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Revisiting the Concept of Power in the Digital Era

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I. Introduction

Writing a contribution to celebrate the 25th anniversary of Professor Amato's *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* reminds me of my own discovery of this gem of a book. Law students in the Netherlands in the early 1990s would not necessarily have received even an introduction into European competition law. It certainly was not (yet) a separate subject, though I gained some familiarity with the topic through courses on European Economic Law. Furthermore, the Netherlands did not (yet) have a serious regime of competition law, nor anything like a blossoming enforcement practice. By working in law practice – first at a law firm and then in the court system – with the then newly minted Dutch Competition Law Act coming into force, I deepened my knowledge, both as to substance and as to procedures. It was an exciting time to work in Dutch competition law practice, not only because the new Dutch act gave rise to novel questions, both great and small, but also because around this time the more economic framework for looking at competition law enforcement gained real traction. It was perhaps similar to today's rapidly changing regulatory frameworks, but with the significant difference that 'the Internet' – with up-to-date information on new rules and regulations, all commentaries and learned contemplations at one's fingertips – had not *quite* yet reached the masses. But it was only when I returned to academia and embarked

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upon the adventure of dissertation-writing that I not just found the time, but also the sense of necessity, to contemplate the following: I thought I knew the rules quite intimately. I was certainly familiar and up to date with almost all the relevant case law, even beyond competition law (I have now given up on this Herculean task). But that knowledge and familiarity turned out not to be sufficient to really grasp the meaning of the system of competition law.

Then I read Amato's book.

It was eye-opening. It made explicit – and in such succinct prose, too! – the political nature of competition law. This was a point that I had not seen made so clearly before. Amato demonstrates that inherent in any system and application of competition rules is the need to examine the line between public power and private power. And, slightly more implicitly, that where one draws the balance between them is dependent on sociocultural and political contexts; that where one draws that line is ultimately also a personal, normative, preference. This demarcation and balance of power has been a recurring theme in much of my academic teaching and writing since, not just when it comes to competition law *strictu sensu*, but also in the demarcation of the spheres of 'the market' and of 'the state', specifically in relation to public interests. It is also relevant for understanding politics, and the interplay between political philosophy, the Rule of Law basis of liberal democracies and competition law. Though here it is not just Amato that helped shape my thinking; there is a clear link even to the general notion that too much power, held too long, without any checks and balances, ought to be distrusted indiscriminately: true both in the world at large, and within the microcosms of institutions such as universities.

The concept of power is currently also at the core of a research project I am leading, which questions the role of European competition law vis-à-vis the power of big tech companies, which have mostly built an ecosystem around and upon one or more platforms. The *ex ante* question of the research project relates to power itself – what is this power, and how can we grasp it, conceptually? – followed, quite logically, by the question: which bits of that power, should it be possible to separate them, are or ought to be relevant to European competition law?

This is also the topic of my contribution in this volume, set up in a straightforward manner, asking questions which are also posed by Amato himself in more recent writings. After providing some context in section II, I will delve into our conceptualisation of power, referred to here as 'Modern Bigness' (section III), which closely follows a recent publication.[2] In section IV, I will sketch how to answer the question of relevance and implications for competition law, which (obviously) depends on where the line is drawn between public power and private power. Section V concludes.

[2] A Gerbrandy and P Phoa, 'The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-power' in R Claassen (ed), *Wealth and Power* (Routledge, forthcoming 2022).

In line with Amato's writing style – which I wish I could emulate! – I have limited references and have focused on the flow of the argument. However, in contrast to Amato's book, which is still standing firm after 25 years, there is no finality to the line of argumentation; in a sense it is a snapshot-in-time of a conceptualisation effort to grasp complexity.

II. The Context of this Contribution: The Digitalisation of Society

Though society is always changing, the shift to a digital society and economy is surely a fundamental one. It has been labeled a transition, a paradigm shift, a new era. Though we can be sceptical about sweeping statements, it is obvious that the impact of digitalisation and datafication must be taken seriously. For the competition law community, the focus logically is on what is happening in the market(s). The relevant lemmas, also in this chapter, are, first, that digitalisation has given us many innovations and provided economic growth (and, perhaps less certainly, that it is expected to continue doing so). Second, that it has also, over time, created several very large and valuable platform companies, such Amazon, Google, Facebook/Meta, Microsoft and Apple, which have branched out into the digital economy in myriad ways. Third, and lest we overlook more recent trends, digitalisation towards integrated platformisation is underway in other segments of the economy too: for example in agriculture, healthcare and transport. Fourth, the classic platform companies – yes, they are still very young, but let us call them 'classic' nonetheless – are built around a core of digital services (or hardware for a digital age) and have branched out towards the more physical economy, which is being swept up into the platform ecosystem. (This is somewhat in contrast to sectors like agriculture and transport which are moving *towards* digitalisation, datafication and platformisation).[3]

Certainly, these classic platforms companies are 'powerful' in the common usage of that word. These platform corporations – a grouping that may include other companies than the five mentioned above – in this chapter are labelled jointly and separately as big tech companies. These big tech companies have impact not only on the market(s), but more generally on how citizens, consumers, employees and business owners work and live, how we interact and play, and how we obtain and perceive information. All this is, in its essence, not really contested. However, it is much more difficult to grasp whether these companies are also 'powerful' in a competition law sense. This is the question of section III. It is, perhaps even more difficult to then ascertain whether their impact is a good or a bad thing – both on

[3] The platformisation and the concomitant rise of platform power in the agri-food sector is the focus of research of Pauline Phoa, postdoc in the ERC project team.

balance, but also zooming in on specific behaviours – and whether this specific bad (or good) thing is relevant for competition law. Or whether it *should* be relevant for competition law. Those are questions for section IV.

III. Corporate Power of Big Tech Companies as 'Modern Bigness'

In my research team's work, presented to the competition law scholarly community, and the more recent contribution to an interdisciplinary edited volume on 'Power and Wealth',[4] we have posited that the competition law conceptualisation of and vocabulary for defining and describing 'power' falls short in recognising fully the extent and intricacies of the corporate power of big tech companies. A more developed conceptualisation is needed, which will also invite better answers to questions on competition law relevance. To enable a better grasp of this corporate power we propose a richer conceptualisation, beyond the competition law notion of 'market power'. We distinguish between the *foundations* of power, the *dimensions* of power and the *domains* across which the power can manifest.

A. Foundations of Power

The foundations of corporate power of big tech companies lie, firstly, in market power. Competition law is intimately familiar with this notion, so I will skip over most of it. However, it is relevant to note that the 'threshold' (not in the merger regulation sense of thresholds, but in a more substantive sense) of market power as leading to a dominant position – which implies the ability to behave to an appreciable extent independently of competitors and consumers, and in economic terms to the possibility of extracting monopolistic prices and excluding competitors – does not necessarily have to be met for market power to be a relevant part of the power-concept we are developing here. Integrated in the notion of market power is, in the platform economy, the understanding of the workings of network effects of multisided platforms (and lock-in and fence-off strategies). These lead to winners that capture a large share of the market and to the emergence of 'super-platforms'.

Secondly, as is also well established, the platform companies of today's digital economy function on the basis of *data*. More specifically, they function on the basis of the gathering of data, the combining of data streams, and the capabilities to infer *information* from the data. There is a continuous feedback loop within each company's systems and services, in which the information gained is fed back into the provision of services, gathering more data. Though there are relevant

[4] Gerbrandy and Phoa, 'The Power of Big Tech Corporations' (forthcoming 2022).

differences between them, for the big tech companies generally the purpose of the loop is focused on strengthening their business model, profit-making and corporate power (and not, just as an example, necessarily improving consumer satisfaction, let alone enhancing democratic institutions; and yes, strengthening democratic institutions is not normally seen as having relevance for a market-based, profit-seeking company, and I am not implying that it should hold relevance for all companies generally; more on this below). This feedback loop is especially important for business models that rely on advertising, such as the Facebook/Meta and Google ecosystems. In order to better understand corporate power of big tech companies, we suggest that having data and being able to gather data – let us call that 'data power' for now – strengthens the market power foundation of big tech companies. It is, however, the capability to do something useful with vast and growing sets of data that moves their power of beyond mere market power. It becomes informational power too.

Thirdly, a further foundation of corporate power lies in enormous, accumulated wealth, which makes it possible to invest in innovation efforts within the company's ecosystem, acquire start-ups or competing businesses, grow in size and branch out into whatever takes their fancy. In a co-tangled course of 'how these things have turned out' it is clearly very often also in the interest of start-ups themselves to be acquired; it is their raison d'être. Thus, innovation within the corporate conglomerate of the big tech companies themselves is flanked by acquiring innovation and enveloping adjacent markets.

B. Dimensions of Corporate Power

The work of Doris Fuchs provides a stepping stone in our understanding of what the combination of these foundations of corporate power of big tech companies means for having power that can be effectuated.[5] Her research focuses on the understanding of political influence by corporations. Fuchs distinguishes three dimensions of corporate power: instrumental; structural; and discursive. Whereas the instrumental dimension of power relates to the direct influencing by an actor of another actor, the structural dimension is about influencing what is placed on the agenda of a (political) process and creating the structures in which that process takes place. The discursive dimension relates to the power to shape norms, ideas and the discourse itself, that create (or limit) the availability of space for communicative practices. We build upon this work to consider that these three dimensions of corporate power of big tech companies (and probably of many other companies too), does not only relate to how power engages in the political domain, but also in other domains.

[5] D Fuchs, *Business Power in Global Governance* (Lynnen Rienner Publishers, 2007).

C. Cross-Domain Manifestations of Power

From just a cursory look at the activities (in the broad sense of that word; see also below) of the big tech companies, it is clear that their corporate power is felt not merely in the political domain, but also in the economic, the social and the personal domains. We distinguish these domains to better understand how the corporate power of big tech companies may manifest in society. Thus, the political domain, for the purpose of this chapter, relates to power structures and decision-making by governments; it is the domain of citizens and governments. This is also the domain in which, formally, but context-specifically, the precise demarcation between (and acceptance of) power between private parties and the government is shaped. It is the public domain, and when Amato speaks of 'public power', this is the domain in which it rests. But this is also the domain where the political decision on where the balance of power is drawn (between private and public power) is, in principle, made (or at least: this is what we mean when we call that a political issue). The political domain is conceptually separate from the economic domain and is not generally thought as being the domain towards which competition law is aimed and towards which it is enforced.

The economic domain, of course, is the domain of competition law. Or, more precisely, the domain of the market for goods and services within the wider economic domain is the main focus of competition law; the economic domain at very least also includes the economic factors of labour and capital, establishment and industry. Here, in the market domain, the interactions are shaped by the market mechanism. While the market and its institutions are of course also shaped by the political domain of legislation and regulation, this is the domain in which 'power' as it is used in competition law terms, and 'private power' as used by Amato, is generally understood. The social domain relates to the sphere of human interactions, within and between groups and networks, where interactions are shaped by social norms and where concepts like 'social capital' play a role in understanding how these interactions form. Finally, the personal domain is the domain of individuals, the domain which relates to or affects a particular person. We include that which is intended to be (and remain) private in this domain too. Thus, in our conceptualisation, corporate power in the personal domain does not relate to the power of individual leaders within the big tech world, but the power over the personal domain of others: users and non-users, predominantly citizens and consumers, but also sometimes workers and others.

How power occurs, and which checks and balances are in place, is both conceptualised and organised – if it can be said to be formally organised – differently for each of these domains. Power (or the prevention of power occurring) is perhaps more implicitly governed in the social and the personal domain, in comparison to the economic and political domain. It is, for example, understood that the more social capital – which is, though, not the same as power in the social domain – is present in a society, the better the shared values, norms and understandings,

which means the networks of relationships, allow individuals to work together to achieve a common purpose to function effectively.[6] In relation to the topic at hand, it seems clear that a dominant social structure, in the form of a network, with common norms and purpose, can lead to social exclusion and inequalities, both in the digital sphere and in real life. More familiar to a competition law audience is that in the economic domain, market power is held in check predominantly by the market mechanism itself, by way of competitive pressures. And political power is disciplined, at least in democracies, by political processes of election, representation and legislation, and in many jurisdictions, by the specific safeguards of the Rule of Law.

D. The Corporate Power of Big Tech Companies

It is useful to draw these threads together at this stage to make clear the relationship between the three dimensions of power and the four domains. Focusing first on the instrumental dimension of corporate power, which is effectuated in the political domain, we stay close to Fuchs' findings: here campaign financing and lobbying activities come into view, both those of big tech companies and other large corporations. Also in the political domain, the structural dimension of corporate power is wielded in shaping legislative processes or creating self-regulation, possibly pre-empting democratically legitimised legislation. Discursive power, in this domain, is wielded in political campaigning and directly or indirectly shaping political agenda-setting: what is being talked about (and what is not on the table) is as important as how it is talked about.

Beyond the political domain we find the *instrumental power dimension* in the social domain clearly tied to digital economy, for example in shaping online interactions into groupings. It plays out in the economic domain by excluding competitors; and in the personal domain, for example, by individually tailored steering of users. Possible examples of how the *structural dimension of power* comes to light in the social domain lie in the way platform work is shaped and understandings of platform work are normalised. In the economic domain the structural dimension of power relates, for example, to the structures in which notions of 'property' – including of data – or 'employment' – including for platform work – are shaped. Also here the setting and defining of the structures for interaction between consumers and companies, including the developers of apps using the structures of the platform companies to reach consumers, are elements of the structural dimension of power in the economic domain; as is the cutting off of innovation by (the possibility) of acquiring and discontinuing competitive

[6] R Putnam, *Making democracy work: civic traditions in Modern Italy* (Princeton University Press, 2013).

threats. In the personal domain, examples of the structural dimension of corporate power relate to, for example, the normalisation of tracking devices, and the arrival of digital assistants, smart glasses and other devices into our homes.

The *discursive dimension* of power, when it comes to big tech companies, is perhaps the most elusive, even though it might be what first comes to mind when we talk about the power of big tech companies. This dimension encompasses both the direct impact on discourse(s), and discourse-forming, stemming from the big tech companies themselves; for example by their direct communications and presentations, and their presence on stages during innovation and technology conferences, but also by shaping the discursive space of perception of technology and innovation, or by agenda-setting in, for example, think tanks. But this dimension also encompasses their pivotal role in the news and information system; here the information itself does not necessarily stem from these corporations themselves, but is made, shaped and provided by users (who can in this sense be political parties, individuals, NGOs, dictatorships, etc). Platforms – some more than others – thus play several *roles* when it comes to the discursive dimension. This discursive power reaches in all four domains: big tech companies are shapers of the discourse surrounding themselves, and exercise discursive power through the services offered on their platforms.

E. Modern Bigness

So far the corporate power of big tech companies has been broken down into the components of the foundations of power, dimensions of having power, and the domains in which this power may be manifest. Each of these manifestations – of which only some examples have been mentioned – can, potentially, lead to effects that might be labelled 'positive' or 'negative'. Though a 'standard' of negative effects – which is the focus of our competition law-infused thinking tools – needs to be developed, as would the notion of providing evidence to a required standard of proof, for now 'negative' is still fairly vague, because the conceptualisation so far has not made the explicit jump towards a normative assessment. I will address that more normative point in section IV.

Although looking at the individual dimensions and domains brings into view their potential negative (and positive) effects, looking at them as a coherent whole highlights the formidable power of the big tech companies: the elements are not separate, but strengthen each other in a flywheel effect, leading to positions of, what we have labelled, Modern Bigness. As an aside: whether one understands the notion of 'bigness', which has run through the US discourse on antitrust law for more than a century, as inherently pejorative, is as much tied to the socio-political and normative contexts as the position in the balance between private and public power that is the topic of Amato's book. The currently, seemingly very partisan, antitrust debate in the US is not necessarily the lived context for EU-based competition scholars. At any rate, in this coherence, which is

tied to the pervasiveness, scope, and precision and invasiveness of corporate power, the novelty of big tech corporate power (vis-à-vis 'old' corporate power) becomes clear.

Its *pervasiveness* is tied to the foundation in the digitalisation and datafication of society and the economy: much of the current economic and societal shift seems tied to an even further digitalisation and further entwinement of the physical social reality with its digital counterpart. As to *scope*, again the direction of movement is a continual branching out of activities, including an incursion of market-offered services into previously public-run domains (at least: public in many EU countries), in which the services are being now provided by, or make use of, the platforms and technologies of the big tech companies: healthcare, education and identification services are examples. Infrastructural services, such as access to the Internet or cloud computing, are offered mostly by big tech companies, and governments are as dependent on these services as are citizens and consumers. The balance between public services and market services has shifted, and while some of these services are akin to public utilities, the accompanying universal service guarantees are not present. As to the *precision and invasiveness* of corporate power of big tech companies, again the direction seems to be towards the use of data, including private and personal data, becoming more all-encompassing (also as a result of the pervasiveness and scope of power of the big tech companies). Even if one were to reject the notion of 'surveillance capitalism',[7] as too harsh, or too pejorative, the power of big tech companies is formidable, and is set to remain formidable, with digital services being ubiquitous. It is built upon datafication and personalisation, making both precision of tailored services (and advertisements) and a further invasiveness into the private sphere possible.

The flywheel effect comes about in the interconnection between growing pervasiveness, growing scope, and growing precision and invasiveness, and is made even clearer when considering how the corporate power of Modern Bigness spans the four domains. Consider that from the perspective of a user, whether they are a citizen, a consumer, a friend, or a patient, these domains are delineated (at least somewhat, at least conceptually), but that from the perspective of the platform these roles and domains are, in fact, mostly irrelevant. Whether she is engaging in a lively online discussion with friends, reading news to stay updated or to decide upon how to cast her vote, or looking to book a holiday, the user produces and shares data (relevant to both the platform and other parties tracking her online). She moves seamlessly from one activity to another, making it possible for platforms to reach her, and many others, quite personally, across all four domains too. This is an all-encompassing power, based on digitalisation and datafication, which shapes current and future lives, markets and democracies.

[7] S Zuboff, *The Age of Surveillance Capitalism* (Profile Books, 2019).

IV. Too Much Power, or Business as Usual for Competition Law?

The Modern Bigness corporate power of big tech companies is, therefore, quite impossible to overstate. But, let me reiterate the point that though this is a bold statement, it does not necessarily imply that this is a 'bad thing'. To come to a conclusion on whether the power of big tech platforms is, say, too great and problematic and needs to be bound, or not to be worried about too much, several analytical steps need to be taken even before we come to the question of relevance for competition law.

A. The Road Not (Yet) Travelled

The first steps on this analytic path are not explicitly normative, but factual. I will address them fairly quickly, though I note their importance. First, there is an incompleteness to the conceptual analysis presented above, in that 'power' is not localised precisely. Does it rest in each of the big tech companies or is it a conceptualisation of corporate power of these companies taken together? My position here is that it is possibly both, but where one focuses the gaze depends on the question asked (see also below). Second, though the previous section provided a conceptual framework to understand and speak about the different dimensions and manifestations of corporate power of big tech companies across domains, and some examples of how that power might play out are mentioned, we have not yet undertaken the more factual fine-grained analyses of actual manifestations of power, in actions, behaviours or effects. Mapping the activities of big tech companies is necessary to understand our conceptualisation, and why such a richer conceptualisation is useful, but it is also necessary to grasp fully how corporate power of big tech companies actually plays out.

B. A Framework for Analysis: European Competition Law's Possible Response

Our conceptualisation of the Modern Bigness corporate power of big tech companies up to this point leads to the view that it is almost impossible to overstate the power, concentrated within and between a handful of corporate conglomerates, acting centre-stage within digital societies. It is a power that reaches beyond the economic domain and the domain of market transactions, and reaches into the social, the personal and the political domains. So, how can, and how should, European competition law respond?

Amato reminds us that the question of whether, and how, competition law draws the boundaries on corporate power, like a subset of the more general question of the role of law within a society, is ultimately of political nature.

Possible responses of European competition law may take different forms. Amato also reminds us that the provisions of competition law are *flexible* as to their interpretation and can adapt to changing economical and societal circumstances (that, when I started in competition law, the economisation movement, had not yet put down strong roots is a first-hand testimony to this flexibility). At any rate, the response of European competition law might take the form of a renewal of normative underpinnings, new or improved procedural interventions, introducing new(ish) concepts, or take the shape of thinking of new remedies within competition law or within related (novel) regulatory frameworks. It might also move beyond competition law proper and focus on strengthening alternative, perhaps public, infrastructures.

The possible and possibly relevant, response seems to depend on the level of analysis. Whether it can be covered by the inherent flexibility of competition law provisions and procedures, or whether something *new* is required is also tied to the level of analysis. A fairly precise case-tailored level of analysis is presented in a focus on a specific action, an instance of behaviour by an individual corporation which is directly based on business model of the user–platform/service interaction. Such a precise case-tailored level of analysis also occurs by focusing on a specific behaviour which is, however, not directly based on user-platform interaction. Less in relation to specific instances of behaviour, a different level of analysis focuses more on the direction of developments pertaining to size and innovation paths. And finally, we could focus on the power-as-such: on the coherency of what big tech's corporate power entails and how competition law can, or ought to, respond.

Each of these levels of analysis is discussed in turn with a view to the relevance of different types of responses within (and beyond) European competition law.

C. A Focus on Specific Instances of Behaviour, with Effects in the Market Domain and Beyond

Specific instances of behaviour (which we do not need to define precisely for the purposes of this analysis), stemming directly from the business model of the platform-corporation, provide a case-specific focus, with the (ultimately) profit-making business-logic of interaction between platform company and the users (on different sides of the platform) at its core. Such behaviour might manifest within the economic domain, and more precisely to the market. Examples are plentiful. This is where generally accepted competition law applies (though in the platform economy the focus is not so much on price as a parameter, but on consumer choice or degradation of quality): self-preferencing, consumer-targeting, excluding competitors from access, or leveraging practices are examples. If flexibility in the interpretation of competition law provisions is needed, it is not (conceptually) difficult to provide.

However, specific instances of behaviour stemming directly from the business model might also manifest in one of the other three domains introduced above, the

social, political or personal domain. For example, shaping a newsfeed or engaging in political microtargeting, and the non-consensual (at least not in a meaningful way) gathering of personal and private data. The difference of the domain in which effects are felt is relevant for competition law purposes, because behaviour which has effects within the other domains is much less easily covered, at least not in the current interpretation of European competition law, by its provisions. More than mere flexibility of interpretation might, if one wishes to extend its application, be needed here.

Focusing on a case-level analysis of specific behaviour also brings into view behaviour which is not directly tied to the business-model logic of extracting value from users and thus not directly in the realm of user-platform interaction. Similar to the business-model-based behaviour, again these actions can have effects in the economic domain or in the other domains. Examples in the economic domain might relate to the establishment of headquarters, with concomitant investments in infrastructure and jobs. Think also of the impact of the Silicon Valley model of corporate culture. Or the way platform work, especially on the precarious side of the spectrum of possible platform work, is being shaped. Outside the economic domain behaviour might relate to campaign financing and lobbying or – relevant for academia too – the financing of chairs, research, research centres and think tanks. Though some of these behaviours can stem from all (large) corporations, other examples (such as platform work) are directly linked to the platform economy. Here, the role of European competition law is, in a current or more flexible interpretation, not immediately clear.

D. Size, Innovation and Power

Zooming out, the focus is on effects of growth (of size, including through innovation paths). Admittedly, this is more vague than the more concrete behaviours mentioned so far, but in considering how competition law might respond to the power of big tech it seems relevant to distinguish 'growing size and innovation paths' from (the resulting) 'power'. Focusing on growing size and innovation paths brings into view – in the economic domain – the competition law-relevant activities of mergers and acquisitions and also endogenous innovations, such as the big-tech-led investment in quantum computing and the (promise of) the metaverse. In the non-economic domains the 'geographical' impact comes into focus: presence in the physical world through various infrastructures (with concomitant relevance for employment); and presence in the geographical political world, in global geopolitics.

Finally, the focus on power-as-such is relevant too. Our conceptualisation of the corporate power of big tech platform companies as Modern Bigness focuses on this level. Power as market power, in the economic domain, being the focal point of competition law, needs no further introduction here. For instance, the potential issues of control over access and control over (dominant) essential facilities

are clearly salient; as are those of public utilities and universal service obligations when it comes to the non-economic domains.

E. European Competition Law's Response

It is important to note that, as follows from the above, European competition law – in its mostly uncontested core – *can* and does already cover negative competitive impacts (on price, if that is a relevant parameter, or on consumer choice or degradation of quality), stemming from dominant economic positions in a market. Equally, European competition law *can* already scrutinise mergers and acquisitions for such potential negative impact within the remit of the existing merger regulation. There are also some conceptual frameworks in place relating to services of general economic interest. The EU's Digital Market Act (DMA) adds a regulatory response in relation to the platforms of the big tech companies, for example, adding interoperability requirements, prohibiting self-preferencing, and giving the option to scrutinise or open up possibilities to scrutinise mergers and acquisitions more widely. No *novel* responses are thus needed here, though perhaps a focus on improving the use of existing *procedures* – such as the interim measure procedure at the level of the European Commission – might be sensible.[8] Within the merger control (and the DMA merger scrutiny) regime a struggle can be discerned in relation to the role of innovation in exogenous growth, so that new *concepts* – such as the dominant design theory or complex systems theory – might be useful here.[9] These concepts do not necessarily deviate fundamentally from the accepted logic of how competition law is interpreted and applied. However, these competition law responses are only present when it comes to *economic domain manifestations* of power, and more precisely, where these relate to the market (but not – unless in specific circumstances – when it comes to labour, for example). When focusing on effects that occur in the other domains, competition law's response is generally absent.

So: here the question whether competition law has a role to play (to counter possible negative effects) becomes more political, because these behaviours do not neatly fit into the existing logic of European competition law. But again there are clear differences to be distinguished: compare, for example, the behaviour of political microtargeting and that of lobbying or financing think tanks. For the issue of political microtargeting we can make the argument (and have made this argument elsewhere) that precisely because political microtargeting is, from the perspective of the business model of a platform, *no different* from commercial microtargeting – both are based on obtaining income generated by targeted advertising – it is difficult to grasp why the one could be covered by current competition laws

[8] This is the topic of research in the PhD project of Carla Farinhas, member of the ERC team.
[9] This is part of research in the PhD project of Lisanne Hummel, member of the ERC team.

notions of abusive behaviour, but the other could not. On the level of the reaction by the user, being targeted, the same type of influencing/manipulation takes place, and both targeted commercial advertising and targeted political advertising are based on generated user profiles. The business model, based firmly in the market mechanism, works for both types of targeting and this would be the underlying rationale for extending competition law concepts to also cover political advertising.[10] However, this also means going back to the normative underpinnings of competition law and rethinking competition law purposes as not merely covering negative effects on consumer welfare and consumer choice.

A connection to existing competition law responses is more tenuous, it seems, when it comes to behaviour of big tech companies that results in the shaping of information flows and the shaping of ideas. Though the business model of platforms is probably one of the leading factors in decisions of moderating content, combatting misinformation and removing certain users from a platform connects, on the more aggregate level, or on the conceptual level, to notions of the free flow of information or the market place of ideas. Such a connection could then be used to shape a more concrete theory of harm. But, as also mentioned above, this needs a reconsideration of the normative underpinnings of European competition law more generally, and would go beyond a mere flexibility of the currently dominant interpretation of the competition law provisions.[11]

On the one hand, a connection to the big tech companies' business models is certainly not immediately present when it comes to, say, lobbying or financing think tanks. Neither is it immediately present in relation to geopolitical power. And it might also not be present when it comes to the choice of establishing a new headquarters or campus, or influencing the look and feel of a Silicon Valley startup. But, on the other hand, clearly these are manifestations of corporate power, with potential negative general effects on economic welfare, society, and individuals (across domains). Here the potentially more fruitful level of analysis lies on the level of the concept of power itself: the concept of corporate power as Modern Bigness is much more encompassing than the competition law concept of market power. And while the concept of market power is useful in the economic (market) domain, the wider concept invites the conversation to move beyond that domain and enter into a discussion of where to place the boundaries of power. On this level of analysis of power itself, concepts of innovation as a competitive restraint also need to be reconsidered, as do such concepts of *access*, both for consumers but also for *citizens*, which are implicit in the notions of services of general economic interest and universal service obligations, or within the notion of public utilities more generally but not necessarily applied in this framework of corporate power.[12] We could also broaden our understanding of how competition law could be used to shield collaborative efforts aimed at organising counter-power.

[10] This is part of the research in the PhD project of Viktorija Morozovaite, member of the ERC team.
[11] This is part of the research in the PhD project of Jan Polanski, member of the ERC team.
[12] This is part of the research in the PhD project of Laura Lalikova, member of the ERC team.

On this overarching level it is for me, personally, not difficult to normatively posit that in a democratic society, based on the Rule of Law, too much power needs to be bound. A system of checks and balances is inherent in the concept of a liberal democratic state. The Modern Bigness type of corporate power seems to be too much power (but note the limitations of the research, mentioned above). On the more concrete level of European competition law, this implies that either the corporate power in the form of Modern Bigness needs to be countered, so as to limit its negative effects, and/or all or some of these negative effects directly. As European competition law is one of the legal regimes which is part of the system of checks and balances of the power of corporations, it ought to broaden its conception of power by going back to its normative roots so as to be able to do so. It might mean that European competition law goes beyond the economic (market) domain. This normative position, is, as Amato states, not merely an internal legal position, but also intrinsically linked to sociocultural contexts, and is *political* in nature too. Here, it is based on the legal-historical roots of European competition law, on its place in the EU constitutional set-up, on case law of the Court of Justice, and on the EU's basis in protecting and shaping an open society rooted in the Rule of Law. It is fed by notions of autonomy, equality and sustainable, inclusive welfare, and firmly rooted in the idea that a living democracy needs constant nurturing. Some of these notions are already present, though perhaps somewhat hidden, in the constitutional set-up in which European competition law functions. Thus, on the level of *normative underpinnings* of competition law, such a position would mean a refocusing of competition law on a broader understanding of what it is in service of: not only consumer welfare, but also on these other elements inherent in this richer understanding. This then feeds into how power itself is regarded, including by building upon the notions of joint dominance within interdependent platform ecosystems. Taking the normative position as described here might ultimately also mean considering the introduction of the remedy of breaking up corporate power, not as a remedy against abusive behaviour, but as a remedy against power as such – an instrument which is not present in the EU today and would need a (democratically legitimised) legislative basis.

Importantly, there are responses outside European competition law that seem both (more easily) possible and necessary. To shape these responses the conceptualisation of corporate power as Modern Bigness is also useful. Not only is specific *regulation* – such as the DMA and privacy protection – a counter to (some) manifestations of this power, but other concepts within the system of law (such as ownership of data) can be also conceived. And beyond the realm of legislation and regulation it is also possible to provide more balance in a digitalised society, between private and public power, by *strengthening the public sphere*: this can range from using collaborative open technologies as an alternative (innovation-based) platform to public investment in public-owned infrastructures and digital services, robust democracies and strong, independent media.

V. Conclusion

The conceptualisation of corporate power of Modern Bigness provides a richer understanding of the power of big tech platforms and a vocabulary to be used to shape possible responses. It teases apart the answer to the question 'what power is this?' by distinguishing between foundations of power, dimensions of power and the domains in which this power can potentially manifest. This richer understanding is relevant, too, for the response of European competition law. Taking a normatively informed position on the role of European competition law – as I have done in this chapter – also means taking a position on Amato's line between private and public power. Though it follows from the above that the conceptualisation of corporate power of big tech companies as Modern Bigness implies a greater role for European competition law in combatting its negative effects, sometimes including effects that are felt outside the market domain,[13] this is no argument taking the position that competition law is an instrument to solve all societal woes. But nor is competition law an instrument that should be kept pure, risking detachment from societal developments. As Amato also makes clear, competition law is a formidable instrument of public power, which can be used to legitimately provide checks and balances on private power. It is, again as Amato notes, also a flexible instrument. My conclusion – while acknowledging and making explicit that and how this is a normative position – is that refocusing on the normative underpinnings of European competition law, in relation to a richer understanding of the corporate power of big tech companies, brings a shift in just where flexibility ends and where stepping beyond the current Rule of Law-based bounds of public power starts. This conceptualisation is therefore also an instrument – a vocabulary – to make clear where the demarcation lies between broadening or stretching the scope of the existing competition law concepts, procedures and remedies, and introducing novel concepts, procedures and remedies, either within or beyond competition law. Both the broadening of existing responses and the introduction of novel ones change the overall balance between private power and public power. Making explicit the fact that the question of how that balance is struck, also within European competition law, is an inherently political question, is a lasting legacy of Amato's *Antitrust and the Bounds of Power*.

[13] But note that our analysis is not complete and this chapter is a snapshot of the current position in a bigger research project.