms on the other, how should we respond? What happens when Big Tech companies enter regulated markets or the public domain by offering patient database warehousing, personalised health-care services or educational services by providing them to budget-restrained schools and health-care providers for 'free' (while of course gathering data in the process)? Is this situation problematic in an open society? What should the response be if profiling by the algorithms of powerful companies leads to discrimination and strengthening of bias?

So far, European competition law has no answer to these problems. As they are not market problems, they are not competition problems; the problems do not occur in the market domain. While they are potential problems, they arise in the public domain, where the user is not a consumer but a *citizen.* This fact produces a very defensible argument from the perspective of this slice of the legal system (also see the next section), which essentially says: it is not my problem; solve it in a different way! Of course, however, this reaction might be too easy and too quick from an internal legal perspective (within competition law) as well as an external perspective (from the position of protecting against threats to the open society). After all, from the business perspective of the Big Tech companies, there is no difference between the user-consumer and the user-citizen, as the driving business force for many – though not all – platform services is advertising. It therefore makes no difference from the perspective of the precise targeting that can be performed on the basis of personal user data whether the user is a user-consumer looking to book a holiday in the Carinthian mountains or a user-citizen 'consuming' news or being targeted by political campaigns. In other words, the source of both is the same power that Modern Bigness brings; the effects are entangled. Ultimately, this source is the concentration of vast power in the hands of private companies.

In essence, European competition law is an instrument against private power, because such power is distrusted in an open society (as is public power). However, competition law has no answer to these non-market effects. Because of its different focus at present, and perhaps also because the law has become more fragmented into occasionally highly specialised segments with their own logic and language, it is difficult for competition law to shape a response that takes in the wider perspective of protecting the open society. In the absence of other laws and regulations (though see Section 4 for a change in this respect), there is a gap in the legal system from the perspective of protecting the open society.

This analysis of the specific challenges posed by Big Tech can be mapped onto the legal system's perspectives of Open Societies, labelling the threats that a lack of response might entail:

BIG CHALLENGES AS CHALLENGES FOR THE LEGAL SYSTEM

The intersection of a slice of law (European competition law) and a slice of the global challenges (Big Tech) unsurprisingly leads to the general conclusion that the legal system is struggling to shape a response. The legal system is slow to respond, but there is no reason to despair. To be fair, this fact might be because we are caught in the middle of the adaptation process. European competition law is adapting to the realities of Big Tech when combatting the effects of Modern Bigness in the market domain, the domain of consumers and producers. Competition law has not focused on the effects that are felt in the public domain. There are reasons for it to do so nonetheless: first and foremost because there is no reason from the business perspective of the Big Tech companies to distinguish public and market domains,

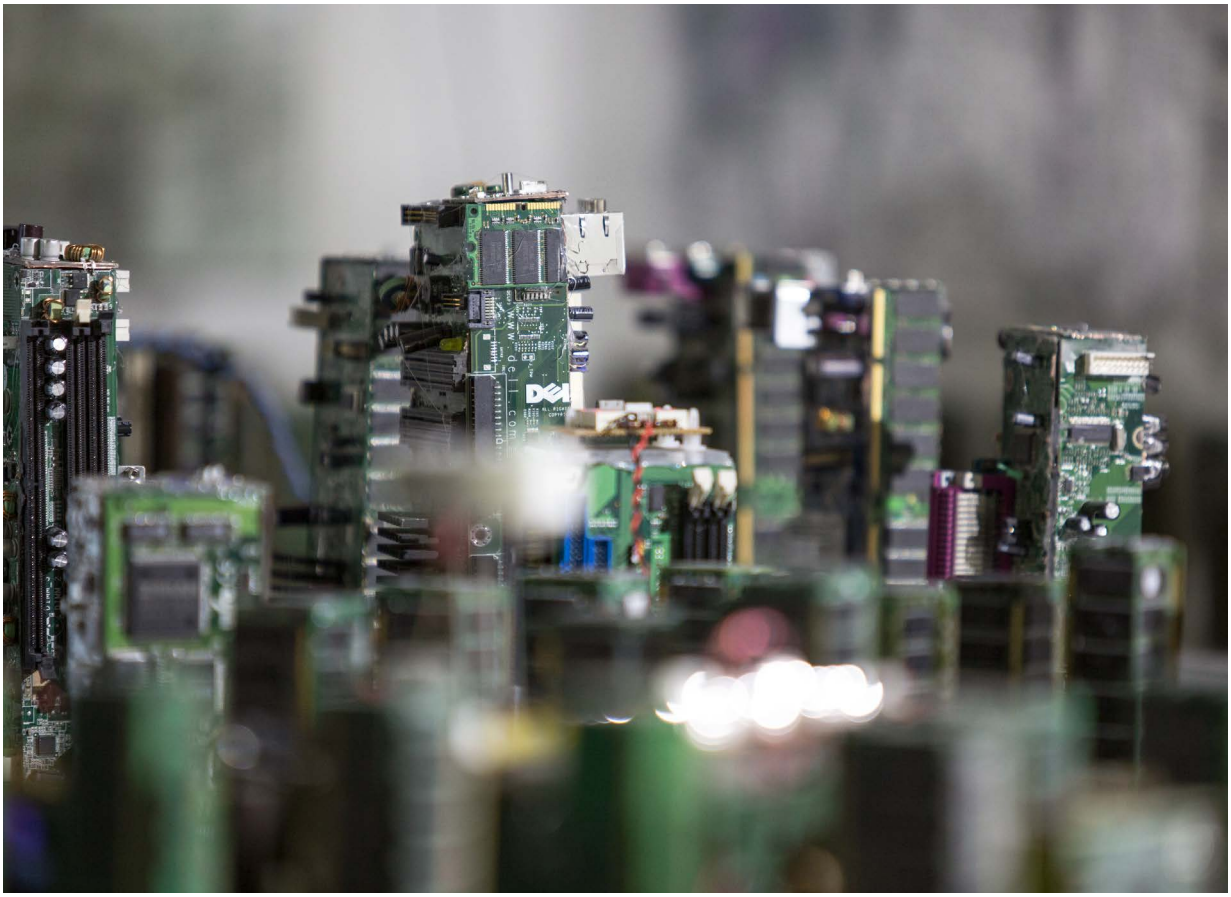
The intersection of Big Tech and competition law: challenges for Open Societies	
Liberal perspective; threat: surveillance society	Digitalisation is neither negative nor positive from a Popperian or liberal perspective on Open Societies. Though the neutrality of technology is contested, it is difficult to see how technology itself has a negative effect on intellectual reasoning. However, digital power is a threat. It is problematic if there is no legal response to the power of Modern Bigness in the sense of *accountability* for power (especially in the public domain). With *public* power comes responsibility for fundamental rights, such as privacy and equal treatment, but there is no such immediacy for private market power. As a result, there is a lack of checks and balances in the legal system (digital power can also be *public* power without proper checks and balances). Either one (or a combination) could lead to a *surveillance* society.
Socio-cultural perspective; threat: manipulative society	An immediate concern is the challenge of Big Tech companies to the public sphere of news, its impact on democratic processes and the media (digital power can also be *public* power over news). Either one (or a combination) could lead to a *manipulative* society.
Socio-economic perspective; threat: unequal society	The adaptation of competition and regulatory law to new forms of market effects is being shaped. However, the response to the platformisation of labour and the effects on inequality in society are unclear. If left unchecked by public regulation and socio-economic equalisers, it will lead to an *unequal* society.
Constitutional perspective; threat: powerless society	In addition to the above, the power of Big Tech companies may lead to excessive lobbying and capture, as well as more directly to influencing democratic and legislative processes. Accountability and legitimacy, checks and balances in private as well as public power and their interplay need rethinking. For the legal system, the constitutional threat also lies in the mismatch between the globalised economy that gives rise to private digital power and the localised legal systems, leading to a *powerless* legal system and society.

and second because European competition law is ultimately a very good instrument to combat the negative effects of private power. If it can adapt and stretch itself, it would mean that this gap in the legal system is filled through a development within the existing legal framework. The danger lies in stretching too far and crossing the boundaries inherent in a properly functioning rule of law. Partly for this reason, the debate on the boundaries of European competition law has been a very lively one.

Of course, other rules and regulations that address part of the challenges are in place, such as privacy protection rules, regulation in relation to labour and regulation of public services. These rules do not focus on the *power* of the Big Tech companies as such, however, while power seems to be the greatest threat in open societies.

This fact is salient considering the future branching out of tech companies into food, health-care services, personalised nutrition and warfare. However, new rules are already considered,[8] which might provide a counterbalancing factor against private power – though not precisely tackling the issues that I raised above. Predominantly in the USA, the most drastic measure is considered: breaking up the powerful companies, based on the 'old' version of anti-trust legislation. Even the EU is no longer 'ruling out' that breaking up private power is ultimately a necessary response.

If what we have learned from the intersection of two slices holds true for global challenges on a general level, we can conclude that global challenges also affect open societies.



8 For example, see the European Parliament resolution of 30 May 2018 on the future of food and farming, preamble G, which reads that 'whereas it is vital to halt and reverse the current concentration of power in the hands of the large retail sector and big business'. The resolution further acknowledges the importance of creating a level playing field among farmers and empowering local farmers to move up the value chain.

Threats to the legal system itself may be part of these challenges: an obvious example can be found in the threats of some European governments to the independence of the judiciary, which is a cornerstone of the legal and governance system in an open society. Such threats are very specific and cannot be accommodated within the legal system itself. However, all global challenges also raise issues to which the legal system itself must respond. While the legal system is willing – and often able – to adapt and accommodate, accommodation is sometimes a bridge too far; crossing that bridge might lead to new breaches in the rule of law. Democratically legitimised legislation will have to be shaped in order to address these gaps in the legal system. Specifically in relation to digitalisation and the power of Big Tech companies, the threats pertain to a surveillance society, a manipulative society, an unequal society and a powerless society. For the other global challenges, similar dire perspectives can be sketched, underlining the importance of a robust legal system. Even though the legislative process might be slow due to the complexities of global challenges (and the contestability of the necessary rules and regulations), there are really no viable alternatives, based on the rule of law and a system of democratic governance from the perspective of safeguarding an open society.

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