



Unveiling the Discursive Power of Big Tech: Implications for EU Competition Law and Beyond

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ARTICLE

ABSTRACT

The public sphere is understood as a place where citizens meet, exchange views and form a public opinion. In today's platform society, part of the public sphere is comprised by the digital public sphere, whose information flows are largely mediated by big technology companies. This contribution builds on and expands the literature on the power of big technology companies, focusing on discursive power, which refers to the power to shape discourse and narratives. It proposes an analytical framework as a tool to capture a variety of discursive power manifestations in practice that are relevant in the context of EU competition law. Recognising the role of EU competition law in protecting democracy, and that it cannot be considered in isolation from the EU value system as such, we propose three ways of construing discourse-related theories of harm relevant to EU competition law: (i) building on existing theories of harm; (ii) building on the intersection where harms pertinent to EU competition law and plurality in discourse (as a non-economic consideration) converge; and (iii) introducing an independent, democracy-oriented theory of harm.

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The public sphere is a cornerstone of democratic societies. As an ideal, it is understood as a place where citizens meet, exchange views and form a public opinion. In today's platform society, part of the public sphere is comprised by the *digital public sphere*.¹ As digital environments, and thus information flows, are largely mediated by big technology companies, and the commodification of users' time, attention and data playing an important role in shaping interactions online, the boundaries between public and non-public spheres have become blurred. In recent years, several issues have emerged that led European legislators to adopt forward-looking regulatory measures:² from disinformation on public policy issues,³ support for and collaboration with political candidates,⁴ to foreign interference in national elections.⁵

This contribution builds upon and expands the literature on the power of big technology companies. It takes Gerbrandy and Phoa's theory of Modern Bigness as a point of departure, which is premised on a finding that big technology companies possess multi-faceted positions of power, covering instrumental, structural and discursive power dimensions, spreading across economic, political, social and personal domains (see introduction to this special issue).⁶ *Discursive power* – which is the focus of this article – is the power to shape discourse and narratives. Discursive power has a real impact on the quality of the digital public sphere and in turn on the functioning democratic societies based on the rule of law. When it comes to big technology companies that possess discursive power, they may impact the way ideas, knowledge and institutions are shaped, affecting the framing of, amongst others, policy problems.

The aim of this article is to examine discursive power and its manifestations through the lens of EU competition law. In particular, the article makes two contributions: it proposes an analytical framework as a tool to capture a variety of discursive power manifestations in practice that are relevant in the context of EU competition law. Recognising the role of EU competition law in protecting democracy, and that it cannot be considered in isolation from the EU value system as such, we propose three ways of construing discourse-related theories of harm relevant to EU competition law: (i) building on existing theories of harm; (ii) building on the intersection where harms pertinent to EU competition law and plurality in discourse converge; and (iii) introducing an independent, democracy-oriented theory of harm.

This article is structured as follows. Section 2 provides a short recap of the interaction between EU competition law and democracy – which has recently received renewed attention in competition law academia. Section 3 unpacks the notion of discursive power and provides an analytical framework to capture its manifestations. Section 4 brings together the exposé of the previous sections to engage in a legal analysis, by examining whether and how competition law may play a role in countering the negative effects of discursive power; it includes a discussion

¹ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press 1991); Jürgen Habermas, 'Reflections and Hypotheses on a Further Structural Transformation of the Political Public Sphere' (2022) 39(4) *Theory, Culture & Society* 145; José van Dijck, Thomas Poell & Martijn De Waal, *The Platform Society: Public Values in a Connective World* (Oxford University Press 2018).

² For example, see: 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) [2022] OJ L277/1; Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) [2024] OJ L2024/1083; Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising (Text with EEA relevance) [2024] OJ L2024/900.

³ Ingjerd Skafle et al., 'Misinformation About COVID-19 Vaccines on Social Media: Rapid Review' (2022) 24(8) *Journal of Medical Internet Research* e37367.

⁴ Giulio Corsi, 'Evaluating Twitter's algorithmic amplification of low-credibility content: an observational study' (2024) 13(1) *EPJ Data* 18; Alicia Tatone, 'How Elon Musk turned X into a pro-Trump echo chamber' (NBC News, 31 October 2024) <<https://www.nbcnews.com/tech/social-media/elon-musk-turned-x-trump-echo-chamber-rcna174321>> accessed 26 January 2025.

⁵ Eliza Gkritsi, 'EU opens investigation into TikTok and the Romanian election' (*Politico*, 17 December 2024) <<https://www.politico.eu/article/eu-opens-investigation-into-tiktok-over-romanian-election/>> accessed 26 January 2025.

⁶ Anna Gerbrandy & Pauline Phoa, 'The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter' in Michael Bennett, Hubb Brouwer & Rutger Claassen (eds), *Wealth and Power: Philosophical Perspectives* (Routledge 2022). Instrumental power relates to direct influence over actions of other actors; structural power is used to influence institutional agenda-setting, the delineation of a scope of options, and other structures (such as infrastructures and rules) in which activities and interactions takes place.

2. A SHORT RECAP OF THE RELATIONSHIP BETWEEN EU COMPETITION LAW AND PROTECTING DEMOCRACY

The notion that EU competition law has a role to play in protecting democracy (and thus: the digital public sphere) has gained renewed attention in both competition law academia and practice. In this article, we posit that EU competition law is a relevant legal tool in the context of discursive power of big technology corporations because open and democratic societies, based on the rule of law, are the preferred way of political and societal organisation. EU competition law cannot be viewed in isolation from the EU's value system and plays a role in protecting (these structures of) democracy.

In support of this position, it is first important to note that the base-line argument seems to be uncontested that consumer welfare-centred competition law helps to limit market power and maintain competition, thereby preventing economic concentration that could undermine democracy. Preventing economic concentration mitigates the risk of economic consolidation leading to political power, which can be linked with unconstrained political decision-making.⁷ Furthermore, there are credible theories of harm that are consistent with the consumer welfare focus of competition law that relate to (protecting democracy by) protecting the quality of the elements that make up the digital public sphere from erosion by market power (section 4.1).

However, secondly, we disagree with the view that the sole normative goal for competition law lies in using a narrowly defined consumer welfare standard.⁸ When its application is 'triggered' by market power and negative effects based in market-logics, competition law has a role to play in protecting democracy beyond this baseline-argument.⁹ We will therefore show how both a plurality-focused theory of harm (section 4.2) and a self-standing theory of harm in relation to fostering the digital public sphere as cornerstone of democracy (section 4.3), could be considered.

Our normative position is embedded in the EU origins, fundamental values, as well as in the long-standing acceptance that competition law itself is not an a-political institution, but has political content, with competition law and democracy having an interdependent relationship.¹⁰ Indeed, competition law is enshrined in the TFEU itself, from which it can be argued – considering Article 7 TFEU, which requires consistency and coherence of EU policies¹¹ – that it must be interpreted

⁷ Kati Cseres, 'The role of competition law in defending the rule of law values in the EU' in C Fasone, A Dirri & Y Guerra (eds) *EU rule of law procedures at the test bench* (Palgrave Macmillan, 2024) 261–279; Elias Deutscher, 'The competition-democracy nexus unpacked – competition law, republican liberty and democracy' (2022) 41 *Yearbook of European Law* 197; Daniel A Crane, 'Antitrust as an Instrument of Democracy' (2022) 72 *Duke Law Journal Online* 21, 21–22 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1097&context=dlj_online> accessed 22 March 2025.

⁸ See e.g., Ioannis Lianos, 'Polycentric competition law' (2018) 71(1) *Current Legal Problems* 161; Konstantinos Stylianou and Marias Iacovides, 'The goals of EU competition law: a comprehensive empirical investigation' (2022) 42(4) *Legal studies* 620.

⁹ For discussion, see: Kati Cseres & Maciej Bernatt, 'The forgotten Constitutional Identity of EU Competition Law' (Kluwer Competition Law Blog, 7 January 2025) <<https://competitionlawblog.kluwercompetitionlaw.com/2025/01/07/the-forgotten-constitutional-identity-of-eu-competition-law/>> accessed on 15 February 2025; Ariel Ezrachi & Viktoria HSE Robertson, 'Can competition law save democracy? Reflections on democracy's tech-driven decline and how to stop it' (2024) *Journal of Antitrust Enforcement* 1; Agustín Reyna, 'Why Competition Law Must Protect Democracy – A European Perspective' [2017] OECD Global Forum on Competition Contribution by BEUC, DAF/COMP/GF/WD(2017)36, at 4; Richard Bunworth, 'EU Merger Control and the Development of an Alternative to the Consumer Welfare Standard: Incorporating the Union's Social Values' (PhD thesis, University College Dublin forthcoming 2025). The ordoliberal roots of EU competition law support this: Laurent Warlouzet, 'The EEC/EU as an Evolving Compromise between French Dirigism and German Ordoliberalism (1957–1995)' (2019) 57(1) *Journal of Common Market Studies* 77, 80; Elias Deutscher, *Competition Law and Democracy: Markets as Institutions of Antipower* (CUP 2024).

¹⁰ Among others, see: Giuliano Amato, *Antitrust and the bounds of power: the dilemma of liberal democracy in the history of the market* (Bloomsbury Publishing 1997); Elias Deutscher & Stavros Makris, 'Exploring the Ordoliberal paradigm: the competition-democracy nexus' (2016) 11 *Competition Law Review* 181; Spencer Weber Waller, 'Antitrust and Democracy' (2018) 46 *Florida State University Review* 807; Robert Pitofsky, 'Political content of antitrust' (1978) 127 *University of Pennsylvania Law Review* 1051; Lina M Khan & Zephyr Teachout, 'Market structure and political law: a taxonomy of power' (2014) 9 *Duke Journal of Constitutional Law and Public Policy* 37.

¹¹ Klaudia Majcher, 'Media Pluralism and Independence: Legal Assessments of the Agora/Eurozet and PKN Orlen/Poliska Press Transactions (Poland)' (2022) 13(6) *Journal of European Competition Law & Practice* 419.

in the light of the overarching values of the Union.¹² Article 2 TEU sets out the foundational values of the EU, including *inter alia* democracy, freedom, the rule of law and pluralism. Thus, it follows that competition law cannot be seen in isolation from these overarching values.¹³ It also follows from the EU's explicated value system that a well-functioning digital public sphere demands respect for citizens' fundamental rights, including access of and to a plurality of voices.¹⁴ This is supported by both the EU competition legal and policy documents,¹⁵ and the Court's case law, which recognise the link between competition law and these values, with the *Sped-Pro* judgement explicitly confirming compliance with fundamental values being applied to EU competition law institutions.¹⁶

Furthermore, the interdependence between competition law and the fundamental values of the EU is underpinned by the view that competition law, together with the four freedoms, constitutes the European economic constitution.¹⁷ This is aligned with the Ordoliberal school of thought that has been influential in shaping the (early) development of EU competition law and policy.¹⁸ Central to Ordoliberalism is the interaction between private (market) and public (state) power, with excessive power in either domain threatening the functioning of markets and the risk of political capture.¹⁹ The market dynamics between undertakings that comprise the digital public sphere point to the risks of outcomes that Ordoliberals warned about. In particular, the market power of a handful of big technology companies may lead to, and be reinforced by, discursive power that wields political power. After all, when concentration of market power occurs in markets, such as those related to information dissemination in the digital public sphere, that market power may more easily transition to political power than in other sectors.²⁰ Sticking out in this scenario is the lack of meaningful accountability mechanisms both from "the hand" of the market, but also the state.²¹ Thus, taking the notion and protection of the digital public sphere seriously calls for legal creativity, including for EU competition law

¹² Viktoria HSE Robertson, 'Digital Democracy and Competition Law' [2024] OECD DAF/COMP/WD(2024)96, 5. This idea seems to find support in the Court's judgment in Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* EU:C:1974:18, para 32, where the Court found that competition rules need to be interpreted in light of what is now Article 2 TEU.

¹³ Bunworth (n 9).

¹⁴ Consolidated Version of the Treaty on European Union [2016] OJ C 202/1, Article 2; Majcher (n 11).

¹⁵ Deutscher (n 9), chapter 4; Commission, 'A Dynamic and Workable Effects-Based Approach to Abuse of Dominance' [2023] 1 Competition Policy Brief (March 2023) <https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf> accessed 22 March 2025; Commission, 'Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (Communication) [2023] OJ C 116/01, para 1.

¹⁶ T-791/19 *Sped-Pro v Commission* EU:T:2022:67; Case C-252/21, *Meta Platforms Inc and Others v Bundeskartellamt* EU:C:2023:537; Case T-604/18, *Google and Alphabet v Commission (Google Android)* EU:T:2022:541, para 1028; Case C-769/22 *Hungary v European Parliament and Council of European Union* (this case, at the time of writing, is pending). The Court, more generally, never explicitly supported the notion of a single goal for competition law, see: Case C-8/08 *T-Mobile Netherlands BV and Others* EU:C:2009:343, para 28; Joined Cases T-213/ and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* EU:T:2006:151, para 115; Anna Gerbrandy, 'Changing Competition Law in a Changing European Union' (2019) 14(1) *Competition Law Review* 33.

¹⁷ Anna Gerbrandy, 'Rethinking competition law within the European economic constitution' (2019) 57(1) *Journal of Common Market Studies* 127.

¹⁸ Warloutzet (n 9); Laurent Warloutzet, 'Towards a fourth paradigm in European Competition Policy? A historical perspective (1957–2023)' in Adina Claiici, Denis Waelbroeck & Assimakis Komninos (eds) *The transformation of EU competition law – next generation issues* (Kluwer, 2023); Anselm Küsters, *The making and unmaking of ordoliberal language: A digital conceptual history of European Competition law* (Klostermann, 2023).

¹⁹ The balancing between the two can be achieved through setting-up an economic constitution (Wirtschaftsverfassung) to provide "rules of the game" that govern the economic life of a community, see: Lars P Feld, Ekkehard A Köhler, & Daniel Nientiedt, 'Ordoliberalism and the social market economy' (2021) *Freiburger Diskussionspapiere zur Ordnungsökonomik*, No. 21/5. According to Eucken, an ideal economic constitution would be "functioning and humane", meaning that it would foster economic efficiency, while at the same time allow people to freely pursue their own goals within the limits imposed by the (legal) rules of the game. In regard to the latter, economic freedom is considered a central value to Ordoliberals, viewed as a source and premise of all other values. See also: Viktorija Morozovaite & Anna Gerbrandy, 'Exploring the nexus between European competition law and democratic society: A case of political microtargeting' (2024) 17(30) *Yearbook of Antitrust and Regulatory Studies* 9.

²⁰ Maciej Bernatt, 'Democracy and competition law: Exploring substantive and procedural links' (2024) Working Paper of the Centre for Antitrust Regulatory Studies, University of Warsaw, No.1–24.

²¹ Linnet Taylor, 'Public actors without public values: Legitimacy, domination and the regulation of the technology sector' (2021) 34(4) *Philosophy & Technology* 897.

as one of the instruments to prevent this scenario from materialising. In section 4, we further operationalise how EU competition law could be used to address these concerns, in light of the analytical framework developed in section 3.

3. DISCURSIVE POWER: DEVELOPING A COMPETITION LAW RELEVANT ANALYTICAL FRAMEWORK

To analyse how competition law could play a role in curbing the negative effects of discursive power, we begin with a section that provides a better understanding of discursive power itself. In section 3.1 we use insights from discourse analysis to dissect the concept of discursive power as distinct from “market power”. In section 3.2 we build upon this to provide an analytical framework relevant to competition law: we construe discursive power as an element of the composite corporate power of big technology companies (Modern Bigness power) as *power behind discourse* (structures of discourse and the access to them) and *power in discourse* (which relates to *content*, *access to* and *form of* discourse), especially in their combination where it affects the digital public discourse.

3.1. UNDERSTANDING DISCURSIVE POWER

Understanding discursive power begins with the notion of discourse, which denotes the study of language in use as well as social practices in social interactions.²² Discourse *analysis*, in turn, is a study of how language and communication shape social realities and relationships. Discourse analysis can focus on a micro-sociological level or a macro-sociological level.²³ Discourse and *power* is situated in the latter category. Understanding the notion of ‘power’ has been a fascination for millennia.²⁴ We focus here on the power of big technology *corporations* and their role in shaping knowledge, meaning, and truth, in the digital public sphere, building on only a fraction of the existing literature. To grasp the notion of ‘power’ in this context, we build upon Fairclough (who builds upon Foucault),²⁵ who focuses on power vis-à-vis discourse; and Fuchs’s more specific focus on corporations.²⁶

Discursive power operates through what Foucault calls “power/knowledge”, which are intimately connected and mutually reinforcing: knowledge is not neutral or objective but is shaped by power relations; power is also not held by a few individuals or institutions but rather is dispersed throughout society. Individuals are both the subject and object of power, simultaneous and continuously engaged in a process of exercising, accepting and resisting it. In this view, discursive power is not merely a tool of domination but also a site of resistance and agency.²⁷ Fairclough provides two building blocks, useful for our proposed competition law-relevant analytical framework (below): ‘power behind discourse’ and ‘power in discourse’.²⁸

²² Deborah Tannen, Heidi E Kamilton & Deborah Schiffrin, ‘Introduction to the First Edition’ in D Schiffrin et al. (eds), *The Handbook of Discourse Analysis* (2nd edn, John Wiley & Sons, Inc. 2015) 1.

²³ Johannes Angermüller, Dominique Maingueneau & Ruth Wodak, *The Discourse Studies Reader: Main Currents in Theory and Analysis* (John Benjamins Publishing Company 2014). See also Maarten A Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford University Press 1995) 264.

²⁴ There are many starting points, for example, Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (vol 1, Bedminster Press 1968) 53 and the work of Steven Lukes, *Power: A Radical view* (MacMillan, 1974). In regard to corporations, Karl Marx & Friedrich Engels, *The German Ideology* (Foreign Languages Press, 2022, originally published 1932). Our starting point, however, lies predominantly with Foucault: Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings 1972–1977* (The Harvester Press, Limited 1980).

²⁵ Norman Fairclough, *Language and Power* (second edn, Longman, 2001); Norman Fairclough, *Critical Discourse Analysis* (Longman, 1995).

²⁶ Doris Fuchs, *Business Power in Global Governance* (Lynne Rienner, 2007); Doris Fuchs & Markus ML Lederer, ‘The Power of Business’ (2007) 9(3) *Business and Politics* 1.

²⁷ Foucault (n 24). His work seems to also lie at the basis of the notion of ‘opinion power’, which has come (from media studies) into the field of competition law more recently. Opinion power can be defined as the “ability of the media to influence processes of individual and public opinion formation”: Tomás Dodds et al., ‘Popularity-driven metrics: Audience analytics and shifting opinion power to digital platforms’ (2023) 23(2) *Journalism Studies* 403. Opinion power is linked to the German concept of *Meinungsmacht*, which has been used by the German Constitutional Court linking opinion power with media-plurality: Theresa Josephine Seipp, ‘Media Concentration 2.0: Regulating Platform Opinion Power in a Concentrated Digital Media Ecosystem’ (PhD thesis, Universiteit van Amsterdam 2024), 43. Conceptually it can be tied back to Lukes (n 29). Opinion power concept is ultimately based on understanding systemic power structures. As stated by Helberger, the focus is on ‘systemic opinion power’ and ‘structural dependencies’: Helberger (n 10).

²⁸ Fairclough (n 25), 36.

Power behind discourse means that the organisation of discourses (genres, conventions, standards) is regulated and defined by institutional order and power relations themselves. Power in discourse means that discourse is also a (social) site wherein power is exercised, and power relations are actually enacted. It is this latter form of discursive power that also Fuchs focusses on, zooming in on *corporate* power, and specifically its influence over *politics*. Such political corporate power, she posits, encompasses discursive power which “shapes perceptions and identities and fosters the interpretation of situations as of one type rather than another”.²⁹ This, we add, is all the more true for the corporate power of big technology companies.³⁰ The resulting conceptualisation of corporate power is thus broader than the legal conceptualisation of market power found in EU competition law.

Market power is the conceptual and practical keystone of competition law rules.³¹ It relates to the economic strength of a company on a particular market, which is usually determined through a structural analysis of that market, notably the calculation of a firm’s market shares.³² For example, in the context of Article 102 TFEU, which is relevant regarding unilateral conduct of big technology companies, market power can lead to dominance which allows a firm to “behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers”.³³ Notably, in EU competition law market power as such is not considered problematic – its abuse is – but it can provide a signal that a corporation is able to distort competition in markets by excluding and/or exploiting customers and consumers. When zooming in on discursive power of big technology companies, it becomes apparent that the narrowly construed concept of market power does not really fit when considering the (negative) effects of big technology corporations’ discursive power on the digital public sphere.³⁴ After all, expressions of discursive power online would, in the conventional competition law logic, be perceived as *separate* from the market itself, with their impact on ideas, narratives and truth being far more intangible, incommensurable and invisible than market power effects on price and output parameters of competition.³⁵ However, this view is overly simplistic. As the manifestations of discursive power (of big technology corporations) are rooted in market dynamics, we posit that a healthy functioning of the digital public sphere necessitates competition law solutions, to supplement other regulatory frameworks (see section 4).

3.2 ANALYTICAL FRAMEWORK: DISCURSIVE POWER OF BIG TECH CORPORATIONS AS PART OF MODERN BIGNESS

The *discursive* dimension of the power of big technology companies, specifically where it impacts the political aspects of digital public discourse, is the focus of this article.³⁶ This section introduces an analytical framework to enable competition law to ‘capture’ manifestations of discursive power. In the broader context of the multi-faceted power of big technology companies, the analytical framework is comprised of two layers. By holding (market) control in *both* these layers, big technology companies influence the (quality of) the digital public discourse

²⁹ Fuchs (n 26), 60.

³⁰ Gerbrandy & Phoa (n 6).

³¹ Market power is a central concept to capturing anticompetitive agreements for the purposes of Article 101 TFEU, abuse of dominance for the purposes of Article 102 TFEU, and problematic concentrations in merger control.

³² Adriana Hernandez Perez & Aldo Gonzalez, ‘Market Power’ (*Concurrences*, Art. N 12330) <<https://www.concurrences.com/en/dictionary/market-power#:~:text=the%20undertaking%20concerned.,European%20Commission,and%20loss%20of%20economic%20welfare>> accessed 8 December 2024.

³³ C-85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECLI:EU:C:1979:36, para 38.

³⁴ The notion of Modern Bigness, of which discursive power is one dimension, is proposed precisely to capture better the complexity of the power of big technology corporations (see intro to this special issue).

³⁵ Generally, starting from a consumer welfare concept of harm in competition law, one would focus on price and output as most relevant parameters of competition; taking a more dynamic competition approach one would also include innovation (trajectories) as relevant parameter.

³⁶ Reflecting on the fundamental role some big technology companies play in shaping the digital public sphere, there is a growing scholarly consensus about the need to reconsider their classification as (also) media companies, even though of course not all big technology companies have the characteristics of media companies to the same extent. Therefore, any such reconsideration would require nuance. e.g., Natali Helberger et al., ‘Regulation of News Recommenders in the Digital Services Act; Empowering David Against the Very Large Online Goliath’ (2021) 26 *Internet Policy Review* 1.

and democratic processes: power behind discourse as structures of discursive power (section 3.2.1) and power in discourse as instances of discursive power related to content, access and form (section 3.2.2). For analytical purposes, we first distinguish between these layers but note that the power *in* discourse depends on the power *behind* discourse. The ultimate challenge for (competition) law is to ensure that market logics do not negatively impact democratic processes and values, by protecting open access to and participation in (the shaping of) the public discourse as a pre-requisite for well-functioning digital public sphere.

3.2.1 Structures of discursive power: Power behind discourse

The notion of ‘power behind discourse’ relates to infrastructures that facilitate and shape discourses. In the context of big technology companies and Modern Bigness theory, it combines the structural and discursive dimensions of composite power. Indeed, big technology companies provide digital tools and infrastructures, which enable communication and other forms of interaction, and have positioned themselves as the key information channels online (e.g., social media platforms, digital advertising services), with their technical, design and other internal policy choices explicitly or implicitly shaping discourse in the digital public sphere.³⁷ These (physical and intangible) new digital infrastructures have transformed the media and communications landscape, leading to a shift in “opinion power, changes in news production, distribution, and consumption, and increased structural and technological dependencies on digital platform companies”.³⁸ In this regard, we observe several risks. First, while the structures of discursive power of some big technology companies, such as social media, strongly resemble (even surpass) legacy media these companies fall within the cracks of the legal system, so that rigorous editorial responsibilities and other rules do not.³⁹ As a result, while performing a similar public function of providing (political) information and public discourse, they have been able to build discursive power structures around the logics of commodification of users’ time, attention and data to fulfil profit-driven goals, without the public function-related responsibilities.

Second, zooming out further, since big technology companies are often industry leaders and trailblazers in developing new digital infrastructures, they also play key roles in shaping industry-wide standards.⁴⁰ Standardisation processes shape the development, interoperability and functionalities of technologies. They also impact technological affordances – the technological features that enable or constrain potential user behaviour.⁴¹ Such structures could be viewed as ‘the rules of the game’, shaping discursive power relations among different actors. For instance, power behind discourse can be observed in relation to developments of generative AI. Big technology companies not only lead in developing Large Language Models, which entail choices about which and how to train data, and in turn discourse-shaping, but also the structures – technological affordances – in which these models can be engaged with by consumers and customers. The discursive power structures of these companies go far beyond the power of legacy media companies, particularly because they are reinforced by digital markets’ characteristics, including winner takes all dynamics, vertical integration and network effects.⁴² Ultimately, ‘power behind discourse’ underlies the instances in which ‘power in discourse’ takes place. Therefore, to fully understand and capture the negative effects of discursive power on the digital public sphere, it is necessary to consider the digital infrastructures that underlie them.

³⁷ According to the analysis of van Dijck, Poell & de Waal, big technology companies form the core of the platform ecosystems online. See: Van Dijck et al. (n 1).

³⁸ Theresa Josephine Seipp, ‘Media Concentration Law: Gaps and Promises in the Digital Age’ (2023) 11(2) *Media and Communication* 392; Manuel Castells, *Communication Power* (third edn, Oxford University Press 2013) 74.

³⁹ Reflecting on the fundamental role some big technology companies play in shaping the digital public sphere, there is a growing scholarly consensus about the need to reconsider their classification as (also) media companies, even though of course not all big technology companies have the characteristics of media companies to the same extent. Therefore, any such reconsideration would require nuance. e.g., Helberger et al (n 36).

⁴⁰ IBM, ‘Leading companies launch consortium to address AI’s impact on the technology workforce’ (4 April 2024) <<https://www.newsroom.ibm.com/2024-04-04-Leading-Companies-Launch-Consortium-to-Address-AIs-Impact-on-the-Technology-Workforce>> accessed 23 September 2024.

⁴¹ Kokil Jaidka, Alvin Zhou & Yphtach Lelkes, ‘Brevity is the Soul of Twitter: The Constraint Affordance and Political Discussion’ (2019) 69(4) *Journal of Communication* 345.

⁴² Jacques Crémer, Yves-Alexandre De Montjoye, & Heike Schweitzer, ‘Competition policy for the digital era. Final Report’ (Publications Office of the European Union, 2019).

3.2.2. Instances of discursive power: Power in discourse

Having shown that discursive power is largely interdependent with big technology companies' structural dimension of power, the second layer of the proposed analytical framework focuses on identifying *instances* of power in discourse, defined as ways in which companies exert control over content, access to, and form of discourse.⁴³

Content: What is talked about

Big technology companies exert discursive power over content in digital public discourse at least in two ways: *direct* and *indirect*. *Direct* discursive power over content relates to conventional ways companies influence (political) content. An example is lobbying. While lobbying is not limited to big technology corporations, they are champions of it. For example, in 2023, the top ten digital platforms alone – including big technology companies – spent over 40 million euros, a third of the overall sector's lobby spending.⁴⁴ A large part of this lobbying campaign is taking place in the digital public sphere, where these same corporations exert power behind discourse (as discussed above). Furthermore, big technology companies shape content through funding research agendas.⁴⁵ The collaborations between tech giants and top universities⁴⁶ attracted discussions regarding academic integrity, especially when research subjects are explicitly normative in nature, such as AI ethics.⁴⁷ The risk emerges as corporate wealth can be used to advance science and innovation, but it can also be used to take control of the narratives, including in the digital public sphere, of the very people and institutions that are meant to hold these companies accountable.⁴⁸

Indirect discursive power, which includes more subtle ways in which big technology companies provide, amplify or suppress content in the digital public sphere, could be viewed as a sliding scale. For example, for content to reach some of the key (public) information dissemination channels online, content creators need to comply with platforms' respective Terms and Conditions (hereinafter: T&Cs). As such, T&Cs not only set out company's policy regarding specific content-oriented issues but also outline what is meant by controversial labels such as 'political' or 'public' content.⁴⁹ In addition, more covert expressions of discursive power also relate to platforms' ability to promote or demote specific types of content. One of the more striking examples relates to 2024 US Presidential Election, where researchers suggest that the algorithm of X was tweaked to boost Republican posts.⁵⁰ It is only in the past years that the EU adopted a more interventionist approach (see section 4.1), in contrast to earlier permissiveness of self-regulation.⁵¹

⁴³ Teun A van Dijk, 'The Discourse-Knowledge Interface' in G Weiss and R Wodak (eds), *Critical Discourse Analysis: Theory and Interdisciplinarity* (Palgrave Macmillan 2003); Shiao-Yun Chiang, 'Power and Discourse' (2015) *The International Encyclopedia of Language and Social Interaction* 1.

⁴⁴ Corporate Europe Observatory, 'Big Tech lobby power in Brussels continues to grow: New analysis shows Big Tech increased its lobby spending by 16.5 per cent since 2021' (7 September 2023) <<https://corporateeurope.org/en/2023/09/big-tech-lobby-power-brussels-continues-grow>> accessed 5 August 2024.

⁴⁵ The gap between research funding from public funds and the R&D funding by big technology companies is staggering. For instance, the EU's Horizon Europe research and innovation programme for 2021–2027 has a budget of 95.5 billion euros: Commission, 'Horizon Europe' <https://research-and-innovation.ec.europa.eu/funding/funding-opportunities/funding-programmes-and-open-calls/horizon-europe_en> accessed 5 August 2024. In contrast, Amazon's R&D spending reached 85.622 billion dollars in the year 2023 alone: Macrotrends, 'Amazon Research and Development Expenses 2010–2024' <<https://www.macrotrends.net/stocks/charts/AMZN/amazon/research-development-expenses#:~:text=Amazon%20annual%20research%20and%20development,a%2031.15%25%20increase%20from%202020>> accessed 5 August 2024.

⁴⁶ University of Cambridge, 'Cambridge and Google partner to facilitate AI research' (17 October 2023) <<https://www.cam.ac.uk/news/cambridge-and-google-partner-to-facilitate-ai-research>> accessed 5 August 2024.

⁴⁷ Olivia Solon, 'Google spends millions on academic research to influence opinion, says watchdog' (*The Guardian*, 13 July 2017) <<https://www.theguardian.com/technology/2017/jul/13/google-millions-academic-research-influence-opinion>> accessed 5 August 2024.

⁴⁸ Joseph Menn & Naomi Nix, 'Big Tech funds the very people who are supposed to hold it accountable' (*The Washington Post*, 6 December 2023) <<https://www.washingtonpost.com/technology/2023/12/06/academic-research-meta-google-university-influence/>> accessed 5 August 2024.

⁴⁹ For instance, see: Meta Business Help Center, 'Information on prohibited ads related to voting and ads about social issues, elections, or politics' <<https://www.facebook.com/business/help/253606115684173>> accessed 23 September 2024.

⁵⁰ Wes Davis, 'A study found that X's algorithm now loves two things: Republicans and Elon Musk' (*The Verge*, 17 November 2024) <<https://www.theverge.com/2024/11/17/24298669/musk-trump-endorsement-x-boosting-republican-posts-july-algorithm-change>> accessed 29 March 2025.

⁵¹ Luciano Floridi, 'The End of an Era: From Self-Regulation to Hard Law for the Digital Industry' (2021) 34 *Philosophy & Internet* 619.

More recently, against the backdrop of the political shifts in the US, one cannot but note the influence that big technology companies exert on ‘what is talked about’ in the political realm more generally.⁵² As the tech bros are overtly adjusting their policies and investing in currying political favours in the new political climate, the risks of oligarchical structures taking shape are more salient.⁵³ For example, Musk has been actively shaping political discourse through his role as a CEO of X and, recently, as a political appointee of the US Department of Government Efficiency (DOGE).⁵⁴ In such circumstances, the distinction between exertion of (non-discursive) political power and wielding of discursive power over the (digital) public sphere becomes blurred. We reiterate that the argument for competition law to be used as an instrument in relation to discursive power is precisely intended to negate the risks of oligarchical structures forming (see section 2).

Access: Who can talk?

Intertwined with the indirect discursive power over content, access is important for actors to participate meaningfully in the digital public sphere. This concerns both the access of *content creators* to (physical and digital) infrastructures – such as social media platforms or app stores – to obtain and disseminate information, as well as the access of *users* to participate in the discourse itself.

In this regard, it is helpful to circle back to big technology companies’ T&C’s. Restriction of access to a platform is a common practice, if content creators’ and users’ behaviour does not align with the platform’s terms of service. However, challenges emerge when companies are placed in the position of policymakers that rule on ‘grey area’ issues that are not illegal per se. For instance, the suspension of accounts linked to QAnon after the U.S. Capitol invasion and the deplatformisation of Parler from Google’s and Apple’s app stores have fuelled debates about the influence of platforms in shaping political speech and highlighted the role of social media platforms as gatekeepers of information.⁵⁵ A more subtle example of potential hindering of content creators’ access to discourse relates to largest platforms’ recommender systems, which are instrumental in ranking information online. Such ranking may become subject to intentional or unintentional bias, leading to discriminatory outcomes. While in principle users could access content that is downranked, in practice, due to information overload and cognitive biases at play, prioritisation of content matters for capturing users’ attention.⁵⁶ From users’ perspective, practices such as shadow banning – a covert suppression of online users’ content without their knowledge – has brought to light the opacity of content moderation processes, as users may be unaware that their contributions are being downplayed or excluded from broader online conversations.⁵⁷

When focusing on power over access to the digital public sphere, the impact is felt not only by users in their capacity as consumers, but also (often at the same time) as citizens that require access to the digital public sphere to form political opinions.⁵⁸ In this context, the roles

⁵² Dia Kayyali, ‘Meta’s content moderation changes are going to have a real world impact. It’s not going to be good’ (Tech Policy Press, 9 January 2025) <<https://www.techpolicy.press/metas-content-moderation-changes-are-going-to-have-a-real-world-impact-its-not-going-to-be-good/>> accessed 22 March 2025.

⁵³ Dara Kerr & Johana Bhuiyan, ‘Crypto and big tech’s backing pays off as Trump makes tech friendly moves’ (The Guardian, 22 February 2025) <<https://www.theguardian.com/technology/2025/feb/22/crypto-big-tech-trump>> access 22 March 2025.

⁵⁴ Oliver J Conroy, ‘How Elon Musk’s X became the global right’s supercharged front page’ (The Guardian, 4 January 2025) <<https://www.theguardian.com/technology/2025/jan/04/elon-musk-x-trump-far-right>> accessed 22 March 2025; Josh Gerstein & Kyle Cheney, ‘Judge orders urgent release of DOGE records, citing ‘unprecedented’ power and ‘unusual secrecy’’ (Politico, 10 March 2025) <<https://www.politico.com/news/2025/03/10/judge-orders-doge-record-release-00223151>> accessed 22 March 2025.

⁵⁵ Deplatformisation can be defined as “an effort to push back encroaching extreme (right-wing) platforms to the fringes of the ecosystem by denying them access to the infrastructural services to function online.” See: José van Dijck, Tim de Winkel & Mirko Tobias Schäfer, ‘Deplatformization and the governance of the platform ecosystem’ (2023) 25(12) *New Media & Society* 3438; Emily B Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (CUP 2015).

⁵⁶ *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final [2017] OJ C 9/11, paras 375 and 460.

⁵⁷ Paddy Leerssen, ‘An End to Shadow Banning? Transparency Rights in the Digital Services Act between Content Moderation and Curation’ (2023) 48 *Computer Law & Security Review* 105790.

⁵⁸ Habermas (n 1); 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/>> accessed 16 February 2025.

of consumer and citizen ‘collapse’ together. As argued elsewhere, however, even if a person is not engaging directly in the digital public domain she still is a relevant citizen, impacted by power in relation to access: also the non-users are impacted as citizens, through the effect of the digital public discourse on democracy.⁵⁹ We will return to this notion below (section 4.3).

Form: How can we talk?

Lastly, in terms of *form*, technological affordances are often linked with digital platforms’ profit-making logic, favouring user *engagement* over providing high quality content for the public discourse.⁶⁰ In this regard, consider the “like”, “share” and “subscribe” buttons, as well as emoticons, which were deliberately designed to not only allow users express their feelings about specific content, but also to gather their data for monetisation purposes. The use of hashtags may be used to amplify and mobilise people regarding specific topics (e.g., #blacklivesmatter or #ArabSpring movements), and foster engagement on the platform. However, while allowing for rapid dissemination of news and (political) information, it may contribute to spreading content that is not fact-checked, leading to concerns about fake news and misinformation.⁶¹

To conclude, section 3 introduced an analytical framework as a tool to understand discursive power of big technology companies in the digital public sphere. The analytical framework is comprised of two layers: *power behind discourse* and *power in discourse*. We underscore that it is when a company possesses discursive power in both of these layers that the effects on the digital public sphere are potentially the most harmful. Importantly, discursive power of big technology companies is continuously reinforced, with relationships of dependency among relevant actors identified through a feedback loop: platform ecosystems produce data, leading to data power, and this leads to strengthening discursive power, with discursive power impacting the (development of) platform ecosystems. However, big technology companies are not neutral operators of digital infrastructures, nor are they obliged to prioritise public interest considerations, or are they accountable to the public in markets that are vital to the functioning of the digital public sphere.⁶² Against this backdrop, the question of what shape a competition law response should take, as a means of ensuring accountability for the exercise of discursive power by big technology companies, is of particular relevance. This is what we turn to next (section 4).

4. DISCURSIVE POWER AS EU COMPETITION LAW CONCERN

The intersection between EU competition law and discourse in the digital public sphere is not a novel phenomenon. When viewed through the lens of the market, the (digital) public sphere is shaped by the dynamics of information markets.⁶³ The presumption behind the marketplace of ideas is that competition leads to diverse information environment that helps to establish the “truth” in a society.⁶⁴ However, this idealised view disregards the realities of digital markets, characterised by a handful of powerful market actors that dominate the structures behind discourse and exert influence in discourse (content, access, form), affecting the digital public sphere. In fact, the very functioning of the digital public sphere has become dependent on these companies’ commercial infrastructures, disempowering public actors in steering public discourses.

Before positioning EU competition law as a relevant legal instrument in addressing harmful manifestations of discursive power, it is helpful to underscore that in the past years the EU has made strides in strengthening democracy and citizens’ interests through several legislative initiatives. In response to high profile scandals and risks to the quality of the the

⁵⁹ Anna Gerbrandy, Malgorzata Kozak & Dionysios Pelekis (forthcoming, not publicly available).

⁶⁰ Jaidka et al. (n 41).

⁶¹ On a role of social media platforms, with specific example of TikTok and Twitter, in spreading fake news, disinformation and misinformation campaigns, see: Laura Pérez Rastrilla, Pablo Sapag & Armando Recio García, *Fast politics: Propaganda in the age of TikTok* (Springer, 2023); ‘Twitter and Politics: Analyzing the Role of the Platform in Public Discourse’ (*Influencer Marketing Instagram*) <<https://adicted.io/twitter-and-politics-analyzing-the-role-of-the-platform-in-public-discourse/>> accessed 5 August 2024.

⁶² Van Dijck et al. (n 55).

⁶³ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), para 630 on the role of the “free trade of ideas” in competition of the market.

⁶⁴ Claudio Lombardi, *The Illusion of a ‘Marketplace for Ideas’* (2018). Available at SSRN 3104449, 198–199.

(digital) public sphere,⁶⁵ the Commission adopted the European Democracy Action Plan (2020), aimed at empowering citizens and civil society through promoting free and fair elections, strengthening media freedom and countering disinformation in the EU.⁶⁶ It led to adoption of the Transparency and Targeting of Political Advertising Act (TTPA), set to increase transparency in political advertising in the EU; the European Media Freedom Act (EMFA), aimed at protecting media independence, pluralism and cooperation amongst responsible national authorities; and the Digital Services Act (DSA), providing additional accountability mechanisms for (very large) online platforms through imposing asymmetric monitoring and reporting obligations.⁶⁷ These regulations are promising for incorporating EU-level safeguards against the risks and challenges to democratic processes in the digital public sphere. While much ink has been spilled on each of these regulations and their specific provisions,⁶⁸ it is important to note that they are limited in tackling harmful discursive power manifestations as these legal frameworks tackle very specific aspects of it, without capturing the full scale of discursive power concerns. In the context of big technology companies possessing power *behind* and *in* discourse, a more proactive approach to dealing with structural discursive power concerns is warranted. As competition law applies to all sectors of the economy, including media and communications markets, and because in the EU the application of competition law is not mutually exclusive with other regulatory frameworks,⁶⁹ it has a role to play in addressing the negative effects of manifestations of discursive power that fall through the cracks of regulatory frameworks. That role, in this article, is revealed by examining directions for development of (novel) theories of harm, further cementing discursive power harms as part of EU competition law's concerns.

In EU competition law, a credible theory of harm is a cornerstone of any competition law infringement. It provides a narrative to explain competitive harms in specific cases and to identify how can competition law step-in to correct them.⁷⁰ Since the modernisation period, theories of harm in EU competition law are generally tied to consumer welfare standard and expressed in economic efficiencies.⁷¹ In turn, inefficient undertakings may be pushed out of the market, without the need to take social and public considerations into account.⁷² However, as this article shows, since certain (information) markets form an integral part of the digital public sphere, efficiency-oriented theories of harm may not fully capture the negative effects that result from the composite power of big technology companies.

Furthermore, the proposed analytical framework (section 3.2) provides a tool to grasp a variety of manifestations of discursive power in practice. While discursive power structures (e.g.,

⁶⁵ European Parliament, 'Foreign interference: how Parliament is fighting the threat to EU democracy' (9 April 2024) <<https://www.europarl.europa.eu/topics/en/article/20240404STO20215/foreign-interference-how-parliament-is-fighting-the-threat-to-eu-democracy>> accessed 25 March 2025> accessed 25 March 2025.

⁶⁶ Commission, 'On the European Democracy Action Plan' (Communication) COM(2020) 790 final.

⁶⁷ Digital Services Act (n 2); European Media Freedom Act (n 2); Transparency and Targeting of Political Advertising Act (n 2).

⁶⁸ See e.g., Martin Husovec, *Principles of the Digital Services Act* (OUP, 2024); Elda Brogi et al, *The Media Freedom Act: media freedom, freedom of expression and pluralism* (European Parliament, 2023); Max van Drunen et al, 'European approach(es) to regulating targeted political advertising: Money, data, and more' in Darren G Lilleker (eds), *The Routledge Handbook of Political Campaigning* (Routledge 2024).

⁶⁹ Peter Alexiadis & Martin Cave, 'Regulation and Competition Law in Telecommunications and Other Network Industries' in Robert Baldwin et al. (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 512.

⁷⁰ Xingyu Yan, *Competition law in China and the EU: Institutional dynamics and theories of harm* (Routledge, 2024).

⁷¹ Nevertheless, there is a multiplicity of goals of competition law, see: Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' in Ioannis Lianos & Damien Geradin (eds), *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar Publishing 2013); A Ezrachi, 'EU Competition Law Goals and the Digital Economy' (2018) Oxford Legal Studies Research Paper No.17/2018; David J Gerber, 'Two Forms of Modernization in European Competition Law' (2007) 31(1) *Fordham International Law Journal* 1235. Some have argued for a citizen welfare standard: Firat Cengiz, 'The conflict between market competition and worker solidarity: moving from consumer to citizen welfare standard in competition law' (2020) 41(1) *Legal Studies* 73; OECD, 'The Consumer Welfare Standard – Advantages and Disadvantages Compared to Alternative Standards' [2023] OECD Competition Policy Roundtable Background Note DAF/COMP(2023)4, 16 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/05/consumer-welfare-standards-advantages-and-disadvantages-compared-to-alternative-standards_4de3277e/3d174fdf-en.pdf> accessed 16 February 2025; José van Dijk, David Nieborg & Thomas Poell, 'Reframing platform power' (2019) 8(2) *Internet Policy Review* 1, 10.

⁷² Andrea Piletta Masaro, 'Market integration and competition as a way to strengthen democracy' in Dunja Duić, Tunjica Petrašević & Ante Novokmet (eds), *EU at the crossroads – ways to preserve democracy and rule of law* (ECLIC 8, 2024) 334.

social media services, digital advertising) already fall under the purview EU competition law,⁷³ when discourse-related harms are considered through the lens of the proposed analytical framework, it becomes apparent that these harms do not necessarily *materialise* at the level of discursive power structures, but instead in instances related to content, access, and form: by silently demoting or amplifying certain voices and content, as well as restricting access to specific (public) information channels.⁷⁴ These instances are fluid and could manifest across and in combination of different digital infrastructures of the same big technology company's ecosystem.⁷⁵

Congruent with the interlinkage between competition law and democracy (section 2), we put forward three ways of construing discourse-related theories of harm relevant for EU competition law: (i) building upon existing theories of harm; (ii) building upon the intersection where harms relevant to EU competition law and plurality in discourse (as a non-economic consideration) intersect,⁷⁶ and (iii) where, given the normative position which acknowledges the interdependency between EU competition law and democracy, we propose a self-standing theory of harm.

We do, however, not suggest that EU competition law can or should provide a one-size-fits-all solution to all discursive power harms. Rather, it serves a complementary function to existing regulatory frameworks, which may already cover specific instances of power in discourse. Moreover, not all elements of power in discourse are equally susceptible to trigger competition law intervention: for example, if we consider an undertaking's power in discourse over form, such as technological affordances (e.g., emoticons, hashtags) which influence the way discourse is being shaped through elements of platform design, the circumstances in which they could lead to competition-law relevant harms on their own are limited. This is because in most cases these elements play an ancillary or supporting role in platform's business models, oftentimes constituting pro-competitive unique selling points of the platform.⁷⁷ Finally, EU competition law is a relevant tool only in the context of the presence of market power. This could occur when harms of power in discourse are a direct result of the functioning of the structures behind discourse; thus, when an undertaking simultaneously holds power on both levels. Discursive power, as discussed earlier, is based in corporate power and market logics, thereby overlapping with the competition law concept of 'market power'. However, the proposal for a democracy protecting theory of harm is partly rooted in the understanding that discursive power transcends considerations stemming exclusively from market power.

4.1. FORECLOSURE AND QUALITY RELATED THEORIES OF HARM

Interaction with discursive power is not new to EU competition law. Thus, staying close to conventional theories of harm, there are circumstances in which EU competition law can be a plausible instrument to deal with discursive power harms. While current competition law theories of harm are often build on the consumer welfare standard and focus on price and output elements of competition, it is also recognised that market power can deprive consumers of other critical parameters of competition, ultimately leading to competitive harm.⁷⁸ It is undisputed that these parameters also include quality, diversity of goods and services, and innovation – all of which are essential to well-functioning markets.

⁷³ *Meta Platforms Inc. v Bundeskartellamt* (n 15); *Case T-612/17 Google LLC v Commission (Google Shopping)* [2021] EU:T:2021:763; *Google Android* (n 15).

⁷⁴ For case studies related to free speech implications of social media platforms and the potential role for EU competition law to address them, see: Jan Polanski, *The pattern of antitrust: Free speech lessons for antitrust law* (PhD thesis, Utrecht University, 2025).

⁷⁵ More fundamentally, of course, when it comes to how to define power, the Modern Bigness theory proposes that 'market power' does cover the actual power of big technology corporations.

⁷⁶ Jan Polanski, 'The Marketplace of Ideas and EU Competition Law: Can Antitrust Be Used to Protect the Freedom of Speech?' in S Hindelang & A Moberg (eds) *YSEC Yearbook of Socio-economic constitutions 2021* (Springer, 2021).

⁷⁷ For example, one of the value propositions of Twitter (now: X) was the quick way of allowing users to share short posts with their social network and broader public. As a micro-blogging service, it represented an intersection between blogging and instant messaging that users find valuable. For example: Dejin Zhao & Mary Beth Rosson, 'How and why people Twitter: the role that micro-blogging plays in informal communication at work' in *Proceedings of the 2009 ACM International Conference on Supporting Group Work*.

⁷⁸ See for example: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ C 31/5, para 8.

In this regard, consider the above example of the power of big technology companies over content creators' and users' access to discourse in the digital public sphere.⁷⁹ Where market power is present, the unilateral limitation of access to essential infrastructures by dominant undertakings has long been viewed as anticompetitive.⁸⁰ An analogy here could be drawn between powerful undertakings denying certain market actors the opportunity to engage in discourse on their open digital infrastructures, and refusal to deal cases, especially in the contexts where big technology companies' open platforms are meant to be nourished by third parties and are not developed for the platform's exclusive use.⁸¹ Where big technology companies' decisions on access to discourse fall in a grey area of company's discretion,⁸² the harm is twofold: firstly, the refusal to provide access could be seen as akin to refusal to deal vis-à-vis the third parties (market actors themselves); a foreclosure-related *refusal to deal* theory of harm seems fairly straightforward.

Secondly, because of exclusion of certain voices from platforms that form an integral part of the digital public sphere, the quality of public discourse is likely to be affected negatively. This could manifest as lessening of the quality of consumer-experience: a lack of diversity of views, a lack of choice for consumers, and dissatisfaction from consumers when their preferences for specific types of information are not being met. In this sense, a lowering of quality in digital discourse can be construed as an indirect 'price' increase.⁸³ Nevertheless, building a narrative for such a consumer-focused '*lessening of quality of discourse*' theory of harm in EU competition law context is a less straightforward exercise. Quality is (seen as) a subjective notion, it is not tangible or observable and it is dependent on consumers' perception.⁸⁴ Examining quality in relation to privacy reveals, for instance, that consumers have heterogeneous preferences; that their stated preferences and behaviour are not always consistent;⁸⁵ that even if they value privacy, this is only one quality parameter;⁸⁶ and that trade-offs are real: more data collection and monetisation through advertising may allow firms to offer a zero-price product and invest in higher quality, which benefits consumers.⁸⁷ Furthermore, challenges emerge as even with blatant expressions of discursive power at stake, drawing a line between welfare-enhancing and welfare-reducing practices is hard: even with systemic diversion of user attention to specific content (creators), users may benefit from relevant recommendations and avoid cognitive costs associated with making decisions in information-rich contexts.⁸⁸ One could argue, however, that a well-functioning digital *public* sphere does have some firm boundaries as to quality that relate to content, access and form: for example, open access to all users to discourse on matters of general interest, free from economic or political control, whilst subject to rules of accountability and transparency.⁸⁹ Still, and in relation to those firm boundaries, finally, an important hurdle to overcome in assessing quality in markets that constitute the digital *public* sphere is that there are not (or at least: there should not be) only market logics at play. It is

⁷⁹ For the relevant line of argumentation being developed in relation to social media companies chilling free speech, please see: Polanski (n 74).

⁸⁰ On essential facilities doctrine see, among others: Inge Graef, 'Rethinking essential facilities doctrine for EU digital economy' (2019) 53 *RJTUM* 33; also: Laura Lalikova, 'Safeguarding essential access: a study of essential facilities doctrine and public service concept and their application in digital markets' (PhD thesis, Utrecht University, forthcoming).

⁸¹ Case C-233/23 *Alphabet Inc., Google LLC, Google Italy Srl v Autorità Garante della Concorrenza e del Mercato (Android Auto)* ECLI:EU:C:2025:110; Case C-233/23 *Alphabet Inc., Google LLC, Google Italy Srl v Autorità Garante della Concorrenza e del Mercato (Android Auto)* ECLI:EU:C:2024:694, Opinion of AG Medina.

⁸² As opposed to cases where platforms are obliged to remove illegal or false content by law.

⁸³ See for a similar argument in relation to a media merger the decision of the Belgian competition authority nr. BMA-2013-C/C-03, 25 October 2013.

⁸⁴ Christophe Carugati, 'The Antitrust Privacy Dilemma' (2023) 19(2) *European Competition Journal* 167.

⁸⁵ OECD, 'Role and measurement of quality in competition analysis: Key findings, summary and notes' DAF/COMP(2013)17.

⁸⁶ Carugati (n 84).

⁸⁷ Lianos (n 8).

⁸⁸ Barry Schwartz, *The Paradox of Choice: Why More is Less* (Revised edn, Ecco 2009). Also see: Martin Moore, 'Tech Giants and Civic Power' (2016) Centre for the study of Media, Communication & Power, King's College London.

⁸⁹ Habermas (n 1). Accountability and transparency is also about legality of content; transparency of who is speaking e.g., users should at the very least know they are exposed to content as part of a foreign bots campaign to sway public opinion.

the user-citizen participating in a political or cultural discourse. We argue that in information-rich digital public sphere relevant is the *user*, and while these identities have become blurred (as the content that makes up the sphere of digital discourse is often concurrently consumer-focused and citizen-focused), this should not limit the application of competition law but be the rationale for its application.

4.2. LESSENING PLURALITY IN THE DIGITAL PUBLIC SPHERE AS THEORY OF HARM

There is a more fundamental argument for not attempting a somewhat artificial construct of theories of harm related to lowering the quality of the consumer experience, by hindering access, limiting form, and curating content at stake. While the quality parameter of competition may be particularly important in markets that are fundamental to the healthy functioning of the digital public sphere, and while it may provide an entry point for the application of competition law in specific cases, it is not desirable to frame the analysis in terms of *consumer* welfare without engaging with the question of what a degradation of the quality of discourse entails. After all, plurality, democracy and other public interest considerations are the bedrock of open and democratic societies, based on the rule of law. When it comes to the healthy functioning of markets that are critical to the digital public sphere, they deliver high quality outcomes when they promote and reinforce citizens' ability to access it and participate in it: freedom of speech and assembly, a free press, participation in political discourse are all elements of this (digital) public sphere; these elements are also critical in safeguarding it from erosion by market power.⁹⁰

The consideration of non-economic factors in EU competition law assessments has been gaining momentum in the recent years. Examples include privacy, labour and environmental factors, to name but a few.⁹¹ Here, we focus on *media pluralism* as such a non-economic factor.⁹² There are both similarities and differences between 'legacy' media companies (to whom the term media plurality relates) and big technology corporations. As noted above, while big technology companies in some respects function like media companies, and certainly in terms of their role in the (digital) public sphere, they fall between the cracks of media-focused legal frameworks. Nevertheless, the infrastructures of big technology corporations not just resemble but surpass the legacy media features (see section 3.2.1). Thus, wielding discursive power in the digital public sphere by way of having power over discourse and being able to limit content, access or form, comes down to lessening plurality in that sphere.

The concept of media pluralism is widely debated.⁹³ For the purposes of this article, it relates to the possibility citizens' access to a heterogeneity of opinions and voices, through different media services and content. Media pluralism focuses on diversity in ownership, diversity in respect to sources, and diversity of voices/content;⁹⁴ It ensures that there is no single point of control over (non) public discourse,⁹⁵ and that all voices have an opportunity to be heard.⁹⁶

⁹⁰ Jürgen Habermas, 'The Public Sphere: An Encyclopedia Article (1964)' (tr Sara Lennox and Frank Lennox) (1974) 3 *New German Critique* 49.

⁹¹ David Pérez de Lamo, 'Mutual Trust and Rule-of-Law Considerations in EU Competition Law: The General Court Extends the "L.M. Doctrine" to Cooperation Between Competition Authorities (*Sped-Pro*, T-791/19)' (*Kluwer Competition Law Blog*, 1 March 2022), <<https://competitionlawblog.kluwercompetitionlaw.com/2022/03/01/mutual-trust-and-rule-of-law-considerations-in-eu-competition-law-the-general-court-extends-the-l-m-doctrine-to-cooperation-between-competition-authorities-sped-pro-t-791-19/>> accessed 16 February 2025.

⁹² We build on the work of Gerbrandy, Kozak, & Pelekis (n 59).

⁹³ Kari Karppinen, *Rethinking media pluralism* (Fordham University Press, 2013); Elda Brogi, 'The media pluralism monitor: Conceptualizing media pluralism for the online environment' (2020) 29(5) *Profesional de la Información* 1; Natali Helberger, 'Challenging Diversity: Social Media Platforms and a New Conception of Media Diversity', in Martin Moore & Damian Tambini (eds), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (OUP 2018) 153 and 155; European Media Freedom Act (n 3), recital 64 defines media pluralism as: "[T]he possibility to have access to a variety of media services and media content which reflect diverse opinions, voices and analyses".

⁹⁴ High Level Group on Media Freedom and Pluralism, A free and pluralistic media to sustain European democracy, Report (January 2013) 13; Brogi (n 93), 'The media pluralism monitor: Conceptualizing media pluralism for the online environment' (2020) 29(5) *Profesional de la Información* 1.

⁹⁵ Helberger (n 93), 153 and 155.

⁹⁶ *ibid*, 155.

Since, as an ideal, democratic processes are based on informed decision-making, and the right to (access) information is necessary for a user-citizen engaging with such processes.⁹⁷ We propose that the analogy between legacy media companies and the media-akin activities of big technology corporations is especially strong when it comes to diversity of political content.⁹⁸ In constituting the democracy-supporting sphere of public debate and opinion-making, both legacy media companies and big technology corporations provide, shape, and control access to quality media services.

Protecting plurality in the digital public sphere as a competition law concern can be grounded in existing case law relating to incorporating non-economic considerations in competition law assessment by making a reference to external benchmarks from other laws, such as the EMFA, the DSA and the TTPA.⁹⁹ The possibility for taking this approach was left open by the *Meta Platforms v Bundeskartellamt*, where the Court confirmed a possibility for a national competition authority to investigate a breach of the General Data Protection Regulation (GDPR) within a competition law investigation and obliged relevant authorities to respect the EU principle of sincere cooperation.¹⁰⁰ In this case, it was highlighted that access to, and processing of, personal data have become a ‘significant parameter of competition’ in the digital economy. Ignoring data protection rules in competition law assessments would risk undermining effectiveness of EU competition law enforcement.¹⁰¹ The Court considered that an NCA may determine – within the framework of assessing an abuse of dominance under Article 102 TFEU – that an undertaking’s general terms of use regarding personal data processing, as well as their implementation, do not comply with the GDPR,¹⁰² if such a finding is essential to establishing the existence of the abuse.¹⁰³ As there is no obstacle to using a similar approach with respect to media pluralism, we argue that this approach can also be taken to protecting pluralism in the digital public sphere as a relevant parameter of competition.

Furthermore, an area where plurality considerations have already been incorporated in competition law assessments is merger control in media context. In the EU Merger Control Regulation (EUMR),¹⁰⁴ Article 21(4) states that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration in the EUMR. Such legitimate interests, among others, include plurality of media, thus giving NCAs the opportunity to introduce additional reviews of plurality in their merger control assessments.¹⁰⁵ Taking a step beyond national level, the Commission has also clarified that its appraisal of concentrations needs to be placed in the context of the fundamental objectives of the EU, referred to in Article 2 EEC and Article 2 TEU.¹⁰⁶ Therefore, although the Commission’s position endorses consumer welfare as the main focus of competition law, which is in line with the more economic approach, it does also express that it is EU competition law’s objective to protect democracy by using

⁹⁷ Baskaran Balasingham, Malgorzata Kozak & Tais A Ruiz Palacios, ‘Fair Play in the Digital Arena–In Search of a Balanced Relationship Between Press Publishers and Digital News Aggregators’ (2025) IIC-International Review of Intellectual Property and Competition Law 1.

⁹⁸ European Media Freedom Act (n 2), recital 14: “Quality media services are also an antidote against disinformation and foreign information manipulation and interference. Access to such services should also be ensured by preventing attempts to silence journalists, ranging from threats and harassment to censorship and cancelling of dissenting opinions, which could limit the free flow of information into the public sphere by reducing the quality and plurality of information. The right to a plurality of media content does not entail any corresponding obligation on any given media service provider to adhere to standards not set out explicitly by law”.

⁹⁹ Ezrachi & Robertson (n 9).

¹⁰⁰ *Meta Platforms Inc and Others v Bundeskartellamt* (n 15).

¹⁰¹ Ibid, para 51.

¹⁰² Regulation (EU) 2016/679 of the European Parliament and of the Council 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, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

¹⁰³ *Meta Platforms Inc and Others v Bundeskartellamt* (n 15), para 62.

¹⁰⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR) [2004] OJ L 24/1.

¹⁰⁵ In practice the merger control landscape is fragmented, whereas some national competition laws include special merger-related procedures for media firms, others apply the same rules irrespective of the sector: Adelaida Afilipoaie & Heritiana Ranaivoson, ‘EU and the Complex, Nation-Dependent Web of Media Ownership Regulation in Europe: The Role of Media Ownership Rules in Limiting Market Concentration’ in H Ranaivoson et al. (eds), *European Audiovisual Policy in Transition* (Routledge 2023) 117; Gerbrandy, Kozak & Pelekis (n 59).

¹⁰⁶ EUMR (n 104), recital 23.

EU competition law.¹⁰⁷ Given the risks raised by the digital market dynamics, such as market concentrations that affect the digital public sphere, the existing theories of harm need to be refined and adapted to address these emergent challenges.

4.3. PROTECTING THE DIGITAL PUBLIC SPHERE AS DEMOCRACY-CONSTITUTING STRUCTURE

Building upon the analysis that the digital public sphere is a democracy-constituting structure, which encompasses elements related to citizens' ability to access the public and political discourse, ultimately safeguarding their exercise of fundamental rights and freedoms (section 4.2), we propose that a stand-alone theory of harm of 'protecting the digital public sphere as structure of democracy' is, actually, best suited to the complexity of the issue of discursive power of large technology corporations. Such a theory of harm is appropriate for considering the negative effects on the digital public sphere *in its own right*. We understand embracing such a theory of harm is fairly radical; it would also need to be further developed. However, as the intermingling of corporate and political power grows more problematic, developing such a theory of harm is useful as not only informing academic debate and competition law practice, but also as a way of showing that existing institutions – including competition law – are not powerless against these developments.

A theory of harm of 'protecting the digital public sphere as structure of democracy' would address several concerns that are inherent in both the more traditional theories of harm (refusal to deal and lessening quality of consumer experience), and even the slightly more daring theory of harm relating to lessening plurality in the public digital sphere.

Firstly, it recognises that the power behind discourse is the basis for the power in discourse, and that – as a result – the instances in which discursive power manifests in the digital public sphere may not fully capture the *combined* effects of the situation in which big technology companies represent some of the key information channels in the digital domain,¹⁰⁸ and the ways in which power in discourse is enacted (both in online discourse, and in political discourse more broadly). Thus, a standalone theory of harm would include extensive lobbying, capture of politicians, and nudging narratives by way of combining purposefully online and offline content influencing, and shaping – in Fuchs' words – “perceptions and identities and (...) the interpretation of situations as of one type rather than another”.¹⁰⁹ In doing so, such a theory of harm also aligns with the more complex power structures of big technology platforms, captured by the Modern Bigness concept.

Secondly, it bypasses the problem of consumer valuing of quality and plurality, since *consumers* do not consider the public digital sphere as a sphere of citizenship, and it also recognises that a consumer perspective is not necessarily appropriate, as digitalisation has given rise to the possibility of an unlimited replication of output without (proper) remuneration.¹¹⁰ It recognises (as we indicated above) that even if a person is not engaging directly in the digital public domain she still is a relevant citizen, impacted by the exercise of power over the digital public discourse as affecting democracy. It also grasps other elements of quality than the quality of the digital public sphere itself, for example, the structural and systemic dependencies of intermediaries, content creators, and citizens.

But most importantly, and thirdly, while more targeted theories of harms, in relation to foreclosure, quality and plurality may function well in specific circumstances, a stand-alone theory of harm relating to undermining the digital public sphere as a democracy-constituting structure focuses on the real relevant issue. This fundamentally acknowledges that a shift in which powerful technology corporations and political actors entwine is a threat to the fabric of rule of law-based democracies. All democracy constituting structures ought to be cherished

¹⁰⁷ On the more economic approach, see Wouter PJ Wills, 'The judgment of the EU General Court in intel and the so-called more economic approach to abuse of dominance' (2014) 37(1) *World Competition* 405. Note, the focus on consumer welfare was introduced in a later phase of competition law. Initially, the concern was with consumer well-being: Joined Cases T-213/ and T-214/01 *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission* EU:T:2006:151, para 115.

¹⁰⁸ For discussion, [ULR redacted].

¹⁰⁹ Fuchs (n 26), 60.

¹¹⁰ Balasinghan, Kozak & Ruiz Palacios (n 97).

and protected, the digital public sphere not in the least. Other instruments, as discussed in section 4, are also relevant here, but these do not address the fundamental issue of corporate power, as based in market power. As the basis of discursive power ultimately also lies in market power, and is exercised on the basis of the logic of market commodification, and as protecting the digital public sphere is fundamental for the well-functioning of democracies, we conclude that competition law can, and – as we already note in the introduction explicating our normative position – should have a role to play in protecting the digital public sphere.

5. CONCLUSION

This article examined EU competition law as a relevant legal instrument in the context of discursive power of big technology corporations, based on a normative position that open and democratic societies based on the rule of law are the preferred way of political and societal organisation. The link between competition law and democracy has been long established, embedded in primary and secondary EU law as well as an understanding that EU competition law cannot be viewed in isolation from the EU value system.

The contribution of this article is two-fold. As a starting point, we introduce an analytical framework as a tool to grasp a variety of EU competition law-relevant manifestations of discursive power in practice. We construe discursive power of big technology companies as a dimension of the composite corporate power of big technology companies as: power in discourse, which relates to content, access to and form of discourse, and power behind discourse entailing the structures of discourse and access to them. For analytical purposes, we first distinguish between these layers but note that the real power in discourse depends on the power behind discourse. The ultimate challenge for (competition) law is to ensure that market logics do not negatively impact democratic processes and values, by protecting open access to and participation in (the shaping of) the public discourse as a pre-requisite for well-functioning digital public sphere.

Moreover, and fundamentally, congruent with our normative position and interlinkage between competition law and democracy, we propose three ways of construing discourse-related theories of harm relevant for EU competition law. Firstly, building upon existing theories of harm, we draw an analogy between refusal to deal cases and hindering content creators' and users' access to their open infrastructures that form an integral part of the digital public sphere. This may lead to foreclosure of voices that in turn lessen the quality of users' experience through lack of diversity of views, choice, or inability to distinguish between high quality content and low-quality content. Secondly, building upon the intersection where harms relevant to EU competition law and plurality in discourse (as a non-economic consideration) intersect, we show that concerns related to media pluralism can be grounded in existing Commission's practice, including national merger control cases in media contexts. Furthermore, we argue that *Meta v Bundeskartellamt* judgement left the door open for allowing competition authorities to reference external benchmarks from other laws, such as media plurality embedded in the EMFA. The jump to consider these, more daring, theories of harm in the contexts of unfettered market power in markets critical to the functioning of the digital public sphere is operationalisable. However, we recognise that the abovementioned theories of harm cannot fully capture the combined effects of the situation where big technology companies represent some of the main information channels in the digital domain. This is because the consumer perspective on valuing quality or plurality in the digital public sphere is, to an extent, detached from the citizen perspective, resulting in commodification of fundamental public values. Our final, admittedly more radical, proposition calls for future research and debate in considering 'protecting the digital public sphere as a structure of democracy.' After all, big technology corporations are not neutral operators of digital infrastructures, and they are also not obligated to prioritise public interest considerations or be accountable to the public. As they act as "public actors without public values",¹¹¹ EU competition law together with other legal instruments ought to provide credible mechanisms of accountability.

¹¹¹ Taylor (n 21).

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