Democracy or Domination

The Role of Competition Law in the Face of Oligarchy

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

However, the protection of democracy is habitually said to fall outside the proper scope of competition enforcement, which has been placed on a thin diet of consumer welfare since its 'economic turn' two decades ago. As a result, competition law has been disempowered and under-enforced. Its narrow implementation has contributed to widespread economic inequality, the rise of ultra-dominant Tech oligarchs, and – as we argue in a recent paper – the decline of economic democracy in Europe.

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

Today's narrow approach to competition law and its enforcement has helped lay the groundwork for the emergence of plutocracy. Now, however, competition law must also be part of any attempt to reverse the trend, and should look to protect and reinvigorate democracy in Europe going forward. To do so, the discipline must rediscover a conception of democracy that extends beyond the thinner objectives which currently dominate the competition-democracy landscape. Any attempt to arrest the current vicious circle of private power accumulation will require a holistic, systemic approach to understanding exactly what 'democracy' competition law can protect, and how.

The Competition-Democracy Nexus

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

In this context, courts and scholars have developed a minimalist conception of the competition-democracy nexus. This view gives democracy an *ad hoc* role in competition enforcement, operative in only certain individual and often politically salient cases. But this piecemeal approach overlooks the structural role that competition law can play in enabling either the conditions for economic and political democracy, or as it currently does, the foundations of plutocracy.

Although we agree with Prof. Robertson's contribution to this debate on many points, we see aspects of the minimalist approach in her writing.

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

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

A Systemic Approach to Economic Democracy

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

First, we argue that the bar for competition intervention should be lowered. Currently, strict legal tests must be met for competition intervention to pass muster under the courts. Yet such tests were crafted using a time of heady optimism about the functioning of markets which has shown itself to be ill-founded. Since markets in many cases do not 'naturally' function well, the discipline has found itself struggling to attend to flagrant abuses of economic power which would, under the logic of republican liberty, not have accumulated in the first place.

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

Third, we emphasise the potential to 'shape' markets using competition tools. Again, this perspective is not new. Karel van Miert, Competition Commissioner from 1993 to 1999 eloquently wrote on how under his leadership, the Commission took an "engineering" approach to market competition. This approach should be revived, not least as a way to ensure that markets are in-line with the values expressed in the European Treaties. Competition law is conceptually agile enough to do so, and the current discourse around the "EuroStack" provides the perfect opportunity.

Going Forward

The urgency of Europe's creep towards plutocracy calls for a similarly urgent response. Competition law, given its history and potential as a tool of anti-domination, is a natural fit to protect and revitalise democracy in

Europe from the threats posed by excessive concentrations of private power. For it to be effective for that purpose, competition scholars must clearly articulate which democratic values, like non-domination, competition law should seek to pursue, and clear-mindedly design mechanisms through which to channel them.

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

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