The Challenge of Inequality in the Competition Paradigm

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Abstract

This paper addresses the impact of the inequality debate, that has become prominent in various disciplines related to economic policy, most prominently through authors such as Thomas Piketty and Katharina Pistor. While competition law and competition policy have remained largely unaffected by this debate, this paper questions whether the disregard of broader socio-economic goals, such the alleviation of inequality, could not ultimately threaten to undermine the very foundations and assumptions on which the mechanism of competition or the free-market myth rely. It uses the theory of 'reflexive modernisation' to show that the underlying tension between formal freedom and material equality is not unique to competition law and its competition paradigm, but part of the essential paradox of modernity. New manifestations of economic power in the digital sphere show that inequality and concentration warrants attention despite conceptual inconsistencies.

Introduction

The financial crisis of 2008 laid bare the instability of the global financial system and demonstrated that a set of systemic failures can quickly eradicate significant portions of wealth.[1] The divisive run that this crisis took also put the existence of the so-called '99%' on the political agenda. It also highlighted the problem of global inequality.[2] It is on these grounds that some economists, as well as social and legal theorists, have grown sceptical of the neoliberal models that form the foundation not only of financial market regulation, but of competition policy and of other areas of economic governance as well.[3] Prominently, the work of Thomas Piketty[4] shows persistent and growing levels of inequality in the historical evolution of income and wealth distribution. Equally, and indeed equally prominently, Katharina Pistor's *The Code of Capital*[5] and her legal theory of finance[6] show how private law and its

[1] On the interaction of economic crises on different economic disciplines, see Moura e Silva, "Antitrust in Distress: Causes and Consequences of the Financial Crisis", Competition Law Review, 9 (2), 2013, 119, https://ssrn.com/abstract=2376543

[2] Enis/Gonzaga/Pike, "Inequality: A hidden cost of market power", OECD, 2017, www.oecd.org/daf/competition/inequality-a-hidden-cost-of-market-power.htm; see also Autor/Dorn/Katz/Patterson/v Reenen, "The Fall of the Labor Share and the Rise of the Superstar Firm", The Quarterly Journal of Economics (2020), 645–709. doi:10.1093/qje/qjaa004; Gutièrrez/Philippon, Declining Competition and Investments in the US, nber working paper 23583, 2017, https://www.nber.org/papers/w23583

[3] This has also led to a shift towards more empirical and behavioural economic research.

[4] See Piketty, *Capital in the 21st Century* (HUP, 2014); Piketty, *Capital and Ideology* (HUP, 2020)

[5] Pistor, *The Code of Capital, How the Law Created Wealth and Inequality*, (PUP, 2019), 4.

[6] Pistor, *The Code of Capital, How the Law Created Wealth and Inequality*, (PUP, 2019); Pistor, "A Legal Theory of Finance", Journal of Comparative Economics 41, 2013, 315.

'technologies' and institutions have operated over time to create power and privilege attached to capital, showing that "*law is not a sideshow (but) the very cloth from which capital is cut.*"[7] Though these findings and conclusions could seem to threaten the underlying assumptions of competition law, they have not led to a widely received critique or reformulation of competition law doctrine or a reconfiguration of competition law goals. Due to the prevalence of this critique[8] in the overall social discourse on the fairness and functioning of markets, this paper attempts to articulate the precise way in which considerations of inequality challenge competition law, its goals, and functions. While some competition law regimes explicitly formulate the alleviation of inequality as one of their goals (typically to meet other constitutional-economic goals that exist for specific structural or historic reasons such as the agenda of 'black economic empowerment' in South Africa)[9], in EU law the protection of 'competition' and the furtherance of socio-economic goals are often seen as being in tension. Despite the inclusion of 'fairness' as a policy goal and the overarching treaty goal of the EU to "promote (…) the wellbeing of its peoples" (Art. 3 (1) TEU),[10] the formulation of outright material or substantive equality goals is often met with hostility and said to be beyond scope and outside of the rationality of competition law[11] (the same has held true for privacy or sustainability goals).[12]

The goal of this paper is, first, to investigate the paradox between 'formal' or 'liberal' (allocative) and 'material' or 'substantive' (distributive)[13] notions of justice, not only in law, but as a larger societal phenomenon of our time. And second, to show that there is reason to believe that the exclusion of socio-economic goals (i.e. the alleviation of inequality) could

[7] Pistor, *Code of Capital*, 2019, 4.

[8] It must be noted that while the author is aware of (some) of the methodological critique of the works of both Piketty and Pistor, they are chosen here as reference points due to their immense influence and unique reformulation of the inequality problem.

[9] See Fox, "Equality, Discrimination, and Competition Law: Lessons from South Africa and Indonesia", 41 Harv. Int'l L. J. 259, 2000; see also Act no. 53 of 2003 The (South African Broad-Based Black Economic Empowerment Act, Gazette No. 25899, https://www.gov.za/sites/default/files/gcis_document/201409/a53-030.pdf;

[10] The CJEU expressly used the term 'consumer well-being' and not 'welfare' in its much-disputed Österreichische Sparkasse Judgment, see Joined Cases T-213/01 and T-214/01 *Österreichische Postsparkasse AG and Bankfür Arbeit und Wirtschaft AG v Commission of the European Communities* [2006] ECR II-0160.

[11] Scepticism against social/distributive arguments in the private sphere was strongly expressed by F. A. Hayek. See Hayek, *The fatal conceit,* Ed. W. W. Bartley III. Works 1, 1988, 118: "The whole idea behind distributive justice – that each individual ought to receive what he morally deserves – is meaningless ... because the available product (its size, and even its existence) depends on what is in one sense a morally indifferent way of allocating its parts".

[12] Kerber/Zolna, "The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law," (20.09.2020), ssrn.com/sol3/papers.cfm?abstract_id=3719098.

[13] The distinction between 'allocative' and 'distributive' justice dates back to Aristoteles. See Aristoteles, Ethica Nikomachea, ed. Blywater, OUP (1962), 1129a-1145a.

threaten to undermine the very foundations and assumptions on which the existing 'competition paradigm' and our understanding of the 'free market myth' relies.

To show this, this paper is structured as follows:

It **first** explores the formulation and development of the 'competition paradigm' as it exists today and the influence that welfarist economics has had in formulating its goals and assumptions. It analyses the paradigm's current and historical interaction with broader socio-economic policy considerations and shows how questions of inequality challenge competition law and this paradigm.

The **second** part of the paper confronts the question whether the competition paradigm and its welfarist and meritocratic assumptions can address the problem of inequality and hence whether it can ultimately fulfil the central promise of the modern market system: the creation of welfare in and for wider egalitarian society. While the works of Piketty and Pistor may deliver empirical and institutional answers to this question, this paper addresses it through the lens of social theory and the philosophical foundations that underpin modern societies and capitalism. Here the so-called *discourse of modernity*[14] or *theory of reflexive modernization*[15] postulates that the tension between (formal) freedom and (material) equality is the primary challenge or paradox of modernity. It further shows that this paradox means that modernity not only increasingly 'becomes its own theme' but also threatens the very foundations of promises on which liberal, egalitarian societies and economies rely.

The **third** part of this paper then uses these theoretical findings to address current manifestations of inequality in competition law itself in the form of questions relating to market power and rising levels of concentration. Since economic inequality refers to "how economic variables are distributed—among individuals in a group, among groups in a population, or among countries",[16] the starting point for inequality considerations in competition law is concentration and market power. While the 'per se' control of market power was once central to competition law, these structuralist foundations have eroded away as welfarist economics gave rise to a more outcomes and effects-based analysis and in turn grew ever less sceptical of market power as such. The rise of huge tech-giants shows that competition law is challenged in its ability to detect the harms of power and concentration and their contributions to inequality.

[14] See Habermas, *The Philosophical Discourse of Modernity: Twelve Lecture,* transl. Frederick Lawrence, (Wiley 1990).
[15] See in particular, Giddens/Beck/Lash, *Reflexive Modernisation,* (Polity Press 1994).
[16] United Nations, *Concepts of Inequality*, 2015 https://www.un.org/en/development/desa/policy/wess/wess_dev_issues/dsp_policy_01.pdf

1. The Competition Paradigm and the Challenge of Inequality

Neither the work of Katharina Pistor nor that of Thomas Piketty deal explicitly with competition or competition law, but both mention the inadequacy of the competition paradigm or promise as it exists today. Piketty suggests that *"modern inequality is said to be just because it is the result of a freely chosen process in which everyone enjoys equal access to the market and to property and automatically benefits from the wealth accumulated by the wealthiest individuals, who are the most enterprising, deserving and useful."*[17] Pistor, on the other hand, shows that there simply is no equal application of the consequences of competition: *"Competition is essential for the creation of markets, it fuels the forces of creative destruction, the drivers of economic progress (...) But the legal code of capital does not follow the rules of competition, instead it operates according to the logic of power and privilege."*[18] These quotations suggest that the current competition paradigm may be hedged against the equal distribution of goods and that while competition law cannot proactively make societies more equal or egalitarian, rising inequality ("r > g") could reach a tipping point[19] where it begins to undermine the system of competition itself and foundations on which it rests. They encourage a closer look at what is meant by competition or the 'competition paradigm' from the perspective of competition law itself.

The primacy of competition law was introduced due to its central role in the creation of a single market (*Consten & Grundig*).[20] Since the Commission and the Courts have seldomly define the nature of competition and it is hard to find references to definitions of competition.[21] Both competition law and competition economics, however, centre around the idea of competition as a rivalrous process that pushes undertakings to *"offer the best possible range of goods at the best possible prices(...)".*[22] While rivalrous forces seem to be at the heart of competition, for a long time its virtues were looked at from a far broader perspective. Both ordoliberal[23] and

[17] Piketty, *Capitalism and Ideology*, 1; but also Piketty, *Captial in the 21st Century,* 2014, 573 "Yet pure and perfect competition cannot alter the inequality "r > g", which is not the consequence of any market 'imperfection'. Here Piketty denies that competition can play any great distributive role.
[18] Pistor, *The Code of Capital*, 118.
[19] Within antitrust scholarship Neo-Structuralist or Neo-Brandeisian scholars such as Lina Khan and Tim Wu suggest that this already holds true for the digital economy and that the rise of Tech-Giants have thrown us (predominantly the USA) into a new Gilded Age. See Wu, *The Curse of Bigness,* (Atlantic Book, 2018) and Khan, "Amazon's Antitrust Paradox", 126 Yale Law Journal 3, (2016), 710-805.
[20] See Joined Cases 56 and 58-64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] English special edition Reports of Cases 1966-00299.
[21] For a clear definition of competition see CMA, Merger Review Guidelines, 18.3.2021, 2.2.
[22] Definition of competition policy, Concurrences Online Dictionary, https://www.concurrences.com/en/dictionary/competition-policy-89181.
[23] See Eucken, *Grundsätze der Wirtschaftspolitik*, 7th Ed., (UtB 2004).

structuralist or Brandeisian[24] approaches to competition law drew a strong connection between competition law and democratic institutions and thus saw competition law as being as much as a tool to control political and economic power, as one to protect competitive dynamics.[25] Over past decades political and larger structural or distributive considerations have, however, largely given way to a more monolithic and refined competition law analysis. While it still looks at competition from the perspective of society, competition analysis has been refined over time to focus ever more closely on the intricacies of the competitive process in the relevant market(s) and the effects of competitive constraints of consumer welfare.[26] Much of competition law scholarship sees this *refinement* as a process that has fundamentally changed competition law and that this and that this development was in principle a development that was for the better of competition law and certainly introduced desirable clarity.[27]

The 'welfare standard' originates from the Chicago revolution of Antitrust law which sought to reform antitrust law into a more economically sound discipline and to (in the words of Robert Bork) rid it of 'uncritical sentimentality'.[28] The so-called Chicago School of Antitrust placed the maximization of efficiency and price theory at the heart of antitrust analysis and essentially neglected any intermediate effects on competitors or the structure of the market. Promoting a 'purist' reading of Antitrust and one based solely on a welfarist analysis, the Chicago School quickly worked to refute the idea that size or concentration alone should be an Antitrust concern, pointing to potential welfare losses in the form of productive efficiencies.[29]

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[24] For the original position see Brandeis, *The Curse of Bigness,* Osmond K. Fraenkel ed., 1934; Edwards, "Conglomerate Bigness as a Source of Power", in Stigler, *Business Concentration and Price Policy*, NBER, (PUP, 1955) 331-359.

[25] See Deutscher/Markis, Exploring the ordoliberal paradigm: the competition-democracy nexus, EUI Working Paper 2017/03, 10 "By virtue of its procedural, non-hierarchical characteristics competition constitutes from an ordoliberal perspective the sole market regime that is compatible with democracy, for it guarantees for each market participant an equal sphere of autonomy on which no other market player may impinge."

[26] According to *Nicolas Petit* the modern consumer welfare standard serves two functions, see Petit, *Big Tech & the Digital Economy*, (OUP 2020), 20: "First, the CW standard makes it clear that the proscriptions enunciated in the antitrust rules are about conduct that reduces or is likely to reduce economic welfare and are not intended to prevent noneconomic harms such as harms to the political process or to serve other social objectives. Second, the CW standard provides a criterion to guide the formulation and case-by-case application of the specific rules that are used to identify prohibited, anticompetitive conduct."

[27] This reading of the development of competition law would thus struggle with "originalist" arguments, such as those put forward by "Neo-Brandeisians" such as Lina Khan, whose discursive success has been paralleled to that of Thomas Piketty. On "originalist" interpretations, see: Khan, "Amazon's Antitrust Paradox", 126 Yale Law Journal 3, 2016, 710 and Deutscher/Markis, Exploring the ordoliberal paradigm: the competition-democracy nexus, EUI Working Paper 2017/03); On the effects on this process on the 'ultimate' goals of competition law see Schweitzer, "Efficiency, political freedom and the freedom to compete – comment on Maier-Riguad", in Zimmer (Ed.), *The Goals of Competition Law*, Fifth ASCOLA Workshop on Comparative Competition Law (Edward Elgar, 2015), 169, 174 and Mestmäcker, "Die Interdependenz von Recht und Ökonomie in der Wettbewerbspolitik", in Monopolkommission (Ed.), *Zukunftsperspektiven der Wettbewerbspolitik* (2005), 35.

[28] "Uncritical sentimentality about the 'little guy'", see Bork, *The Antitrust Paradox,* (1978), 2nd Ed. (The Free Press, 1993).

[29] See Posner, *Antitrust Law*, 2nd Ed, 2001.

While early proponents looked at the overall welfare effects and used wealth maximization standards as the basis of their analysis,[30] a more moderate interpretation using Kaldor-Hicks efficiencies and Pareto optimality began to emerge.[31] In the less radical form in which it was later transported into EU competition law as part of the 'more economic approach', the consumer welfare standard (CWS) also aimed to refine the goals and the methodology of competition law: to make competition enforcement more objective, economic and evidence-based, and to give competition policy a more stringent and coherent objective.[32] The CJEU was reluctant to fully embrace the soft-law proclamation of the consumer welfare standards at first, and often interprets it broadly to include "more than just price" (*choice, quality, innovation*)[33] and to protect the structure of the market.[34] Nonetheless, the CWS has become the well-established standard of EU competition law[35] and is celebrated for making competition law analysis sounder.[36] Under the Vestager Commission the focus on the consumer has grown and while the addition of 'fairness' makes it clear that the CWS is not a solely welfarist tool, this is in part mitigated by the fact that the consumer includes both intermediate and end consumers.[37] Equally the protection of 'competition on the merits'[38] or the occasional mention of the competitive structure or process,[39] are only reminiscent of competition law's early ordoliberal rhetoric of keeping power in check and securing a balance between private power and democratic institutions. Instead, the baseline assumption treats virtues of the market and

[30] For this early debate see Posner, "The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication, (1979), 3 Hofstra Law Review, 487 and Coleman, "Efficiency, Utility and Wealth Maximization, (1979), 8 Hofstra Law Review, 509.
[31] See Hovenkamp, "Antitrust Policy and Inequality of Wealth", Faculty Scholarship at Penn Law. 1769, 2017.
[32] „A standard based on economic science, the reasoning goes, would be objective and specific enough to keep competition law enforcement consistent throughout the EU, thus minimizing divergence and guarding against protectionism" Daskalova, Consumer Welfare in EU Competition Law: What Is It (Not) About?, The Competition Law Review, (11) 1, 2015, 133.
[33] Case C-209/10 Post Danmark A/S v Konkurrencerådet [2012].
[34] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission of the European Communities [2009] I-09291.
[35] Kroes, SPEECH05/512, Delivering Better Markets and Better Consumer Choices, 15 September 2005, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512 "(..)Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and efficient allocation of resources."
[36] See Melamed/Petit, The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets, Review of Industrial Organisation, 54, 2019, 741-777.
[37] See leading cases, Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] I-04529, [19]; Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2009] I-09291. For a critical review, Akman, 'Consumer' Versus 'Consumer': The Devil in the Detail, ESRC Centre for Competition Policy Working Paper No. 08-34, 2008.
[38] OECD Policy Brief 'What is Competition on the Merits', https://www.oecd.org/competition/mergers/37082099.pdf
[39] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission of the European Communities [2009] I-09291.

competition in and of itself and as being something akin to a natural order[40] embodying elements of a Darwinian struggle *"in which the most efficient succeed and the weak disappear".*[41] The assumption of the virtues of rivalry or a Darwinian struggle, but more importantly the refinement (or reduction) and focus of the goals of competition law on the enhancement of welfare,[42] causes competition to be seen purely as an instrument of formal or procedural (*iustitia commutativa*)[43] or transactional justice.[44] Hence, any instruments that seek to correct material injustices or inequality seems to "*run directly counter to the idea of consumer welfare in the technical economic sense"*[45] and no longer seamlessly fit into the rhetoric or self-perception of competition doctrine.[46] This leaves little room for consideration of substantive or distributive justice.[47] This 'purity' of this reading of competition means that it informs all levels of competition law: its design, its methodology, the application and interpretation of its central rules and exemptions (Artt. 101, 102 TFEU and EUMR), as well as its place in the European economic constitution (Art. 3 (3) TEU). This makes it difficult to balance the logic of the market against other interests.[48] While sustainability goals are now commonly catered for in exemptions, consideration of wealth of income inequality considerations would often directly challenge the welfare considerations with which they come in conflict.

If, however, we accept the existence of rising levels of inequality as shown by Piketty and others, this creates a challenge for the 'competition paradigm' in two ways. First, inequality or substantive justice considerations seem ever more at odds with the forces of competition and the idea of formal or procedural justice. Indeed, it appears as though "'*rules of the game' cannot*

[40] See Deutscher/Markis, Exploring the ordoliberal paradigm: the competition-democracy nexus, EUI Working Paper 2017/03, F. 72 and Bork, *The Antitrust Paradox*, 116 and Posner, *Antitrust Law*, 29.
[41] Whish/Bailey, Competition Law, 9. Ed., 2018, 21.
[42] Melamed/ Petit, The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets, Review of Industrial Organisation, 54, 2019, 741-777; Petit, *Big Tech & the Digital Economy*, (OUP 2020), 20.
[43] See Aristoteles, Ethica Nikomachea, ed. Blywater, OUP (1962), 1129a- 1145a, Book V but also Markovits, *Market Solidarity – Price as Commensurations, Contract as Integration*, 2014, http://www.privatelawtheory.net/uploads/Markovits-Market-Solidarity.pdf
[44] Commutative justice protects or propagates fairness and inequality insofar as they are the result of properly functioning markets and thus intervenes to correct any malfunctions for the sake of postulated welfare losses.
[45] Whish/Bailey, Competition Law, 9. Ed., 2018, 22.
[46] Odudu, The Distributional Consequences of Antitrust, in Marsden (ed) Handbook of Research in Trans-Atlantic Antitrust (2007) Ch. 23; Hobbes, Leviathan I, 1651, Ch. XV "Distributive Justice [is] the Justice of an Arbitrator; that is to say, the act of defining what is Just. Wherein, (being trusted by them that make him Arbitrator), if he performs his Trust, he is said to distribute to every man his own."
[47] The exclusion of distributive elements from competition law and private law more generally is a long-held tradition and dates back to the distinction between allocative and distributive justice put forward by Aristoteles in his Nicomachean Ethics (see above). Recently, however, voices have pointed out that allocative 'antitrust' is a misnomer, since only markets themselves are truly allocative and that any normative regulatory standard is by definition distributive – even the CWS distributes (to consumers). The latter is based on valuable comments by Eleanor Fox and Miguel Moura e Silva at the Amsterdam Centre for Law and Economics Conference on Wealth and Income Inequality in Competition Law (2021).
[48] Once example of this difficulty has been the reasoning is the Wouters judgement. See *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (2002) C-309/99.

be guaranteed by the 'market game' itself in form of a spontaneous order" [49] and that this is inherently something a competition paradigm ought to address and be concerned with but cannot. A paradox emerges in which we in principle testify full faith in the formal or procedural justice of the market system, but are also faced with undeniable evidence of its failings which it cannot self-correct and may even exacerbate.[50] While the welfare standard is currently under rigorous review and critique by neo-structuralists ideas and scholars,[51] this paradox is the core reason why these demands sit at odds with familiar methodology and rhetoric and seem so difficult to accomplish "in the welfarist world".[52] Second, and more dramatically, it is possible that this paradox, and the existence of substantial and increasing inequality will ultimately undermine the very assumption – of liberty and equality – on which the competition paradigm and the virtues of rivalry are based.

2. Liberalism and Inequality and the Paradoxes of Modernity

Having established the nature of the current liberal competition paradigm, this paper questions whether the exclusion of social/ socio-economic goals from competition law analysis will not ultimately undermine the very foundations and assumption of competition.[53] While Piketty and Pistor deliver empirical and institutional evidence for growing inequality and postulate that the norms in place do not sufficiently close these gaps, this paper turns to social theory (philosophy and sociology) to show why liberal doctrines and paradigms are at odds with and oftentimes have almost a paradoxical relationship to social goals and ideas of substantive or material justice. The theory of 'reflexive modernisation' relied upon here begins with a philosophical narrative of modernity and feeds into later observations primarily put forward by sociologists,

[49] Deutscher/Markis, Exploring the ordoliberal paradigm: the competition-democracy nexus, EUI Working Paper 2017/03, 10.
[50] Deutscher/Markis, Exploring the ordoliberal paradigm: the competition-democracy nexus, EUI Working Paper 2017/03, 5: For this reason, ordoliberals concluded that laissez-faire capitalism is inherently unstable27 and that competition law should prevent economic freedom from destroying its own prerequisites.28. With reference to Möschel, 'Competition Policy from an Ordo Point of View' in Peacock/Willgerodt/Johnson (eds), *German neo-liberals and the social market economy* (Macmillan for the Trade Policy Research Centre 1989) 149.
[51] See Wu, *The Curse of Bigness,* 2018 and Khan, "Amazon's Antitrust Paradox", 126 Yale Law Journal 3, (2016), 710-805.
[52] In the words of Crane: "(T)he neo-Brandeisians have grown up in a welfarist world where contestants over the direction of antitrust law, and legal policy more generally, are accustomed to presenting their arguments in welfarist terms." See Crane, "How Much Brandeis do the Neo-Brandeisians Want", 64 Antitrust Bulletin 4, (2019), 531-539.
[53] For an alternative theoretical approach see, Gal, "The Social Contract at the Basis of Competition Law: Should we Recalibrate Competition Law to Limit Inequality*?"* in: Lianos and Gerard (Eds), *Competition Policy: between Equity and Efficiency*, CUP, 2017.

who look at "*meta-changes, which are happening not within social structures but to them."*[54] Temporally the theory is limited to the ideas that arise in modernity. The theory looks at societal changes that have occurred since the enlightenment and – in particular – since the invention of the "free market". In contrast to anthropology, sociology, whose institutionalization as an academic discipline was led by Émile Durkheim around 1895,[55] studies modern industrial (rather than traditional) societies – their systems of culture, economics and class structures and their societies' relationship with language and nature. Sociology is thus a 'modern science' and it itself is an affirmation of the idea that modernity and the ideas of the enlightenment – those of autonomy, individual or subjective rights and the separation between public and private spheres – make modernity 'new' and novel in ways that justify an isolated temporal field of study.[56] Since early sociology relied strongly on the ideas of August Comte, Karl Marx and Herbert Spencer, and sociology begins long after the dawn of the enlightenment, in so-called 'late modernity', much of its social theory is perceived as a critical reflection on early modern ideas. It has thus given rise to theories of postmodernism (post-colonialism; post-industrialism) or critical theory that are the backbone of many prominent critiques of 'the order of things' today.[57] While not mentioned or identified by all streams and types of sociology as such, to the extent that sociology looks at changes or meta-changes in society, it seems apt to differentiate between a first and second[58] or an early and a late (or post-) modernity.

The construction of the so-called first modernity begins with the normative force of the Enlightenment and belongs to the world of Immanuel Kant and Adam Smith, but also Thomas Hobbes and Hugo Grotius. It is the world in which civil society emerges as an entity that is wholly independent from the state, in which persons became free and autonomous agents[59] – she is the normative foundation and holder of her own rights and set on course to create and define private institutions and markets that are separate from that of state. The first modernity and the ideas of Adam Smith are crucial for our ideas about competition – before Smith free markets and economies did not exist in the way we know and speak of them today. From a legal perspective this is the birthplace of subjective rights, the institutions of civil society (enterprise,

[54] Beck/Boss/Lau, *The Theory of Reflexive Modernisation – Problematic, Hypotheses and Research Programme*, Theory, Culture and Society, 20(2), 2003, 3.
[55] Date of the opening of the first university sociology department at the University of Bordeaux.
[56] See Lash, *Reflexive Modernisation*, 1993, 4, 5.
[57] Giddens, *Consequences of Modernity*, (Polity, 1992), in particular on sociology p. 10, on post modernism, p. 164 and globalisation p. 71 et seq.
[58] See Beck/Giddens/Lash, *Reflexive Modernisation*, 1994; Latour, *We Have Never Been Modern,* (HUP 1993); Beck/Bonss, *Die Modernisierung der Moderne,* Surkamp 2001; Auer, *Der privatrechtliche Diskurs der Moderne,* 2014; Luhmann, *Die Gesellschaft der Gesellschaft,* 2 Bd., 1998.
[59] Auer, *Der privatrechtliche Diskurs der Moderne,* 2014, p. 15 et seq.; Pufendorf, *Of Law and Nature and Nations*, 1729/2005, 79.

the modern family), and the separation of public and private law.[60] The ideas of the first modernity are thus characterised by a high degree of individualisation and rationalisation.[61] The ideas gave rise to economies based on commercialisation, ever greater economic participation and the exploitation of natural resources.[62] While society at this time is still hierarchical and peoples are divided by class and nation states, 'self-interest'[63] and an ever greater accumulation of wealth and resources gave rise to prosperity and the 'free-market myth' that remains largely unaltered today.

The course of modernity has not however been a linear projection of the ideas of the first modernity. Indeed, many might argue, has not managed to sufficiently fulfil the promises once made to an – albeit different and more homogenous – society. In late modernity and together with the dissolving of societal institutions such as the family and the blurring of the boundaries between public and private spheres, ever more cracks and insufficiencies start to show. Whether one looks at the atrocities committed in the name of the (Western) nation state, sustainability, and the limits of growth or at entrenched structures of economic power and rising inequality, its limits and externalities become apparent and a pervasive sense of unfairness seeps into the overall discourse and reflection of the workings of our systems.[64] Despite ever greater individualism, 'man' is no longer seen as fully free and autonomous. Rather, she becomes empirical[65] – a product of socio-economic conditions and her place in global society, and simultaneously caught in normative structures that the individual no longer wants to be defined.[66] Equally, the free-market myth is seen as an institution that has led not only to wealth and progress but also to the destruction of its natural environment, ever greater externalities,

[60] See Auer, *Der privatrechtliche Diskurs der Moderne,* 2014; For Beck this first modernity is the 'industrial society', a society largely coextensive with the nation-state whose axial principle is the distribution of goods, see Beck, *Risk Society: Towards a New Modernity*, translated by Mark Ritter, Theory, Culture and Society, (Sage 1992).

[61] Max Weber understood rationalisation in four ways: practically, as an individual cost-benefit calculation; theoretically; bureaucratically, as a broader organisational principle for society; and metaphysically, as a disenchantment for broader society. See Ritzer, in. Ritzer/Stepnski, *Classical Sociological Theory*, 8. Ed, 2020 Chap. 2; see also Habermas, "Modernity's Consciousness of Time", in: *The Philosophical Discourse of Modernity,* 1985.

[62] Alexander, "Critical Reflection on 'Reflexive Modernisation'", Review, Theory, Culture and Society 1996, Vol. 13 (4) p. 133, 134: "In early modernity, economic production focused on energy-based technology, and material goods; actors believed in the inevitability of progress; science was an object of blind faith; nature was perceived as inanimate matter to be mastered instrumentally – and the ugly realities of modernity began to show."

[63] Smith, *An Inquiry Into the Nature and Causes of a Wealth of Nations,* 1776/2019, "It is not from the benevolence of the butcher, (…) but from their regard to their own self-interest."

[64] Giddens, in Beck/Giddens/Lash*, Reflexive Modernisation,* 1994, p. 58. "Max Weber's steel cage in which he thought humanity was condemned to live for the foreseeable future, is a prison-house of technical knowledge; we are all, to alter the metaphor, to be small cogs in the gigantic machine of technical and bureaucratic reason".

[65] Foucault, *The Order of Things, An archaeology of the human sciences,* 1974, 366.

[66] The later applies both to modern day identity politics and critiques of the patriarchal society but also to early reflections on the plight of the working class and Marx's critique of the family.

large discrepancies of power and unsustainable inequality. Thus, late modernity – or this *second modernity*[67] – is, at its core, a critical assessment and a reckoning with the virtues and ideas of the first modernity and not a new design of modernity itself.

What late modernity or the second modernity, however, does to the ideas of the first, is a matter of contention. Rather than see this second phase of modernity as a deconstruction of the first (as do theories of post-modernism)[68], the theory of *reflexive modernisation* focuses on the interplay and (negative) interdependence of the negative dialectic of the two. In doing so it does not deny the importance and sustained relevance of the ideas and principles of the first modernity – in particular autonomy, individualism, and the free-market myth – but observes how they interact with and become ever more contentious in light of the realisations of the second modernity. Here the world envisioned by Adam Smith falls under the critique of Karl Marx. Increasingly, it gets stuck between two truisms, making it paradoxical, and struggling to find its own bearings.

Ulrich Beck, Anthony Giddens and Scott Lash coined the term 'reflexive modernisation' to describe how, as Giddens puts it, "*simple modernization becomes reflexive modernization to the extent that it disenchants and then dissolves its own taken-for-granted premises.*"[69] According to this theory modernity become reflexive[70] (rather than reflective[71]) in the sense that it becomes self-monitoring and self-critical by directing its attention to the process of modernity itself. Modernity thus becomes its own theme. Within the reasoning of this theory modernity becomes *reflexive* in two ways:

First, becoming self-critical and self-referential, by growing ever more wary and critical of its own (original) assumptions. It does not and cannot deconstruct or rid itself of the ideals of the first modernity (autonomy, hierarchy, egalitarian equality, promises of growth and prosperity)

[67] A term primarily used by sociologist that differentiate their views late modernity from those proposed by post-modernist theory.

[68] See Beck/Giddens/Lash, *Reflexive Modernisation,* 1994, preface

[69] Beck/Boss/Lau, *The Theory of Reflexive Modernisation – Problematic, Hypotheses and Research Programme*, Theory, Culture and Society, 20(2), 2003, p. 3: "Eventually this leads to the undermining of every aspect of the nation-state: the welfare state; the power of the legal system; the national economy; the corporatist systems that connected one with the other; and the parliamentary democracy that governed the whole."

[70] Beck/Boss/Lau, *The Theory of Reflexive Modernisation*, Theory, Culture and Society, 20(2), 2003, 1: "The „reflexive" in 'reflexive modernization' is often misunderstood. It is not simply a redundant way of emphasizing the self-referential quality that is a constitutive part of modernity. Instead, what 'reflexive modernization' refers to is a distinct second phase: the modernization of modern society. When modernization reaches a certain stage it radicalizes itself. It begins to transform, for a second time, not only the key institutions but also the very principles of society."

[71] Chang, *Reflexive Modernisation*, 2017, 1, "To reflect is to somehow subsume the object under the subject of knowledge. Reflection presumes apodictic knowledge and certainty … Reflexive modernization is a form of social change driven by judgments and actions which are supposedly scientific or rational, but in practice comprised of reflexes (entangled with or contaminated by given knowledge, image, technology, wealth, power, desire, etc.), and therefore destined to engender a risk-ridden state of affairs in society."

but equally cannot rise above the critique and realisation of the second modernity. Thus, modernity is said have become 'discursive'[72] and deeply paradoxical. It is reflexive in the sense that it is stuck between two readings of itself, each of which carry significant normative and discursive weight, but neither of which fully negates the other. The first tragedy of modernity is that this paradox seems unresolvable and shades all normative quest within it. Hence modern 'man' believes that she is autonomous and 'free' but also 'not-free'; that markets best allocate resources but also that they do so unequally and lead to poverty and destruction.

Second, and in a more radical and practical way, modernity's reflexivity means that it cannot fulfil the promises of the Enlightenment but is confronted with feedback effects that give rise to opposite and contradictory results. In the face of ever greater externalities and negative consequences, the continued attempt of modernity to fulfil its original claims and ideas leads it on a path of intrinsic self-harm and impoverishment.[73] This fundamental critique of modernity and of Smith's original ideas was first expressed by GWF Hegel in his *Outlines of the Philosophy of the Right*.[74] According to this critique a social and capitalist model that centres around individual demands and self-interest may lead to exponential increases in production and prosperity, but also, and inevitably, to the production of economic excesses that lead to poverty.[75] As Hegel puts it, despite the 'excess of wealth' that characterizes modern capitalism, "civil society is *not rich enough*, i.e. its own resources are insufficient to check excessive poverty and the creation of a penurious rabble [*Pöbel*]."[76]

At the centre of this reading of modernity lies the economic argument that through the process of the ever-greater creation and accumulation of individual or private wealth, ever larger groups of society are excluded from market participation and that this eventually undermines the pillars and principles on which modern society and the free-market economy rests.[77] This suspicion can also be found at the heat of Joseph Schumpeter's idea of "creative destruction". Schumpeter's theory of monopoly and oligopoly was an early illustration of the fact that markets do not lose their normative legitimacy in the face of market failure, monopoly or the

[72] Habermas, *The Philosophical Discourse of Modernity,* 1990.
[73] Auer 2014, *Der privatrechtliche Diskurs der Moderne,* 74 in reference to: Horkheimer/Adorno 1944/1988, S. 9: „Seit je hat Aufklärung im umfassendsten Sinn fortschreitenden Denkens das Ziel verfolgt, von den Menschen die Furcht zu nehmen und sie als Herren einzusetzen. Aber die vollends aufgeklärte Erde strahlt im Zeichen triumphalen Unrechts."
[74] Hegel Outlines of the Philosophy of Right. Trans. T. M. Knox. ed. S. Houlgate. (OUP) 1821/2008. *(ENGLISH VERSION)*
[75] On Hegel's critique of civil society, see in particular Habermas, *The Philosophical Discourse of Modernity,* 1990, Lecture II "Hegel's Concept of Modernity", p. 23.
[76] Hegel 1821/2008, 222; Ferro, Poverty and Recognition in Hegel's Philosophy of Right, in: Schweiger (Ed.), *Poverty, Inequality and the Critical Theory of Recognition,* Springer 2020, 59.
[77] Auer 2014, *Der privatrechtliche Diskurs der Moderne,* 77

creation of ever greater concentrations of economic power. Rather, such phenomena can – and always will – be justified by efficiency gains such as the creation of overall welfare or the enabling of innovation.[78] Modernity thus sets in motion a process by which ever greater inequalities can always be justified by the realisation of greater profits. The resulting inequality, impoverishment, and entrapment of peoples in their socio-economic circumstances, ultimately undermines the very pillars that justify the free market society. Thus, the essential paradox of modernity or "tragedy of civil society"[79] is that it gives rise to dynamics that do not only lead to ever greater disintegration and impoverishment, but, also, by having no backstops, lead to the eventual demise and erosion of its central ideals and condition. By striving for the ever-greater production of wealth for the few and in turn creating poverty more widely and a chasmic inequality between those two extremes, modernity undermines the conditions on which it rests[80] – its ability to guarantee autonomy and equality.[81]

3. Inequality and Concentration – the problem with new manifestation of economic power

Last, this paper uses the example of market power and concentration to illustrate the mechanisms of reflexive modernisation in relation to questions of inequality in competition law. While competition law does not concern itself directly with questions of inequality, increases in concentration can generally be seen as a cause for inequality concerns, as high levels of concentration and economic power usually lead to great socio-economic discrepancies (in particular unequal bargaining power)[82] and less equal societies.[83] European competition law asserts that market power is not a harm in itself, but that undertakings holding market power may not abuse this power to harm competition, and thus share responsibility for the cultivation of rivalry and competitive market structures. The assumptions attached to market power have changed over time. The mitigation and outright prevention of market power was once seen as

[78] Schumpeter, *Capitalism, Socialism and Democracy,* Part, II, Chapter VII, Chapter VIII, 1943/1994, George Allen & Unwin.
[79] Which Hegel himself translated from the English (civil society) into "die bürgerliche Gesellschaft" and Marx adapted into "bourgeoise society". See Habermas (Fn. 75).
[80] Auer, D*er privatrechtliche Diskurs der Moderne* 2014, p.74; Beck, *Risk Society: Towards a New Modernity,* translated by Mark Ritter, Theory, Culture and Society, 1992; Beck/Boss/Lau, The Theory of Reflexive Modernisation – Problematic, Hypotheses and Research Programme, Theory, Culture and Society, 20(2), 2003.
[81] This can be traced back to a Hegelian critique of modernity, Auer, *Der privatrechtliche Diskurs der Moderne revisited*, 2019, 2.
[82] Kennedy, "Law Distributes I: Ricardo Marx Cls," 2021, SSRN: https://ssrn.com/abstract=3813439
[83] See Longman, "The Case for Small-Business Cooperation" (Washington Monthly, October 2018, https://www.openmarketsinstitute.org/publications/case-small-business-collusion, "

the primary goal of competition law and informed the abuse doctrines as well as merger control.[84] Later, the strict control and prevention of market power became less obvious and more nuanced through the development of welfarist approaches. While there is empirical evidence to suggest that market power and concentration has risen in the digital era and that it has a significant impact in inequality,[85] we seem to be incapable of even clearly identifying the market or economic power held by the huge tech-giants in the present. We struggle with the fact that they are often conglomerates rather than monopolies and that the sources of their power cannot be reduced to market shares or identified by increases in price.[86] The same is true for concentration in other sectors or through joint ownership or access to resources.

While many definitions and interpretation of 'power' and 'economic power'[87] exists and it is a nuanced and tricky field of inquiry, the theory of reflexive modernisation mirrors the struggles that competition law – and private law overall – have with questions of power, as well as with questions of inequality. These struggles or challenges are matched to the two meanings of 'reflexivity' explored above. First, our relationship to power in the digital sphere is deeply paradoxical, as tech giants are simultaneously seen as 'monopolists' and as great innovators under extreme competitive pressure.[88] Second, the rise or return of so-called 'populist antitrust'[89] is based on the fear that digital concentration bears great social and political risks and ultimately threaten to undercut and undermine all principles of the free market economy: in short, the second meaning of reflexive modernisation.

a. Concentration and the competition paradigm – a paradox

The theory of reflexive modernisation can be used to explain overall tensions between formal and liberal considerations in private law. In particular, it explains our continued faith in freedom of contract and the role of a self-governing free market economy coupled with our recognition of their substantive or material shortcomings: lack of real autonomy, and/or great discrepancies

[84] Since much of private law, in particular contract law, assumes autonomy and (formal) equality of all economic agents, it has always struggled with the question of power and inequality. Both competition and labour law were long afforded the role of ensuring the existence of material equality and controlling an imbalance of power.
[85] See Enis/Gonzaga/Pike, "Inequality: A hidden cost of market power", OECD, 2017, www.oecd.org/daf/competition/inequality-a-hidden-cost-of-market-power.htm
[86] See Bourreau/de Streel, "Digital Conglomerates and EU Competition Policy", 2019, CERRE Working Paper 4-7 <http://www.crid.be/pdf/public/8377.pdf.
[87] Lianos/Carballo, Economic Power and New Business Models in Competition Law and Economics: Ontology and new metrics, CLES Research Paper Series 3/2021, 6.
[88] This is also the content of Nicolas Petit's 'Moligopoly Theorem', Petit, *Big Tech & the Digital Economy*, (OUP 2020), 20.
[89] For a recent discussion see Schrepel, "Antitrust Without Romance", 13 NYU Journal of Law & Liberty, 2020, 326.

of economic power between the parties. Private law, in particular contract law, which is blind to power discrepancies is thus said to have an inherent problem or paradoxical relationship to 'power'.[90] Within an ordoliberal reading of private law as an economic constitution, labour law and competition law/ competition policy are thus ascribed the role of controlling these instances of power, taking on a corrective and somewhat external function in private law.[91] For several reasons this reading of the function of competition law has since evolved and dominance or 'power' is no longer seen as a concern of competition law 'per se'. The current rise of concentration in the digital sphere, however, may suggest that the evolution of competition law and its arrival at the consumer welfare standard may not have mitigated but rather ignore or exacerbated competition law's problem with (market) power, but rather ignored or exacerbated it.[92] Looking at concentration in the digital sphere and the current academic engagement with the economic power of digital giants (or GAFMA-companies) our paradoxical relationship (and thus a symptom of reflexive modernisation in the first sense of the word) is self-evident. In fact, much of current antitrust debate centres around this issue and it can probably be said that the antitrust field has never, or at least not in a long time, been as divided and as political or populist as it is currently.[93] The size, financial strength or industry expanse of the tech giants seems to be on the one hand a reflection of fierce rivalry, extreme level of innovation, disruption and numerous (often 'free') benefits for consumers and increases in consumer rent, but on the other a sinister amalgamation of power, a symptom of ever great concentration and monopolisation and the erosion of fundamental freedoms (autonomy, privacy).[94] In addition, fundamental changes in market structure and the way business is done in the digital sphere – from multi-sided platforms to data-related network effects and zero-priced markets –[95] make it difficult to understand new manifestation of power and to match them to the analogue models and legal

[90] See in particular, Mestmäcker, The Role of Competition in a Liberal Society; in: P. Koslowski (Ed.), The Social Market Economy, Theory and Ethics of the Economic Order, Springer, 1998, 329.
[91] This is role that is often reserved "external adjustments" by means of competition law, consumer protection and labour law. This distinction is, however, blurred when competition law can no longer be described as an instrument to control economic power, but rather as one that enhances (consumer) welfare.
[92] See Scott Morton et all., Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee Report, 2019, https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf (19.04.2021); Fox/Harry First, "We Need Rules to Rein In Big Tech", CPI Antitrust Chronicle, 2020.
[93] For example, Khan, "Amazon's Antitrust Paradox", 126 Yale Law Journal 3, (2016), 710-805; Melamed/ Petit, The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets, Review of Industrial Organisation, 54, 2019, 741-777.
[94] See Petit, *Big Tech & the Digital Economy*, (OUP 2020).
[95] Lianos/Carballo, Economic Power and New Business Models in Competition Law and Economics: Ontology and new metrics, CLES Research Paper Series 3/2021, 6.

terminology of market power.[96] 'Power' has thus also become less tangible and difficult to assess and grasp without a decisive yardstick or standard.

b. Concentration and the erosion of the conditions of the competition paradigm

Our current difficulties to capture manifestation of power in the digital sphere may also, however, be a symptom of reflexive modernisation as a process that, when left unchecked, undermines its own conditions. In line with the suspicions put of Hegel and Schumpeter, modernity's striving for an ever-greater production of wealth makes it blinds towards the sources of ever greater power imbalances – oligopolies, monopolies, and now digital ecosystems that service elites and ignore those without access to its spheres. While this is justified by ever greater efficiencies and consumer rents, to many the egalitarian market myth becomes ever less tangible and takes the shape of an ever-greater abstraction.

Current attempts to understand, regulate and even break up the power of Big Tech can be seen as manifestations of this concern. While the US Senate Committee report addresses the political and social dimensions of this concern head-on,[97] the DMA's attempt to reintroduce contestability and fairness is precisely an attempt to make sure digital players (gatekeepers) do not erode the foundational assumptions of the virtues of competition.[98] These instruments also introduce several new notions to detect and control negative manifestation of concentration in future. These included 'strategic market status'[99], 'intermediation power'[100], 'gatekeepers'[101] and theories of harm looking at 'conglomerate power'[102]. They show the way forward and introduce new and nuanced theory of harm related to concentration and power. Equally, however, they too are symptoms of our inability to clearly identify the manifestations and harms of power and inequality in traditional terms. Whether such notions will ultimately lead to a

[96] See Bourreau/de Streel, "Digital Conglomerates and EU Competition Policy" (2019) CERRE Working Paper 4-7 <http://www.crid.be/pdf/public/8377.pdf.

[97] US Senate subcommittee on Antitrust, Majority Staff Report, Investigations in Digital Markets, 2020

[98] Commission proposal, Digital Markets Act, COM/2020/842; on the close alignment of the goals of the DMA and competition law see Schweitzer, "The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What is Fair: A Discussion of the Digital Markets Act Proposal" (April 30, 2021). Forthcoming, ZEuP 2021, Issue 3, April 2021, https://ssrn.com/abstract=3837341

[99] Term used by the Furman Report, UK, Report of the Digital Competition Expert Panel, Unlocking digital competition, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[100] Term put forward by the Report for the Federal Ministry for Economic Affairs and Energy (Germany; Schweitzer/Haucap/Kerber/Welker), on Modernising the law on abuse of market power, 2018.

[101] Commission proposal, Digital Markets Act, COM/2020/842, Art. 3.

[102] Bourreau/de Streel, Digital Conglomerates and EU Competition Policy, CERRE Working Paper 4-7, 2019.

better overall understanding and regulation of economic power or only control its 'excesses' but ignore the inherent problem, is yet to be determined.

4. Conclusion

Reflexive modernisation by no means offers an optimistic outlook on the process of modernity. It does, however, offer a seemingly essential perspective on present-day conditions, values, or principles that are contradictory, at odds with one another and paradoxical. This is no accident, but the very symptom that defines late modernity and makes our world eternally modern and un-modern at once. Reflexive modernisation explains our desire for clear, formal, or procedural theories and normative assumptions. But it also shows that these cannot exist without their paradoxical counter-truths, and, where propagated, can lead to contrary outcomes. The working assumption in modernity must then be to embrace contradictions and contradictions to avoid impoverishment and demise. Competition law may not be able to overcome its discontent by focusing on its liberal origins alone. Questions of power and inequality are uncomfortable, but essential components of the modern competition law.