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**Digital Democracy and Competition Law – Note by Viktoria H.S.E. Robertson**

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This paper by Viktoria H.S.E. Robertson (Professor of Competition Law and Digitalization at the Vienna University of Economics and Business; Director of The Competition Law Hub) was submitted as background material for Item 8 of the 144th OECD Competition Committee meeting on 5-6 December 2024.

*The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.*

More materials on the topics can be found at <https://www.oecd.org/en/events/2024/12/the-interaction-between-competition-and-democracy.html>

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## 1. Introduction

1. As the global election year of 2024<sup>1</sup> is coming to a close, the role that digital platforms may have played in these elections requires closer scrutiny. Power imbalances that could upend democracy are once again a central concern in many jurisdictions, with the dynamics of digital democracy and the role of large digital platforms therein being a particular source of apprehension.<sup>2</sup> On the one hand, market concentration is constantly growing in the digital economy,<sup>3</sup> amassing great (economic) power in the hands of a few Big Tech companies that are heavily lobbying legislators<sup>4</sup> as well as academics.<sup>5</sup> On the other hand, the data-based nature of the digital economy is accumulating unprecedented amounts of personal data in the hands of those very same Big Tech companies.<sup>6</sup> This gives them unique insights not only into users' personal spending behaviour and recent vacations, but also into issues that are central for a working democracy, such as political positions and leanings, community engagement, and voting patterns. This ultimately gives the holders of such data the power to target (potential) voters with political advertising<sup>7</sup> or to curate digital content so as to reinforce political positions in certain ways, thus jeopardising some of the fundamental pillars of liberal democracy.

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<sup>1</sup> Koh Ewe, 'The Ultimate Election Year: All the Elections Around the World in 2024' (28 December 2023) *Time Magazine* <<https://time.com/6550920/world-elections-2024/>>.

<sup>2</sup> Steven Lee Myers, 'As Election Looms, Disinformation "Has Never Been Worse"' *New York Times* (23 October 2024); Felix Kartte, 'Demokratie im Spiegelkabinett' *Frankfurter Allgemeine Zeitung* (3 November 2024); Sapna Maheshwari & Madison Malone Kircher, 'The Election has Taken Over TikTok. Here's What It Looks Like' *New York Times* (21 October 2024).

<sup>3</sup> See, eg, Rhonda Smith & Deborah Healey, 'Attacking Concentration: Market Power in the Digital Space' (2023) 20 *European Competition Journal* 295.

<sup>4</sup> Eg, see Jennifer Rankin, 'EU Events on Curbing Big Tech "Distorted" by Attenders with Industry Links' *The Guardian* (29 October 2024); Max Bank, 'Allied for Startups: Wie Google und Co versuchen, die Politik zu täuschen' *LobbyControl* (15 October 2024) <<https://www.lobbycontrol.de/macht-der-digitalkonzerne/allied-for-startups-wie-google-co-versuchen-die-politik-zu-taeuschen-117884/>>; 'Spamming the Regulator: How Big Tech's "Economic Consultants" Undermine EU Competition Policy' *Corporate Europe Observatory & Lobby Control* (30 January 2023) <<https://corporateeurope.org/en/2023/01/spamming-regulator>>; Georg Riekeles, 'I Saw First-Hand How Us Tech Giants Seduced the EU – And Undermined Democracy' *The Guardian* (28 June 2022).

<sup>5</sup> Eg, see Tommaso Valletti, 'Debate: "Doubt Is Their Product" – The Difference Between Research and Academic Lobbying' (2024) *Public Money & Management* 1; Daisuke Wakabayashi, 'Big Tech Funds a Think Tank Pushing for Fewer Rules. For Big Tech' *New York Times* (24 July 2020).

<sup>6</sup> Eg, see Ulises A. Mejias & Nick Couldry, *Data Grab: The New Colonialism of Big Tech and How to Fight Back* (University of Chicago Press 2024); Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (PublicAffairs 2019).

<sup>7</sup> Eg, recall the workings of Cambridge Analytica; recounting their strategy, see Daniel Susser, Beate Roessler & Helen Nissenbaum, 'Online Manipulation: Hidden Influences in a Digital World' (2019) 4 *Georgetown Law Technology Review* 1, 9 ff.

2. These are legitimate concerns about the state of our increasingly digital democracy. But what's competition law got to do with it?<sup>8</sup>
3. The role of competition law in tackling democracy-related concerns in the platform economy prominently figures in research at the intersection of competition law, democracy and digitalisation. In the present Note, prepared for the OECD Competition Committee Roundtable on 6 December 2024, I provide a brief synthesis of my research findings in this area,<sup>9</sup> while pointing to possible policy implications.
4. Section 2 offers an introduction to the more prominent role that (digital) democracy may need to play in competition policy, based on the democratic roots of antitrust law as well as insights from digital constitutionalism.
5. Section 3 turns to ways in which competition law can respond to democracy-related concerns that arise in the data-driven platform economy, ranging from strengthening antitrust procedure to implementing pro-democratic antitrust remedies.
6. Section 4 concludes.

## 2. Digital democracy's role in competition policy

7. As a background to our discussion, let's consider two independent yet interrelated explanations of why concerns related to digital democracy may need to take a more central role in competition policy. The first is an historical account of the democratic roots of antitrust law,<sup>10</sup> while the second is a present-day understanding of constitutional rights in the digital age, referred to as digital constitutionalism.

8. The democratic roots of antitrust law in the United States (US) of America established a durable nexus between competition law and democracy that is experiencing a revival in the present day. When the US adopted their first antitrust laws in 1890, their main concern was not with high prices, less efficiency or reduced innovation. Instead, what led to the adoption of the Sherman Act was the insight that the overbearing power of big companies would upend the very foundation of democracy. Joseph Keppler, an Austrian émigré, famously captured this concern by highlighting how monopolists were effectively

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<sup>8</sup> Tina Turner, 'What's Love Got to Do with It' (May 1984, written by Graham Lyle & Terry Britten).

<sup>9</sup> Viktoria H.S.E. Robertson, 'Antitrust, Big Tech, and Democracy: A Research Agenda' (2022) 67 *Antitrust Bulletin* 259-279; Viktoria H.S.E. Robertson, 'Demokratiedefizite auf digitalen Märkten aus kartellrechtlicher Sicht' in Matthias Wendland, Rainer Niemann & Iris Eisenberger (eds), *Smart Regulation: Theorie- und evidenzbasierte Politik* (Mohr Siebeck 2023) 127-141; Ariel Ezrachi & Viktoria H.S.E. Robertson, 'Can Competition Law Save Democracy? Reflections on Democracy's Tech-Driven Decline and How to Stop It' (2024) *Journal of Antitrust Enforcement* <<https://doi.org/10.1093/jaenfo/jnae043>>; Viktoria H.S.E. Robertson, 'Big Tech, the Concentration of Power and New Approaches to Antitrust', *Digital Humanism Summit on AI and Democratic Sustainability* (Vienna, 4 July 2023); Jana Lasser & Viktoria H.S.E. Robertson, 'Alternative Recommendation Algorithms as an Antitrust Remedy in Digital (Democracy) Cases' (working paper).

<sup>10</sup> For a more detailed analysis, see Robertson, 'Antitrust, Big Tech, and Democracy' (fn 9) 262-265; on the European constitutional aspect: Robertson, 'Demokratiedefizite' (fn 9) 130-132. On these democratic roots, see also the inflection points recounted in Eleanor Fox, 'The Symbiosis of Democracy and Markets' DAF/COMP/GF(2017)5.

becoming ‘The Bosses of the Senate’.<sup>11</sup> At around the same time, Senator John Sherman famously cautioned:

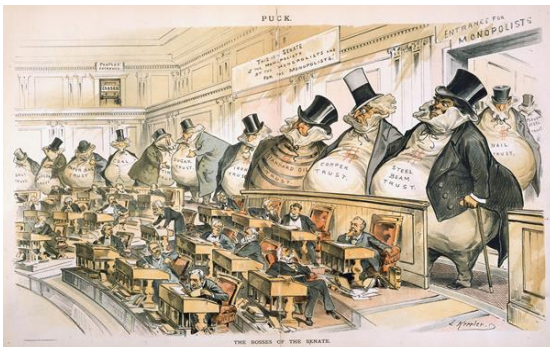
*If we will not endure a King as a political power we should not endure a King over the production, transportation, and sale of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade with power to prevent competition and to fix the price of any commodity.*<sup>12</sup>

9. In the outgoing 19<sup>th</sup> century, it was well understood that economic power could easily translate into political power that would not be democratically legitimised – and that operates to the sole benefit of those wielding that power. In the face of digital concentration in the 21<sup>st</sup> century, these insights are resurfacing and providing an impetus for re-thinking some conventional wisdoms.<sup>13</sup>

10. Democratic ideals are not only at the origin of US antitrust law. Ordoliberal ideas that were developed following World War II left an important mark on the framework of competition law that was developing in Europe; one of them was the assumption that democracy had to be the normative basis of competition law.<sup>14</sup> Ordoliberal thinker Franz Böhm cautioned that the economic power of individual citizens (or companies) may ultimately undermine society’s capacity for democracy,<sup>15</sup> thereby making a strong case for curtailing economic power from the outset.

11. While the influence of private power on democracy is based on market mechanisms, it also takes on a constitutional dimension wherever different facets of democracy are enshrined as fundamental rights. From this perspective, digital constitutionalism has played an instrumental role in highlighting how our understanding of and approach to fundamental rights needs to be updated in the face of digitalisation.<sup>16</sup> This is particularly interesting from a European Union perspective: The EU’s main competition law provisions are enshrined in the Treaty on the Functioning of the European Union

<sup>11</sup> Joseph Keppler, ‘The Bosses of the Senate’ (Puck, 1889).



<sup>12</sup> Senator John Sherman, 21 Cong. Rec. 2515 (1889).

<sup>13</sup> Eg, see the discussion in Justin Lindeboom, ‘Two Challenges for Neo-Brandeisian Antitrust’ (2023) 68 *The Antitrust Bulletin* 392.

<sup>14</sup> Elias Deutscher & Stavros Makris, ‘Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus’ (2016) 11 *Competition Law Review* 181, 181; Franz Böhm, ‘Democracy and Economic Power’, in Institut für ausländisches und internationales Wirtschaftsrecht (ed), *Cartel and Monopoly in Modern Law* (vol. I, 1961) 25, 32-33.

<sup>15</sup> *Id.* at 36.

<sup>16</sup> See, eg, Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022).

(TFEU),<sup>17</sup> ie one of the two founding Treaties of the EU, and therefore have quasi-constitutional standing. As a consequence, it comes quite naturally to assert that the value of democracy, as contained in Article 2 of the Treaty on European Union (TEU)<sup>18</sup> and as protected in the Charter of Fundamental Rights,<sup>19</sup> must be considered when applying EU competition law.<sup>20</sup>

12. Against the background of social media, digital content moderation and the consolidation of digital ecosystems, these insights from the democratic roots of competition law take on new meaning today. Coupled with the developing understandings from digital constitutionalism, they can be a useful reminder for policymakers when they are confronted with some of the downsides of digital democracy, such as an electorate that could be targeted according to Big Tech's whim, or a public debate that could be subjected to arbitrary content moderation driven by the interests of Big Tech, or vanishing media pluralism.

### 3. Democracy-related concerns in the platform economy as competition concerns

13. Competition in the free marketplace of ideas has long been held to constitute a cornerstone of democratic debate.<sup>21</sup> In the digital platform economy, many debates are mediated through social media and messaging platforms, putting these intermediaries in the unique position to tamper with the marketplace of ideas in unprecedented ways. Misinformation and disinformation appear to be reaching new heights, the exploitation of users' click-bait-behaviour polarizes debates, and user data can be utilised to individually target voters and motivate them to cast their ballot in a certain way.<sup>22</sup>

14. While these developments are clearly disconcerting for any citizen, competition policymakers need to pose the question which of these developments – if any – are relevant under the competition laws that they are mandated to enforce. Which democracy-related concerns in the platform economy actually amount to competition concerns?<sup>23</sup> Do the shortcomings of digital democracy warrant a targeted response from competition policy, or

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<sup>17</sup> Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47.

<sup>18</sup> Treaty on European Union (TEU) [2016] OJ C202/13.

<sup>19</sup> Charter of Fundamental Rights of the European Union [2016] OJ C202/391.

<sup>20</sup> See also Agustín Reyna, 'Why Competition Law Must Protect Democracy – A European Perspective' DAF/COMP/GF/WD(2017)36, at 4.

<sup>21</sup> See Justice Holmes (Diss Opinion) in *Abrams v. United States*, 250 U.S. 616, 630 (1919).

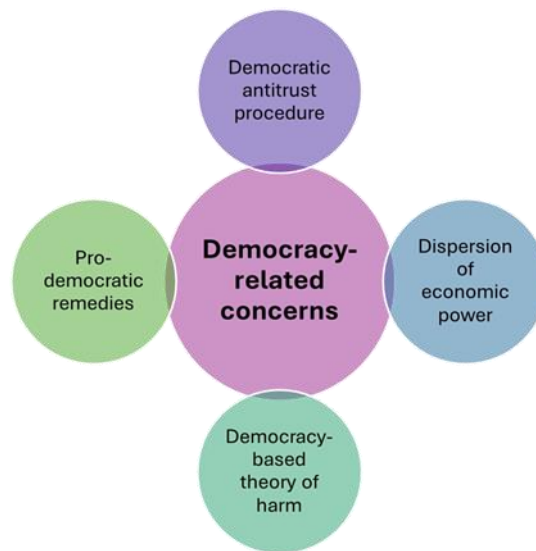
<sup>22</sup> Eg, see Eitan D. Hersh, *Hacking the Electorate: How Campaigns Perceive Voters* (Cambridge University Press 2015); Jeff Chester & Kathryn C. Montgomery, 'The Role of Digital Marketing in Political Campaigns' (2017) 6 *Internet Policy Review* 1; Orestis Papakyriakopoulos, Simon Hegelich, Morteza Shahrezaye & Juan Carlos Medina Serrano, 'Social Media and Microtargeting: Political Data Processing and the Consequences for Germany' (2018) 5 *Big Data and Society* 1, 1; Natali Helberger, Tom Dobber & Claes de Vreese, 'Towards Unfair Political Practices Law: Learning Lessons from the Regulation of Unfair Commercial Practices for Online Political Advertising' (2021) 12 *Journal of Intellectual Property, Information Technology & Electronic Commerce Law* 273.

<sup>23</sup> On this, see already Robertson, 'Antitrust, Big Tech, and Democracy' (fn 9) 265-267; Robertson, 'Demokratiedefizite' (fn 9) 132-133.

may a response on a metalevel suffice? Policymakers' answers to these questions will, of course, very much depend on the jurisdiction in which they're operating.

15. As I've argued elsewhere,<sup>24</sup> competition policy can respond in four possible ways when faced with democracy-related concerns in the platform economy: on a metalevel, it can set out to bolster the role of democratic antitrust procedure (Section 3.1) and it can emphasise the dispersion of economic power as one of its principal roles (Section 3.2). On a more targeted level, competition policy can review its theories of harm in light of democratic values (Section 3.3) and it can adopt pro-democratic antitrust remedies (Section 3.4). These responses are not mutually exclusive: a competition authority or legislator might decide to implement one, two, three or all four of them in a push to make competition law more receptive to democracy-related concerns. What would each of these four possible responses entail?

Figure 1. Competition law's reaction to democracy-related concerns; based on Robertson 2022.



### 3.1. Democratic antitrust procedure

16. The first possible response when competition law is faced with democracy-related concerns is to refer the issue to antitrust procedure. Under this approach, safeguarding due process as well as procedural and fundamental rights will inherently have a positive impact in terms of a more democratic outcome.<sup>25</sup>

17. With a view to digital platforms' bearing on democratic outcomes, an important aspect of ensuring independent and impartial antitrust institutions is to safeguard their independence vis-à-vis certain market players, especially Big Tech.<sup>26</sup> This also extends to

<sup>24</sup> Robertson, 'Antitrust, Big Tech, and Democracy' (fn 9) 269-278.

<sup>25</sup> Eg, see Harry First & Spencer W. Waller, 'Antitrust's Democracy Deficit' (2013) 81 *Fordham Law Review* 2543, 2545.

<sup>26</sup> See text accompanying footnote 5 above, as well as Ariel Ezrachi & Maurice E. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016) 245-247; Pablo Ibáñez Colomo & Gianni de Stefano, 'Protecting

requiring comprehensive disclosures from economic consultancies, organisations, think tanks as well as academics that competition authorities engage with in debates, so as to ensure to the largest extent possible that biases and interest-driven agendas are well-documented and are not masked as neutral contributions.

18. From a policy perspective, ensuring independent, democratically legitimised antitrust procedure is of enormous value and can also go some way towards remedying democracy-related concerns stemming from digital platforms. At the same time, however, recourse to democratic antitrust procedure is by far not the only way in which competition policy can respond to democracy-related concerns in platform markets.

### 3.2. Dispersion of economic power

19. Many antitrust laws see the dispersion of economic power as their core task, and in doing so realise a democratic ideal in so far as this leads to power being more equally distributed among citizens rather than being concentrated in the hands of the (very) few.<sup>27</sup>

20. Under competition law, the dispersion of power can take several forms.<sup>28</sup> A competition law regime can prevent the creation or strengthening of market power through merger control. The history of European merger control shows, however, that mergers are rarely ever blocked in their entirety: out of 9,391 mergers notified to the European Commission over the past 34 years, only 33 were prohibited. 506 concentrations were allowed to go ahead following commitments from the merging parties.<sup>29</sup> These commitments, one can assume, addressed the issue of market power in other ways than directly blocking the merger. In digital platforms, a concern has been voiced that merger control has not been able to successfully curtail the economic power of Big Tech,<sup>30</sup> leading to increased market concentration with its well-known side-effects, also as regards political and discursive power.<sup>31</sup>

21. A second avenue for the dispersion of economic power is the area of unilateral conduct, where competition authorities can police the monopolisation of markets or the abuse of market power and stop this kind of behaviour. While this does not directly lead to a dispersion of economic power unless structural remedies are imposed,<sup>32</sup> unilateral

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the Integrity and Reputation of Legal Research: JECLAP's New Rules on Disclosure' (2017) 8 *Journal of European Competition Law & Practice* 623; Zuboff (n 6) 125.

<sup>27</sup> Eg, see Adi Ayal, 'The Market for Bigness: Economic Power and Competition Agencies' Duty to Curtail it' (2013) 1 *Journal of Antitrust Enforcement* 221, 228.

<sup>28</sup> Robertson, 'Antitrust, Big Tech, and Democracy' (fn 9) 270-271.

<sup>29</sup> European Commission, 'Merger Cases Statistics (21 September 1990 to 30 September 2024)' <[https://competition-policy.ec.europa.eu/mergers/statistics\\_en](https://competition-policy.ec.europa.eu/mergers/statistics_en)>.

<sup>30</sup> Eg, see the dismissal of the US Federal Trade Commission's move to block Meta's acquisition of Within: *Federal Trade Commission v Meta Platforms*, Case 5:22-cv-04325-EJD US District Court for the Northern District of California (31 January 2023); Viktoria H.S.E. Robertson, *Merger Review in Digital and Technology Markets: Insights From National Case Law* (Report to the European Commission, December 2022).

<sup>31</sup> On digital platforms' discursive power, see Pauline Phoa & Anna Gerbrandy, 'Regulating the Discursive Power of Big Tech Companies' *Verfassungsblog* (15 July 2024) <<https://verfassungsblog.de/regulating-the-discursive-power-of-big-tech-companies/>>.

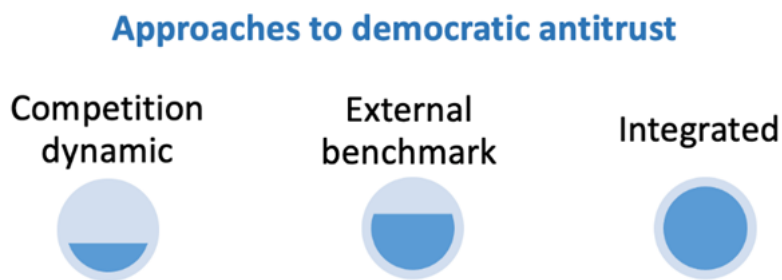
<sup>32</sup> In recent cases and in the media, the question of structural remedies in digital cases has gathered steam: Dan Milmo, 'Lawsuit Aiming to Break up Facebook Group Meta Can Go

conduct measures can ensure that the companies concerned do not engage in anti-competitive behaviour.

### 3.3. Democracy-related harm as an antitrust infringement

22. The first two responses outlined above, ie antitrust procedure and dispersion of economic power, operate on a metalevel and their positive impact on democracy can therefore only be felt as a reflex. This amounts to relying on the dynamics of competition to lead to a democracy-friendly outcome – without incorporating concerns for democracy into the fabric of the competition assessment.<sup>33</sup> We’ve referred to this as the competition dynamic approach vis-à-vis democratic antitrust (Figure 2).<sup>34</sup>

Figure 2. Approaches to democratic antitrust; Ezrachi & Robertson 2024.



23. A third type of response more directly addresses democracy-related harm<sup>35</sup> with the tools of competition law. Such a response would see competition policymakers consider whether democracy-related harm could constitute a stand-alone antitrust infringement or whether it has all the elements of a theory of harm that a merger review could rely on.<sup>36</sup> This third type of response can come in two forms: (i) it can either directly incorporate democracy-based considerations, leading to a fully integrated approach, or (ii) it can make use of external benchmarks to find a middle ground between a hands-off and a fully hands-on approach (external benchmark approach).

24. An instance for the (i) integrated approach can be seen in merger control regimes that assess media mergers not only against traditional competition law benchmarks, but

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Ahead, US Court Rules’ *The Guardian* (12 January 2022); Hermann Fröschl, ‘US-Anklage will Zerschlagung’ *Salzburger Nachrichten* (2. November 2023); Edith Hancock, Francesca Micheletti & Aiofe White, ‘US Talk on Google Breakup Gives EU Political Cover to Get Tough’ *Politico* (16 October 2024) <<https://www.politico.eu/article/google-breakup-eu-political-cover-big-tech/>>.

<sup>33</sup> See, eg, Daniel A. Crane, ‘Antitrust as an Instrument of Democracy’ (2022) 72 *Duke Law Journal Online* 21, 23; Spencer W. Waller, ‘Discretionary Justice in Antitrust’ (2024) *Journal of Antitrust Enforcement* <<https://doi.org/10.1093/jaenfo/jnae035>>.

<sup>34</sup> Ezrachi & Robertson, ‘Can Competition Law Save Democracy?’ (n 9).

<sup>35</sup> Democracy-related harm is here broadly understood to constitute a detriment to democratic values, processes and institutions.

<sup>36</sup> On this response, see Robertson, ‘Antitrust, Big Tech, and Democracy’ (n 9) 272-277; Ezrachi & Robertson, ‘Can Competition Law Save Democracy?’ (n 9).



also against the benchmark of media pluralism.<sup>37</sup> The integrated approach comes with the challenge of having to incorporate values into the fabric of competition law assessments that are alien to it, opening a Pandora's box of questions about where this enterprise should start and end.

25. An instance in which EU competition law relied on an (ii) external benchmark approach was recently confirmed by the Court of Justice of the European Union:<sup>38</sup> in the preliminary ruling of *Meta Platforms v Bundeskartellamt*, the Court confirmed that a competition authority could rely on external benchmarks – such as a breach of the General Data Protection Regulation<sup>39</sup> – in order to assess whether unilateral conduct constituted an abuse of a dominant position.<sup>40</sup> Considering that there are multiple regulations that specifically address democratic values and processes, it is fathomable that these could serve as external benchmarks for competition authorities wanting to take a more pro-active approach to protecting democracy.

26. What could such a scenario look like?

27. On a European level, the Regulation on Transparency and Targeting of Political Advertising (RTPA) is a law that wants to safeguard democratic values. The RTPA contains provisions to minimise foreign interference with elections<sup>41</sup> and to prevent the use of special categories of personal data for targeted political advertising.<sup>42</sup> A similar rule on targeted advertising is contained in the Digital Services Act.<sup>43</sup> Where a digital platform breaches these rules, one can very well imagine a competition authority taking this breach into consideration when assessing whether this conduct can still be considered competition on the merits, or whether it amounts to an abuse of market power. While some might (rightly) argue that these instruments have their own enforcement mechanisms, the answer to this is simple: so does the GDPR. Nevertheless, the Court of Justice considered that a breach of the GDPR's rules could indicate the abuse of a market power by a digital platform, perhaps paving the way also in the area of democracy-oriented regulation.

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<sup>37</sup> Eg, see Article 21 para. 4 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (EUMR) [2004] OJ L24/1; §§ 8, 13 Austrian Cartel Act (Kartellgesetz 2005), Austrian Federal Law Gazette I 2005/61 as amended; Maja Cappello (ed), *Media Pluralism and Competition Issues*, IRIS Special 1/2020. For a more detailed discussion of the integrated approach, see Robertson, 'Antitrust, Big Tech, and Democracy' (n 9) 272-277.

<sup>38</sup> For a more detailed discussion of the external benchmark approach as exemplified by *Meta Platforms v Bundeskartellamt*, see Ezrachi & Robertson, 'Can Competition Law Save Democracy?' (n 9).

<sup>39</sup> Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation, GDPR) [2016] OJ L119/1.

<sup>40</sup> Case C-252/21 *Meta Platforms v Bundeskartellamt* ECLI:EU:C:2023:537, para 48.

<sup>41</sup> Article 5 para 2 of Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising (RTPA) [2024] OJ L900.

<sup>42</sup> Article 18 para 1 RTPA.

<sup>43</sup> Article 26 para 3 of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act, DSA) [2022] OJ L277/1.

28. Democracy is a multi-faceted phenomenon.<sup>44</sup> In order to discuss which aspects of platform behaviour may amount to anti-competitive behaviour within the meaning of competition law, it is useful to break digital democracy down into specific instances that are closely related to the market mechanisms that competition law is concerned with, and that could subsequently come within the sphere of application of competition law. This could relate to practices in targeted political advertising, the influencing of political debates and outcomes in online fora, or questions of media pluralism. For competition policy, this implies looking at individual instances of anti-democratic market behaviour as well as the overall picture. More research is required in this respect.

### 3.4. Pro-democratic antitrust remedies

29. Once anti-competitive conduct or an anti-competitive merger have been identified, it is for antitrust remedies to make things right again. In the area of digital platforms, antitrust remedies currently appear to be the weakest link in antitrust enforcement.<sup>45</sup> Focusing in particular on democracy-related concerns, the question poses itself which behavioural or structural remedies competition authorities could employ that would act as a pro-democratic force.<sup>46</sup> This question naturally poses itself when a competition authority or court apply a democracy-related theory of harm – be it through an integrated or an external benchmark approach, as outlined above (Section 3.3). For instance, assessing a merger through the lens of media pluralism may lead to a divestiture of part of a media business, with this ‘traditional’ structural remedy specifically safeguarding the democratic value of media pluralism. However, behavioural remedies can also be geared towards democratic values. For instance, a unilateral conduct case may focus on disinformation that is being propagated by a digital platform, based on recommendation algorithms that make use of users’ responses to click-bait content. In such a case, a competition authority may consider the implementation of alternative recommendation algorithms as an antitrust remedy,<sup>47</sup> with all the difficulties of implementation and monitoring that this entails.

30. While pro-democratic antitrust remedies will necessarily be considered when a theory of harm revolves around democratic values, the question of pro-democratic remedies can also pose itself in digital cases that rely on other types of theories of harm. Here, a competition authority might see it as a priority to take democratic values into account when negotiating commitments, thereby shaping the market not only in a pro-competitive but at the same time in a pro-democratic way.

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<sup>44</sup> Referring to the ‘open and contestable signification of democracy’, see Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (Princeton University Press 2015) 20.

<sup>45</sup> Eg, see Philip Marsden, ‘Google Shopping for the Empress’s New Clothes –When a Remedy Isn’t a Remedy (and How to Fix it)’ (2020) 11 *Journal of European Competition Law & Practice* 553; Michal Gal & Nicolas Petit, ‘Radical Restorative Remedies for Digital Markets’ (2021) 36 *Berkeley Technology Law Journal* 617.

<sup>46</sup> On this aspect, see Robertson, ‘Antitrust, Big Tech, and Democracy’ (n 9) 277-278.

<sup>47</sup> In a forthcoming paper, we investigate the possibility of implementing alternative recommendation algorithms as an antitrust remedy in digital cases; see Lasser & Robertson, ‘Alternative Recommendation Algorithms’ (n 9). See also Jonathan Stray et al., ‘Building Human Values into Recommender Systems: An Interdisciplinary Synthesis’ (2024) 2(3) *ACM Trans. Recomm. Syst.* <<https://dl.acm.org/doi/pdf/10.1145/3632297>>.

## 4. Conclusions

31. It is often argued that competition law cannot and should not be a general panacea for other policy areas' shortcomings. This is certainly correct, and legislators need to step up to the challenge of safeguarding our democracy in the digital era. At the same time, the revival of the democratic roots of some antitrust jurisdictions and the constitutional underpinnings of others speak a clear language: democracy-related considerations are set to enter competition policy debates. In fact, the EU General Court itself joined this debate when it found, in *Google Android*, that Google's abusive conduct was harming users' interests in accessing several online sources of information – interests which, in the words of the Court, were 'not only consistent with competition on the merits, [but] also necessary in order to ensure plurality in a democratic society'.<sup>48</sup> Picking up on this, the European Commission agreed that 'competition law can achieve broader objectives, ensuring consumer choice is a means to ultimately guarantee plurality in a democratic society'.<sup>49</sup>

32. For policymakers, there are ample opportunities to more closely take democracy-related considerations into account in digital platform markets. This can happen at a metalevel – through antitrust procedure and the dispersion of economic power – or in more targeted ways, with theories of harm and antitrust remedies revolving around different facets of digital democracy. Depending on its particular legal framework, every antitrust jurisdiction will need to assess how best to respond to democracy-related concerns in the platform economy.

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<sup>48</sup> Case T-604/18 *Google v Commission (Google Android)* ECLI:EU:T:2022:541, para 1028.

<sup>49</sup> European Commission, 'A Dynamic and Workable Effects-Based Approach to Abuse of Dominance' *Competition Policy Brief* (March 2023) 1.