**Big Tech and the Digital Economy: the muddled middle in a polarized debate?**

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When Nicolas Petit asked me to contribute to the blogs on his book ‘Big Tech and the Digital Economy’ I replied enthusiastically with: ‘I like that you are inviting your own critical readership!’ Little did I know until after he sent the proofs, that there would be much to laude and less to critique.

However, there is this.

In the first pages of the first chapter, Nicolas describes the two sides of the debate on competition law and Big Tech. Simplified, on the one side are ‘neo-structuralists’ who propose that ‘each tech company must be regarded as a structural monopoly in one product or service area’. On the other side, are consumer-welfarists who focus on ‘adverse economic consequences and potential for abuse’. The former sees a threat to the ideal of democracy favouring corporate dismantlement, M&A bans and price regulation. The latter conditions antitrust and regulatory intervention to a ‘factual evaluation’ of effects (on consumer welfare). It is probably unsurprising that Nicolas is no fan of neo-structuralism and prefers application of the consumer welfare standard as being rooted in ‘hard facts’, not in politics.

Whilst it is impossible to address the nuances here, I would like to argue that there is more to competition life than the polar opposites of irrational neo-structuralists, who want to break up big tech, and staunch consumer-welfarists who believe that economists are and should remain at the forefront of hard science. In the following sections, I develop three arguments that seat in the muddled middle of neo-structuralism and consumer welfarism.

1. **There is more to power**

At the heart of competition law, lies the concept of ‘power’ and how to contain or counter it. Power fascinates competition lawyers but is also a topic for political philosophy; business literature; the social sciences; feminist theory; anarchist theory; media studies; and (of course) economics. Now, what would happen if we combined perspectives and question what ‘power’ means in the big tech context? It would probably lead to recognition that the position of (some) big tech companies provides more than just market power, and certainly more than a monopoly on specific markets. It is more than just a power to abuse a dominant position (with negative consumer welfare effects) or the ability to gobble up start-ups and promising or threatening smaller techs. It is power of a composite nature which includes size and market capitalization and economic power, but also the ability to coerce in political spheres. It is ‘power of governance’ over the public sphere and power to impact labor systems. It can also be ‘platform power’; the power of ‘systemic actors’; of ‘eco-systems of platforms’; or of ‘dataopolies’. What all this means for competition law will be discussed in the third argument. But what must be emphasized here is that this conceptualization, whilst still grounded in empirical reality, provides a richerstarting point than the two opposite endpoints of neo-structuralism and consumer welfarism.

1. **There is a lot between politics versus hard facts**

Both in academia and outside of it, I find truly convinced and undoubting people fairly, to be honest, intimidating or scary, pretty much on principle (I do recognize the irony here, yes). This includes people who are so very convinced that economic theory is both the alpha *and* omega of competition law analyses that they cannot conceive of anything else. (Nicolas is surely capable of conceiving of a ‘something else’, but he strongly argues against it). The main reason that I do not hold this conviction is I do not share the full faith in the truth-telling machinery of economics. This puts me, apparently, in the irrational camp of advocating against *any* standard. I object to this however, because that is not my camp either!

I am not debating the usefulness of economic theory as a solid starting point in competition law or the effectiveness, or necessity at the time, of the economization of European competition law. However, I do not think that economics provides the only way of determining truth or, even, facts relevant to competition law. Nor do I, remembering the previous economic crisis , think it is as hard a science as some of the *really* hard sciences. Of course, it is sensible to distrust a very politicized competition law, if only because one should distrust *any* power, whether it is private or public. So, I am placing myself somewhere in the middle, to a position where it is jointly possible to open competition law up to broader points of view, whilst not discarding use of economics.

1. **One does not simply *either* break up just because of Bigness *or* only provide remedies because of consumer welfare effects**

As to that broader point of view: if big tech power is composite power then how do we deal with its multiple effects? Consumer welfare effects are covered by Nicolas’ proposals, but there are possible effects extending beyond those discussed. *Some* of these effects stem from the same source of power and business strategies as consumer welfare-impacting effects. Take hypernudging, the focus of Viktorija Morozovaite’s PhD research (member of my ERC-team). Hypernudging can lead to negative consumer welfare effects, but also to something that is slightly more difficult to label. Even though from the tech-perspective there is no difference between making a profit from political advertising, tweaking a newsfeed, enticing users to consume more radical content leading to echo-chambers, and self-preferencing. It is only because of *power* that these strategies are impactful on the aggregate level. Whether that is by way of the user-consumer on consumer welfare, or by way of the user-citizen on the vibrant public sphere that is a cornerstone of democracies. As previously discussed, mentioning ‘democracy’ does not equate to irrationality or sitting in the neo-structuralist camp. Instead, it means that from this perspective, the effects of hypernudging strategies might also be seen as competition law concern. These effects could therefore be addressed by remedies that lie between the sledgehammer of dismantlement or the use of a purely consumer welfare standard.

**A final remark.** I readily admit that Nicolas’ book is not really about the opposites between neo-structuralism and consumer welfarists. It proposes purposeful instruments to apply in different market circumstances. As was brought forward during the ASCOLA book presentation-discussion, Nicolas’ proposals are perhaps not so much an *instead,* but something *different* from the European Commission’s proposed ex ante tool. In line with this observation, I suggest that the ongoing conversation on competition law and big tech might be taken a step further without the entrenchment of polar opposites.

1. Professor of Competition Law at Utrecht University. No financial ties to be disclosed. Disclosures of non-paid positions: NGA to the ACM (since 1 June 2020), Crown-appointed member of the Social and Economic Council (since 1 June 2020), honorary judge at High Court of Tariffs and Trade (until 1 June 2020). I have received an ERC Starting Grant of the European Research Council to do research, with a small group of PhD’s & a postdoc, on the conceptualization of power of big tech platforms and what that might mean for competition law. Feel free to reach out if you are interested in what we are doing: a.gerbrandy@uu.nl. [↑](#footnote-ref-1)