Big Tech, The Rule of Law and Democracy

"If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[1] –
U.S. Senator John Sherman in 1890

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Abstract

Antitrust law is on everyone's lips at the moment, whether it be in Washington or Brussels. The rise of big tech corporations in the last twenty years created an enormous amount of wealth and technological advancement while at the same time producing associated problems for many areas of public life and the economy. Regulators in the United States and the European Union started to acknowledge that and placed digital companies' regulation on the U.S. and the EU agenda. While there are many areas of law associated with big tech's market behaviors, antitrust law seems to be the perfect instrument to reign into big technological corporations' dominance. However, within the academic debate, there is a discussion about the goals, legal standards and remedies of antitrust law. Two leading streams dominate the debate about a reform of antitrust law. The first stream is arguing that the world is experiencing a new Gilded Age, similar to the beginning of the last century in the U.S., as a response, antitrust law should reminisce to its initial values, which have been in breaking up corporate trusts for the benefit of society. A counter stream is proclaiming the opposite by arguing that antitrust law is prone to become romanticized by reminiscing old doctrines, which are not adequate for the current economy. The present article strives to go beyond this ideological discussion about the failures of antitrust law in the 21st century. To overcome this impasse in the current scholarship, the present article offers a third way to talk about antitrust law by analyzing the underlying relationship with the rule of law. We require corporations that operate in a rule-based market economy to adhere to the rule of law. Scholars have highlighted that a decline in the rule of law ultimately leads to a decline in democracy. As a result, democracy and the rule of law seem to be inseparable. This article takes the rule of law as a prism to analyze big technological corporations' behavior and inquires whether the ongoing debate in antitrust law is underpinned by a more profound disagreement about divergent rule of law conceptions. By analyzing the external and the internal rule of law of big technological corporations, the article places itself between the discussion about reinforced antitrust enforcement, the discourse about the horizontal application of human rights, and the ongoing debate about regulating tech giants.

[1] Quoted in HANS BIRGER THORELLI, THE FEDERAL ANTITRUST POLICY ORIGINATION OF AN AMERICAN TRADITION (P.A. Norstedt ; John s Hopkins Press ; William S. Hein & Company. 1954).

I. Introduction

Antitrust law is underpinned by the objective of governments to ensure competitive markets for goods and services and foster consumer welfare, while simultaneously providing the framework for a growing economy that ensures political stability. A wide variety of angles approaches the topic of antitrust law. Antitrust law has economic, legal, political, and social implications. The present article aims to approach the topic of antitrust law from a combination of those angles.[2] First and foremost, the present article focusses on the question which concept of the rule of law a liberal democracy requires from antitrust law.

Antitrust law is a topic where there has been much activity recently in the European Union (hereinafter 'the EU') – litigation, investigation, fines – with many cases being reported to the broader public via the news media.[3] Recently, high-profile cases have further shifted the attention of the broader public on antitrust law, specifically in the context of the EU's antitrust law regime exercised by the Directorate General Competition (hereinafter 'DG Comp') of the EU Commission.[4] In this regard, scholars have analyzed the compliance of the active European competition authorities with the rule of law.[5] On the other side of the Atlantic, the Department of Justice (hereinafter 'the DOJ') and the Federal Trade Commission (hereinafter 'the FTC) have recently retained from major antitrust cases and have allowed massive merges in crucial sectors of the economy.[6] Scholars have questioned if the legal methodology stemming from the Chicago School in antitrust policy poses a problem regarding the rule of law.[7] Scholars have argued that this has led to a diverge between antitrust law in the EU and antitrust enforcement in the United States (hereinafter 'the US').[8] However, recent studies on both sides of the Atlantic have highlighted that reforms of the current antitrust law regimes are necessary in light of the technological revolution of the 21st century.[9]

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[2] A manuscript of this article has been presented by the Big Tech & Antitrust Conference 2020 co-hosted by the Information Society Project (ISP) and the Thurman Arnold Project (TAP@Yale) of Yale Law School.

[3] For example, Jim Brunsden & Javier Espinoza, *Vestager's parting shot at big tech aims for Amazon and Qualcomm*, FINANCIAL TIMES, 2019.

[4] See, for example, the non-permission by the European Commission for a major merger in the European rolling stock industry Liran Pang, *How Should European Merger Policy Respond to Global Competition? The Siemens/Alstom Merger Case*.

[5] Ryan R. Stones, EU Competition Law and the Rule of Law: Justification and Realisation (2018) London School of Economics and Political Science).

[6] See, for example, Tony Romm, *Sprint, T-Mobile receive merger approval from Justice Department*, THE WASHINGTON POST, 2019.

[7] Ryan R. Stones, *The Chicago School and the Formal Rule of Law*, JOURNAL OF COMPETITION LAW & ECONOMICS (2019).

[8] Thomas Philippon argues in his book that while the US have given up free markets, the EU has developed into a vanguard of free markets protection. THOMAS PHILIPPON, THE GREAT REVERSAL : HOW AMERICA GAVE UP ON FREE MARKETS (Belknap Press. 2019).

[9] Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee. (2019). And, Unlocking digital competition. (2019). And, Digital Platforms Inquiry. (2019).

In academic and popular literature, there are two leading streams regarding the debate about a reform of antitrust law. The first stream is arguing that the Western world is experiencing a new *Gilded Age*, similar to the beginning of the last century in the US, as a response antitrust law should reminisce to its initial values, which have been in breaking up corporate trusts for the benefit of society.[10] This stream of thought highlights the success of the fundamental antitrust philosophy of US Presidents such as Teddy Roosevelt, Woodrow Wilson, or Franklin Delano Roosevelt. Using antitrust law as a tool to reduce corporate power, strengthen democratic institutions and values, and reducing inequality in society. This stream of thought is further arguing that unrestricted corporate power leads to raising authoritarianism and a decline in democracy. As one leading commentator puts it, "[d]emocracy is under threat because we have allowed concentration of power in our industrial and financial sectors to rival, and exceed, the power of democratic institutions themselves."[11]

A counter stream of thought is arguing the opposite. According to their leading thinkers, current antitrust law is prone to become romanticized by reminiscing old doctrines, which are not adequate for the current times.[12] Scholars further argue that competition officials pursue their own self-referential goals by an activist competition enforcement to enhance their career objectives.[13] As a result, the rule of law is put at risk. Thibault Schrepel writes that "[t]he consequences of [a] instrumentalization of antitrust law could be critical as it may jeopardize decades of jurisprudential construction, causing economic disruption, destabilization of the law and blindness on the part of the competition authorities. The rule of law is put at risk."[14] As a consequence, publications have highlighted that industrial policy should strengthen national champions instead of small business and allow big corporations to flourish since they are ultimately benefiting the consumer.[15] Robert Atkinson and Michael Lind argue that small business is not, as is widely claimed, the basis of American prosperity. Small business is not responsible for most of the country's job creation and innovation. American democracy does not depend on the existence of brave bands of self-employed citizens.[16] Thus, the rule of law has become a proxy which both sides of the argumentative spectrum instrumentalize to argue in favor of their views of antitrust reform and enforcement.

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[10] TIM WU, THE CURSE OF BIGNESS : ANTITRUST IN THE NEW GILDED AGE (Columbia Global Reports. 2018).
[11] Matt Stoller, *A Return to 1912: The Antitrust Center Will Not Hold*, Volume 4 CONCURRENCES: COMPETITION LAW REVIEW (2019).
[12] Thibault Schrepel, *Antitrust Without Romance*.
[13] Interestingly, the argument about self-referential goals has also been made by the other side of the antitrust law spectrum, referring to a captured system of antitrust law by lawyers and economists to promote their career objectives. See Harry First & Spencer Weber Waller, *Antitrust's Democracy Deficit*, Volume 81 FORDHAM LAW REVIEW (2013).
[14] Schrepel, P. 69. 2019.
[15] ROBERT D. ATKINSON & MICHAEL LIND, BIG IS BEAUTIFUL : DEBUNKING THE MYTH OF SMALL BUSINESS (The MIT Press. 2018).
[16] Id. at.

The present article aims to go beyond this ideological discussion about the failures of antitrust law in the 21st century. A discussion about the values of antitrust history is beneficial and informative. However, it might be limited in its possibility to yield any substantive outcome on the future of antitrust law. To overcome this impasse in the current scholarship, the present article is offering a third way to talk about antitrust law, by analyzing the underlying relation of antitrust law with the rule of law. The reader might initially ask why it is necessary to discuss the rule of law when talking about antitrust law. The answer is straightforward. We require corporations in our economy to adhere to the rule of law. Scholars have highlighted that a decline in the rule of law ultimately leads to a decline in democracy.[17] Examples of this are widely visible within the EU.[18] As a result, democracy and the rule of law seem to be inseparable.[19] If big technological corporations disregard the rule of law in their behaviors, externally as well as internally, this has a profound impact on society and democracy.

The argument works vice versa. Scholars in Europe have shown that rule of law deficiencies in Member States of the EU with autocratic tendencies alter the application of antitrust law.[20] A democratic political system with a rule-based economy requires the antitrust law regime to be devoted to the rule of law. Otherwise, antitrust law runs the risk to be applied arbitrarily, favoring monopolies, and thus harm competition, the market, and finally, the underlying democratic system that is based on the rule of law. Posner and Weyl emphasize that "[m]arkets without competition are not markets at all, just as a one-party state cannot be a democracy."[21] The problem question the present article strives to answer is what concept of the rule of law is required for an effective antitrust law regime that strengthens democracy? A direct relationship between antitrust law and democracy might be difficult to establish at first glance. However, thinking about the rule of law can be helpful to grasp this relationship and provide the missing piece which connects the concepts of antitrust law and democracy.

The article is structured as follows. Section II of the article will compare three leading theories of the rule of law to give the necessary background when discussing different conceptions of the rule of law. Exemplary, the rule of law theories of Brian Tamanaha, Jeremy Waldron and Lon Fuller will be compared. This theoretical background is followed by an analysis the external rule of law abidance by big technological corporations in Section III. This Section is structured into three subsections on information and free speech, taxation and public utilities. In Section IV, the internal rule of law of big

[17] Jeremy Waldron, *The Concept and the Rule of Law*, Working Paper No. 08-50 PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES (NEW YORK UNIVERSITY - SCHOOL OF LAW) (2008).
[18] Matthijs Bogaards, *De-democratization in Hungary: diffusely defective democracy*, 25 DEMOCRATIZATION (2018).
[19] Jürgen Habermas, *On the Internal Relation between the Rule of Law and Democracy*, Vol. 3 EUROPEAN JOURNAL OF PHILOSOPHY (1995).
[20] Maciej Bernatt, *Rule of Law Crisis, Judiciary and Competition Law*.
[21] Eric A. Posner, et al., *Radical Markets : Uprooting Capitalism and Democracy for a Just Society,* 2019, at p. 203, *available at* Princeton University Press,.

tech corporations will be examined. This Section looks specifically at State institutions, privacy and authoritarianism. Finally, Section V gives a historical account of the relationship between antitrust law, the rule of law, and democracy by the example of Germany's fascist past. Highlighting the different phases of the German political regime in the 20th century which were intertwined with specific antitrust dogmata. The concluding Section VI proposes to shift the current debate about antitrust law enforcement towards a debate of which rule of law conception a society might aspires. The article, therefore, follows a fourfold approach by first providing the necessary background about different rule of law conceptions and how they can inform antitrust law. Followed by an analysis of the rule of law of big technological corporations – from an external and internal perspective. Thirdly, taking providing an empirical comparison by taking into account the historical relationship of antitrust law with the rule of law and democracy. To finally, endeavor on the question, which concept of the rule of law an effective antitrust law regime in the 21st century might have to follow.

II. The Rule of Law as an Essentially Contested Concept

"The Rule of Law probably cannot exist in a society unless people engage in constant argument what the Rule of Law amounts to; but it doesn't follow that the sheer fact that they engage in such argument means the Rule of Law exists."[22]

The rule of law is discussed since the cradle of humanity.[23] Many attempts have been made to find *the* rule of law. In the second Section of the present article, the author aims to describe three different streams in the scholarship on the rule of law. The idea of 'essentially contested concepts' by W. B. Gallie might be helpful when thinking about the rule of law. Gallie describes 'essentially contested concepts' as 'the proper use of which inevitably involves endless disputes about their proper uses on the part of their users[24] He further describes seven criteria to identify such a concept.[25] This theory was affirmed by legal scholars who have found the rule of law as an 'essentially contested concept.'[26] Due to the different opinions in the scholarship, it may well be said that the rule of law is not one singular concept as some legal scholars take it.[27] Instead, each theory on the rule of law offers different attributes attached to the rule of law. One stream of scholarship envisages a thick rule of law with many attached attributes attached to the rule of law.[28] Another stream of scholarship conceptualizes a thin rule of law, which requires only very essential attributes to comply with the rule of law.[29] One stream of scholarship requires a concept of the rule of law, which places much emphasis and discretion on judges.[30] Another stream strives for the role of the judge as the 'mouth of the law[31] "On this view, the Rule of Law is supposed to supersede the role of human discretion; though, […] there is also a view that the Rule of Law is supposed to frame the exercise of reasoned judgment and furnish it with an aura of legality."[32] The main argument of this article is that the choice of the concept of the rule of law has a significant

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[22] Jeremy Waldron, *Is The Rule of Law an Essentially Contested Concept (in Florida)?*, Volume 21 LAW AND PHILOSOPHY, p. 164 (2002).
[23] Aristotele formulated the question of whether it was better to be ruled by the best man or the best laws. ARISTOTLE, POLITICS: BOOK II, CHAPTER I-II.
[24].' Gallie W. B., *Essentially Contested Concepts*, Vol. 56 (1955 - 1956) MEETING OF THE ARISTOTELIAN SOCIETY (1956).
[25] Id. at. (Appraisiveness, internal complexity, diverse describability, openness, reciprocal recognition, original exemplar, progressive competition)
[26] Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW AND PHILOSOPHY (2002).
[27] For example, Schrepel takes in his article only the Oxford dictionary definition of the rule of law into account. Schrepel. 2019.
[28] LON L. FULLER, THE MORALITY OF LAW (Yale University Press. 1964).
[29] Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SINGAPORE JOURNAL OF LEGAL STUDIES (2012).
[30] Tomasz Tadeusz Koncewicz, *The Court is dead, long live the courts? On judicial review in Poland in 2017 and „judicial space" beyond*.
[31].' CHARLES DE SECONDAT MONTESQUIEU, et al., THE SPIRIT OF THE LAWS (Cambridge University Press. 1989).
[32] Waldron, LAW AND PHILOSOPHY, P. 146 (2002).

impact on the application of antitrust law. A thick concept of the rule of law may require an antitrust law regime to focus on values that go beyond the literal application of the law. A thin concept of the rule of law may require competition enforcement agencies to follow strictly and only the written rules. A concept of the rule of law based on a wide margin of judicial discretion might favor an active competition agency, a concept based on minimal discretion, and a literal application might favor a narrow enforcement policy. The present article will present three different conceptualizations of the rule of law to get a better understanding of which stream of thought is currently followed concerning antitrust law.

Brian Tamanaha's Concept of the Rule of Law

Brian Tamanaha is one of the leading contemporary scholars on the rule of law. In his article 'The History and Elements of the Rule of Law' he fulfills the feat to conceptualize the rule of law in one sentence.[33] "The rule of law means that government officials and citizens are bound by and abide by the law."[34] His concept of the rule of law stands out by its simplicity. Tamanaha draws a clear line between law and morality. Law is not supposed to purport a moral value or a political desire; instead, the rule of law only requires that the law is equally applied to all citizens, officials, and dignitaries.[35] Only the attribute of equality in the application of the laws distinguishes his concept from a monarchical order in which the law is arbitrarily applied to the subordinates of the king. Is the concept of Tamanaha useful for the application of antitrust law? Tamanaha's conceptualization ensures that antitrust law is applied to all subjects of the law equally. He requires that there is no difference in the application of the laws to all kinds of men. In his line of thinking, there is no difference in the application of the laws to big technological corporations, small producers, and consumers. Potentially, his concept of the rule of law is favorable to the Chicago School of thought in antitrust law, which emphasizes to apply antitrust laws by their literal meaning. On the contrary, his concept falls short of having a moral meaning. Tamanaha's conceptualization of the rule of law might be easily fulfilled by an autocratic regime that has unfair, discriminatory, and arbitrary laws. A law requiring slave labor for a specific minority of society is compliant with Tamanaha's conceptualization of the rule of law. Transferring this thought on the market economy, a law allowing the cartelization of whole industry sectors may be compliant with the rule of law under the definition of Tamanaha. The concept of Tamanaha might, therefore, be unsuitable for a functioning antitrust law regime in a liberal democracy. Inevitably, his concept would only ensure that the literal meaning of the law is followed and that the law is equally applied to all entities of the law. However, the concept falls short of any moral value; a liberal democracy might want to subscribe further attributes to the law and the market.

[33] Tamanaha, SINGAPORE JOURNAL OF LEGAL STUDIES, (2012).
[34] Brian Tamanaha, see id. at 2012, P. 233.
[35] Tamanaha, SINGAPORE JOURNAL OF LEGAL STUDIES, (2012).

Jeremy Waldron's Concept of the Rule of Law

Jeremy Waldron is another leading contemporary scholar on the rule of law. In his article 'The Concept and the Rule of Law,' he conceptualizes the rule of law as a normative ideal. This ideal arises out of our understanding of what the law is and what it ought to be.[36] He specifies that the rule of law represents the natural trajectory of normative thought projected from the normative significance of the law's defining features.[37] In opposition to Tamanaha, he finds that the rule of law is underpinned by normative thought and not by amorality. His concept of the rule of law is underpinned by the idea of what law ought to be. Instead of what the literal meaning of the law is. He further describes five essential features that are necessary as the essence of a legal system.[38] (1) impartial courts, (2) general public norms, (3) positivity of the law, (4) orientation to the public good, and (5) systematicity. He describes the term systematicity as the consistency of the law within the general body of law. Accordingly, his concept of the rule of law is more substantive than Tamanaha's concept. It can be described as a thick rule of law concept. Furthermore, Waldron emphasizes the importance of institutions in a legal system based on the rule of law. "No concept of what law is will be adequate if it fails to accord a central role to institutions, to their distinctive procedures and practices."[39] The emphasis on institutions is highly attractive to antitrust law. Antitrust law is a legal area that is also highly dependent in its enforcement on institutions, procedures, and practices. According to Waldron's conception of the rule of law, an antitrust law regime would be required to serve and promote the public good.[40] Regarding current streams of antitrust law, the public good could be either defined as consumer welfare, efficiency, or protection of producers. Further, he requires a positivity of the rule of law.[41] He envisages the positivity of the law as the product of the historical process and the fact that laws are changeable over time. Looking at the current antitrust law regimes in the US and the EU, it is apparent that those have changed over time and are the product of a historical process. In the US, the Sherman Antitrust Act was arguably the result of the imminent threat of corporate power and domination in the economy.[42] While in the EU, the need for a functioning market economy was indispensable after the Second World War and was one of the primary objectives of the European project.[43] The concept of the rule of law by Waldron seems to require much more from antitrust law than the concept of Tamanaha. It promotes an antitrust law regime that goes beyond economic values and also highlights the societal function of law.

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[36] Jeremy Waldron, *The Concept and the Rule of Law*, Working Paper No. 08-50 PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES (2008).
[37] Id. at.
[38] Id. at.
[39] Id. at, P. 60.
[40] See point (4) of Waldron's five essential features of the rule of law.
[41] See point (3) of Waldron's five essential features of the rule of law.
[42] THORELLI. 1954.
[43] David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, 42 THE AMERICAN JOURNAL OF COMPARATIVE LAW (1994).

Lon Fuller's Concept of the Rule of Law

Lon Fuller was a leading scholar on the rule of law in the 20th century. He argues in 'The Morality of the Law' that the rule of law requires a set of eight criteria.[44] The law must be (1) general, (2) promulgated, (3) prospective, (4) clear, (5) non-contradictory, (6) not ask the impossible, (7) constant, and (8) without divergence in text and application.[45] Numerically, he goes beyond Waldron's five criteria. His thick conception of the rule of law goes far beyond what Tamanaha requires and is much more explicit than Waldron's conception of the rule of law which relies on more complex criteria. It reads nearly as an exact recipe which a newly created liberal democracy shall follow to adopt a standard of the rule of law which will guard it for the future. Applying this conceptualization onto antitrust law, it becomes apparent that some attributes of current leading antitrust law regimes do not adhere to the rule of law. An ex-ante merger review (as exercised via the Competition and Markets Authority in the United Kingdom) could conflict with the third attribute of Fuller's eight principles since its consequences are not foreseeable for the parties. Concurrently, corporations could argue that standing antitrust laws would infringe on the sixth principle, in the way that massive divestitures or other remedies from big corporations are often required for a merger. Thirdly, the eight principle would be contested since antitrust law enforcement agencies enjoy a specific discretion in their decision to initiate proceedings against corporations, which inevitably leads to a certain degree of divergence in antitrust enforcement. Finally, the rule of reason in the US antitrust law would come in conflict with Fuller's eight criteria of the rule of law.[46] When looking to the requirements of principles five, seven, and eight, deficiencies in the concept of the rule of reason become apparent. For example, it may be not foreseeable, which assumptions a judge or a court makes when applying the rule of reason. This factual unclarity leaves corporations in uncertainty about the conduct which is legal, and which is prohibited — a status which undermines the concept of the rule of law defined by Fuller. While the eight principles are highly explicit in their requirements, they do not address specific political values that the law could purport. For example, they do not require the law to foster the common good as the conceptualization of Waldron requires. However, they could be a clear guideline for existing antitrust laws. An antitrust law regime that fulfills the eight criteria of Fuller might be more transparent, accountable, and less contested than the current antitrust law regimes since it clearly sets out the requirements that antitrust law has to fulfill.

Conclusion

By comparing the concept of the rule of law expressed by three leading scholars on the subject, it has become apparent that it is insufficient to refer to one singular concept of the rule of law when talking about antitrust law. Instead, there are different concepts which foster different aims and objectives of

[44] FULLER. 1964.
[45] Id. at.
[46] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, Vol. 42 UC DAVIS LAW REVIEW (2009).

the law and subsequently of antitrust law. Applying each of the concepts to antitrust law has a different outcome concerning the objectives of antitrust law. A better understanding of the different rule of law concepts can serve as a pathway to a better understanding of antitrust law values in times of rapid technological change as experienced in the 21st century. An antitrust law regime of a specific legal system is ultimately coined by the rule of law understanding of that legal system.

Consequently, a legal system with a fragile rule of law understanding might restrict the antitrust law regime to a literal application of statues and practices prone to be abused by arbitrary power. This, consequently, leads to a muted antitrust law enforcement. Legal systems that adhere to a thick rule of law understanding potentially require an antitrust law regime to follow specific moral or political values, such as the fostering of the common good, as seen in Waldron's conception of the rule of law. Waldron's conception, in turn, can lead to a strict and active antitrust law enforcement going beyond the literal meaning of the statutes. After having displayed three different conceptions of the rule of law, the third Section of the present article will look at compliance with the rule of law by big technological corporations. Therefore, this article takes a shift by looking at the specific conduct of big technological corporations instead of the overarching rule of law theme of an antitrust law regime. While the rule of law can serve as a lens through which antitrust law is applied, it may also serve as a backstop in areas in which the jurisdiction of antitrust law is limited. In this way, the rule of law is the very minimum requirement a society might ask corporations to adhere to if they are operating in their markets and within their society.

III. The External Rule of Law of Big Technological Corporations

"Let me close by saying that I believe Amazon should be scrutinized. We should scrutinize all large institutions, whether they're companies, government agencies, or non-profits."[47] – Jeff Bezos, Former CEO of Amazon

When conceptualizing the rule of law as an external requirement for big technological corporations to adhere to, it is necessary to look at the current practices of those corporations to establish if they comply with external rules set by the laws of the State. Many practices of big technological corporations are at odds with the rule of law. The spectrum of these activities reaches from free speech, taxation, illicit acquisition strategies to unlawful discrimination of users. The shortcomings of big technological corporations have been described by numerous scholars in the literature. What is the root of this problem? Why seems there to be a concentration of non-compliance with the law by big technological corporations? The author argues that the picture become clearer when using the rule of law as a prism to analyze the activities of those corporations. Following this approach, it becomes apparent that there is a misalignment between the economic and financial goals of big technological corporations and the needs of citizens of a liberal democracy which expresses itself in conflicts with the rule of law. As Balkin notes, "Social media companies [among them big technological corporations] will behave badly as long as their business models causes them to. […] Their business model don't care abour your democracy."[48] From an antitrust law perspective, the sheer dominance of those corporations results in many ways of conduct that is not to the benefit of consumers and citizen of a liberal democracy. The dominance in the market enables those corporations to engage in business practices which contradict the objectives to antitrust and antitrust law. Khan has described this phenomenon in regard to Amazon in its power to engage in predatory pricing and how integration across distinct business lines may prove anticompetitive.[49] Further, these corporations have the highest incentives to remain as market leaders which forces them to eradicate competition at the nascent stages.[50] The practice of so-called killer acquisitions has been widely criticized in the literature. While this practice will not be discussed in the present article, it forms a continuing deficit in antitrust law enforcement. Regarding the external compliance with the rule of law, this Section will analyze the rule of law of free speech and information, the rule of law of taxation, and the rule of law of public utilities.

<u>The Rule of Law of Information and the Free Speech</u>

[47] *Statement by Jeffrey P. Bezos - Testimony before the Subcommittee on Antitrust, Commercial, and Administrative Law.* U.S. House of Representatives (2020).
[48] Jack M. Balkin, How to Regulate (and Not Regulate) Social Media p. 18 (Association for Computing Machinery 2019).
[49] Lina M. Khan, *Amazon's Antitrust Paradox*, Vol. 126 YALE LAW JOURNAL (2017).
[50] Cf. Colleen Cunningham, et al., *Killer Acquisitions*, Vol. 129 JOURNAL OF POLITICAL ECONOMY (2018).

An antitrust law scholar may ask, why should the rule of law adherence of big technological corporations be of specific interest? Given the size of those corporations, they have a significant impact on society, public opinion, political discourse and, therefore, democracy. As Jonathan Tepper describes, "45 % percent of Americans get their news from Facebook. When you add Google, over 70 % of Americans get their news from the two companies."[51] He highlights that two corporations can manifestly influence the public opinion, imagining that these corporations would not respect the standing laws would have broad impacts. He further highlights that "[t]he scale of digital platforms puts them in a completely different category to the companies they compete against."[52] If Google and Facebook would, at the same time, decide not to publish a specific news story, this would significantly restrict the public access to this information. The sheer size of big technological corporations gives evidence of why a rule of law adherence by them is of particular interest to society. Tepper further argues that Facebook and Google have to be seen as media corporations. "[t]hey act as the online gatekeepers to billions of people and collect untold amounts of personal information in the process."[53] Both corporations act effectively as publishers of content; however, "[t]hat would imply responsibility for what happens on their platforms and a need to compensate creators for content."[54] In the United States, *Section 230 of the Communications Decency Act* discharges big technological corporations from their responsibility regarding the content uploaded on their platforms.[55]

Big technological corporations are further fulfilling the function of gatekeepers of free speech. In the case of Facebook, Tepper argues, that their Community Standards "[p]uts the company in the position of deciding arbitrarily what speech is acceptable and what is not."[56] Specifically, if there is no independent appeal mechanism available for user in case a specific content is taken down is at odds with the concept of the rule of law by all three scholars previously described in this article. The right to free speech is a cardinal right in a liberal democracy which is protected via the First Amendment in the U.S. and via constitutional provisions in many other jurisdictions around the world. "Determining how and where to regulate speech is among the most important, and most delicate, tasks a government may undertake."[57] To place this regulatory power in private hand entails vast consequences for the consumer and citizen using those platforms. Criticism on the moderation of free speech by big technological corporations enjoys bipartisan support in the U.S. scholars and politicians have made the argument that those corporations create a digital public sphere (or, square) that gradually replaces the analogue public

[51] JONATHAN TEPPER & DENISE HEARN, THE MYTH OF CAPITALISM : MONOPOLIES AND THE DEATH OF COMPETITION P. 91 (John Wiley & Sons. 2019).
[52] Id. at.
[53] Id. at, P. 99.
[54] Id. at.
[55] Communications Decency Act (CDA) 230 47 U.S.C. § 230 (1996).
[56] TEPPER & HEARN, P. 92. 2019.
[57] Michael Karanicolas, *Squaring the Circle Between Freedom of Expression and Platform Law*, Vol. 20 PITTSBURGH JOURNAL OF TECHNOLOGY LAW & POLICY, p. 177 (2020).

square. Balkin points out that there are no trusted institutions that are able to regulate this new digital public sphere. "We have moved into a new kind of public sphere – a digital public sphere – without the connective tissue of the kinds of institutions necessary to safeguard the underlying values of free speech."[58] Former U.S. Senator Orrin Hatch adds that big technological corporations not only dominate the market, but also the digital public square. "[E]ven more concerning is what happens when a single company, or group of companies, comes to dominate both the market and the public square. That's what we are seeing today. The power of Big Tech now rivals the power of the federal government itself."[59] It is true that amid the lack of institutions able to regulate this new public sphere big technological corporations have accumulated a vast amount of power over the digital discourse, even if those corporations fail to acknowledge this fact. "Facebook argues that it does not want to be the arbiter of public discourse. In fact, it already is the arbiter of public discourse worldwide."[60] As a consequence, and amid public pressure, some big technological corporations engage in a kind of self-regulation.

Several big technological corporations have now taken the initiative to establish review boards to ensure an independent review over free speech issues similar to a U.S. Federal Court that adjudicates on the First Amendment. This is a laudable approach, however, thereby those corporations enter the realm of judicial arbitration which requires a clear and stable rule of law. Karanicolas has suggested that digital platforms should scrutinize their freedom of expression regulation against an international human rights standard in form of a three-part test.[61] This three-part test would entail many aspects that fall under the rule of law, such as provisions provided by law, any restriction serving a legitimate interest, and the yardstick of necessity and proportionality. The *Facebook Oversight Board* seems to be a mechanism by which Facebook strives to ensure an independent body to which a user can appeal, in case he believes his content has been unjustifiably taken down.[62] However, this body itself raises odds with the internal rule of law of Facebook. Further, and as Balkin notes, the *Oversight Board* jurisdiction is limited. "[I]t will not have jurisdiction over Facebook's crown jewels: the company's system for brokering advertisements, its behavioral manipulation of end users, and its practices of data surveillance, collection and use."[63] The rule of law implications of the *Facebook Oversight Board* will be discussed more explicitly in the following Section of the present article.

In conclusions, it seems that the regulation of free speech and information, which can be subsumed under content regulation, is gradually shifted from the governmental level to private coorporations.

[58] Balkin, p. 8. 2019.
[59] Orrin Hatch, Reining in the Techno-Oligarchy | Opinion § 2021 (Newsweek 2021).
[60] Balkin, p. 24. 2019.
[61] Karanicolas, PITTSBURGH JOURNAL OF TECHNOLOGY LAW & POLICY, (2020).
[62] Hannah Murphy & Richard Waters, *Facebook sets out details of 'Supreme Court' for content disputes*, THE FINANCIAL TIMES, 2019.
[63] Balkin, p. 17. 2019.

"[C]ontent regulation are being increasingly handed over to an industry which is not only grossly unprepared to handle the subtleties and technical challenges associated with defining the contours of acceptable speech on a global scale, but has, as far as possible, resisted taking responsibility for this function."[64] This shift from the State to the private level comes with many unaddressed issues and could pose many conflicts of interest in the future. "A private company's core purpose is to maximize profit for its shareholders. A government's core purpose is to promote and respect the rights of its people."[65] Finally, this regulatory shift raises questions to which rule of law concept big technological platforms will adhere when regulating content. According to Karanicolas, international human rights law would provide an adequate framework in content moderation. "International freedom of expression standards are virtually the only conceptual framework for assessing the boundaries of acceptable speech which transcends national law."[66] In the area of free speech, content moderation, and right to information international human rights standards seem as the best fit to deal with big technological corporations. However, if those corporations will transparently adhere to these standards is unclear.

The Rule of Law of Taxation

Beside the access to information and free speech rights, big technological corporations have a significant influence on nation-State laws. Since these corporations have a substantial impact on national economies, governments are prone to bend the rule of law in favor of those corporations to avoid economic disruptions or relocations. A particularly useful example is corporate taxation. Tepper argues that "[i]n tax matters, the companies stand effectively beyond the laws of national governments, playing one country against another in a race to the bottom."[67] Evidence of this can be seen in the European Union's single market were the majority of big technological corporations established their tax residence under the favorable Irish or Dutch tax regime. Utilizing the freedom to provide services is perfectly legal and part of the EU's single market. However, recent decisions by the European Commission have shown that the Irish government awarded these corporations specific tax rebates which infringed upon EU law. In an investigation the European Commission found that the Irish government illegally granted 13 billion EUR tax benefits to Apple.[68] Apple appealed the decision at the General Court of the European Union and won the case. As a result, the European Commission – convinced by Apple's wrongdoings – decided on its side to appeal the judgement.[69] The case is currently pending at the Court of Justice in Luxembourg. Besides this legal battle over the definition of state aid

[64] Karanicolas, PITTSBURGH JOURNAL OF TECHNOLOGY LAW & POLICY, p. 178 (2020).
[65] Id. at, p. 177.
[66] Id. at, p. 200.
[67] TEPPER & HEARN, P. 92. 2019.
[68] State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion (Ricardo Cardoso & Yizhou Ren eds., European Commission 2016).
[69] Statement by Executive Vice-President Margrethe Vestager on the Commission's decision to appeal the General Court's judgment on the Apple tax State aid case in Ireland (Arianna Podesta, et al. eds., European Commission 2020).

in European Union law, it highlights the questionability of the tax avoidance practices of big technological corporations.

Thus, the pressure exercised by these corporations leads to lacking compliance of national governments with the federal rules in the European Union. As Tepper describes, "[n]ot only do they avoid paying taxes in the democratic states where they have their headquarters, they have allowed themselves to become tools against these very states."[70] Ireland seems to be a stern example of a nation-State government which bent the laws to attract and maintain big technological corporations.[71]

The Rule of Law of Public Utilities

The legal definition of a public utility is an "[e]ntity that provides goods or services to the general public."[72] Given the size and dominance of big technological corporations in the everyday life of billions of people, it is necessary to reassign this legal concept to those corporations in the 21st century economy.[73] Google might be seen as a crucial public utility at this point, given its position as gatekeeper to the internet. The dominant behavior of Google in the market of online advertising and search traffic has effectively led to a bipartisan multistate antitrust inquiry into Google's business practices in the US.[74] While this inquiry is currently pending, Google has, in the past, been successful in rectifying anticompetitive behavior by quality improvements. "In the recent antitrust inquiries regarding Google in the United States, the FTC stated that virtually every instance of suspected anticompetitive conduct could be explained as an earnest effort to improve the quality of Google's search engine results"[75] Against the argument of product quality improvement, it becomes increasingly hard to prove any anticompetitive conduct of a technological corporation. In the European Union, several judgments of the Court of Justice of the European Union have ordered Google to delete search results in an attempt to protect privacy rights.[76] However, the most recent case has shown the limits of the jurisdiction of the General Data Protection Regulation (GDPR) in the European Union.[77] While the Court may order Google to delete search results accessed from the European Union, there is very rarely a global injunction against search results.[78] And even if this would be possible, the global enforcement of such

[70] TEPPER & HEARN, P. 93. 2019.
[71] KIERAN ALLEN, THE CORPORATE TAKEOVER OF IRELAND (Irish Academic Press. 2007).
[72] "public utility" (Wex Definitions Team ed., Cornell Law School 2020).
[73] Cf. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, Vol. 39 CARDOZO LAW REVIEW (2018).
[74] Office of the Attorney General, Attorney General Paxton Leads 50 Attorneys General in Google Multistate Bipartisan Antitrust Investigation (Ken Paxton ed., Attorney General of Texas 2019).
[75] Frank Pasquale, *Privacy, Antitrust and Power*, Vol. 20 GEORG MASON LAW REVIEW, P. 1021 (2013).
[76] Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECR, (European Court of Justice).
[77] Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL), ECR, (European Court of Justice).
[78] Mary Samonte, *Google v. CNIL: The Territorial Scope of the Right to Be Forgotten Under EU Law*, Insight of 27 January 2020 EUROPEAN PAPERS (2020).

an order remains unrealistic. As a consequence, this leads to a situation where there is no effective oversight regarding compliance with data privacy standards of big technological corporations.

Facebook, on the opposite, is a gatekeeper to social connections and exercises a public utility function in this regard. Concerning Facebook's privacy standards and its handling of user data, there is currently a pending lawsuit in the courts of California.[79] In this case, the plaintiffs argued that Facebook led them to think they could maintain control over their personal data when it allowed outside corporations access to that data. In his initial statements, the District Judge has shown that he does not regard Facebook's view of the law as accurate.[80] In the European Union, the German competition authority, the *Bundeskartellamt*, ordered Facebook not to combine the private data of its Facebook and WhatsApp users to a common user profile, in an attempt to use antitrust law to protect consumer's privacy.[81] This decision has been appealed by Facebook and is currently pending in the German courts.[82] At the same time, the German lawmaker, the *Bundestag* amended the domestic antitrust act with a new clause to widen the competence of the national antitrust authority to 'abusive conduct of undertakings of paramount significance for competition across markets', with the clear intention to enable an oversight of big techs wide ranging business practices.[83]

Conclusion

What follows from these observations? Are big technological corporations able to follow the given rules of a State? The initial evidence outlined in this article gives rise to the assumption that big technological corporations may face issues in following the standing laws of a State. The observations lead to the assumption that the size of corporations has a negative correlation with the rule of law adherence by those corporations. This correlation is not necessarily grounded in the immoral intention of the leading actors within the corporation. It may be more a structural problem of the rapid rise of big technological corporations, which is given due to the difficulty in the oversight of all corporate activities. Nevertheless, it is necessary to inquiry what impact this non-compliance with the standing laws has on a democratic society? The non-compliance with external laws may undermine the rule of law in a society and thus lead to a democratic decline in a constitutional State as a whole.

[79] In re Facebook Inc Consumer Privacy User Profile Litigation, U.S. District Court, Northern District of California, (United States District Court of Northern California).
[80] Ryan Fernandez, *Flawed assumptions mean Facebook still has to face privacy lawsuit*, SILICON VALLEY BUSINESS JOURNAL, 2019.
[81] Decision under Section 32(1) German Competition Act (GWB) against Facebook Deutschland GmbH, (Bundeskartellamt).
[82] Thomas Thiede & Laura Herzog, The German Facebook Antitrust Case – A Legal Opera § 2021 (Wolters Kluwer 2021).
[83] Philipp Bongartz, Happy New GWB! § 2021 (2021).

Specifically, the cross-border nature of the activities of big technological corporations has an aggravating effect on the observance by external institutions of their compliance with the law. If there is no external institution having the power and the jurisdiction to observe the activities of those corporations, they may operate in the *legal lacuna*. In consequence, one may inquire if there are internal safeguards that value the rule of law internally in those corporations? The fourth Section of the present article will, therefore, analyze the internal rule of law adherence of big technological corporations.

IV. The Internal Rule of Law of Big Technological Corporations

Scholars have argued that big technological corporations function more like a State than a traditional corporation. A CEO of a significant technological corporation has publicly admitted this.[84] Jonathan Tepper notes that "[t]ech behemoths are in many ways more powerful than most large developed nations, and they have far more power as regulators and market arbiters than government."[85] Frank Pasquale notes that "[t]hey are no longer market participants. Rather, in their fields, they are market makers, able to exert regulatory control over the terms on which others can sell goods and services. Moreover, they aspire to displace more government role over time."[86] Moreover, Jed Rubenfeld notes that "[a] handful of internet mega-platforms, unsurpassed in wealth and power, exercise a degree of control over the content of public discourse that is unprecedented in history. No governmental actor in this country, high or low, has the authority to excise from even a small corner of public discourse opinions deemed too dangerous or offensive. Yet Facebook and Google do that every day for hundreds of millions of people."[87] All of this may lead to the conclusion that we have to regard and treat these corporations as State actors. Regarding Facebook, Google, Apple, and Amazon, as State actors make sense concerning their influence and power on government, public opinion, and markets. Robert Lee Hale describes governmental power to prescribe what others have to do (make the laws) and having the power to impose penalties for non-compliance with these rules (enforce the laws).[88] Following this definition, big technological corporations can be classified as governments. Elizabeth Anderson talks about the phenomenon that employers are exercising an immense influence on their employees and, therefore, have become private governments.[89] The same could be said about the users of their services. The present Section takes inspiration by her argument by analyzing the internal practices of big technological corporations to identify which concept of the rule of law those corporations might follow internally.

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[84] David Kirkpatrick, *The Facebook Defect*, April 2018 TIME MAGAZINE (2018). Quoting Facebook's CEO Mark Zuckerberg, saying that "In a lot of ways, Facebook is more like a government than a traditional company."
[85] TEPPER & HEARN, P. 93. 2019.
[86] Frank Pasquale, *From Territorial to Functional Sovereignty: The Case of Amazon*.
[87] Jed Rubenfeld, *Are Facebook and Google State Actors?*
[88] WARREN J. SAMUELS, ESSAYS IN THE HISTORY OF HETERODOX POLITICAL ECONOMY P. 184 (Macmillan. 1992).
[89] Elizabeth Anderson & De Gruyter, *Private Government : How Employers Rule Our Lives (and Why We Don't Talk about It),* 2017, *available at* Princeton University Press,.

The Rule of Law of State Institutions

> *"In a lot of ways Facebook is more like a government than a traditional company, we have this large community of people, and more than other technology companies we're really setting policies."*[90] – Mark Zuckerberg, CEO of Facebook

The fact that big technological corporations are emanating governmental institutions makes perfect sense concerning their acquired power. Facebook has recently presented its currency, which could replace the nation State's currency.[91] Facebook believes "[t]hat the world needs a global, digitally native currency that brings together the attributes of the world's best currencies: stability, low inflation, wide global acceptance, and fungibility."[92] A world's best currency provided by Facebook could, in the long-term, replace national currencies. However, Facebook seems to underestimate the responsibility of providing a world's currency. Issuing a currency requires an independent board (similar to a central bank of governors), which follows predetermined rules which are not subjected to any political or corporate influence. Facebook seems not to provide this for its envisioned digital currency *Libra* currently.[93]

Further, Facebook aims to provide a content Oversight Board, which was by some authors labeled as the 'Facebook Supreme Court[94] While the Facebook Oversight Board (FOB) is not a Supreme Court, it nevertheless establishes a separate legal system that functions under internal rules set by the corporation without external oversight. In the Oversight Board's Charter, Facebook states that "[t]he board will not purport to enforce local law." This statement acknowledges the Oversight Board's position within a broader legal system of State laws. The question, if the judges on the Oversight Board enjoy full independence remains. Trustees who are appointed by Facebook have the right to "[a]ppoint and, if necessary, remove members for breaches of the board's code of conduct."[95] When creating an Oversight Board which functions according to the rule of law, it is necessary that judges cannot be removed for an unlikened decision by the Facebook board. Pollicino and De Gregorio highlighted the various issues of parallel adjudication systems by Big Tech in regard to the Oversight Board. "[I]ts decisions are not only taken outside democratic oversight, but do also not reflect the traditional safeguards guaranteed by constitutional principles like the rule of law, due process and equality of arms. The FOB is not a real court. For this reason, these first decisions cannot be compared with either *Marbury v. Madison* or *West*

[90] Kirkpatrick, TIME MAGAZINE, (2018).
[91] Libra Association, White Paper: An Introduction to Libra (Libra Association Members ed., Facebook 2019).
[92] Id. at.
[93] In the meantime, and amid negative publicity the Libra Association changed its name to Diem. Olga Kharif, *Facebook-backed Libra association changes its name to Diem*, FORTUNE MAGAZIN, 2020.
[94].' Murphy & Waters, THE FINANCIAL TIMES, 2019.
[95] Facebook, Oversight Board Charter (Facebook 2019).

v. Barnes in the US, or with *Lawless v. Ireland* in Europe."[96] Gradoni, on the other hand, makes the counterargument that the Oversight Board exercised a review of constitutional kind with its first decisions.[97] Therefore, its first decisions can be compared to a *Marbury v Madison* moment in platform governance. While this article remains neutral regarding the magnitude of the Oversight Board's first decisions, it is important to emphasize that we are witnessing the advent of a parallel adjudication system within a corporate entity. Placing the responsibility of judicial decisions on internal bodies rivals the prerogative of States in this area. "[T]his thrusts enormous responsibilities onto the shoulders of private sector platforms, who now bear a level of influence that rivals, and in some cases even exceeds, that of nation states."[98] With the creation of internal judicial systems, tech platforms break into the prerogative of State adjudication. This could have a lasting impact on how we understand the rule of law in general. As a corollary, it creates parallel rule of law paradigms within States.

Finally, Facebook aims to provide a curated news service for its users.[99] By providing news for its users, Facebook fulfills the role of State-owned media publisher. In a political system, media functions as a gatekeeper towards society and public opinion.[100] Only those news and stories that are promoted by the gatekeeper will reach the audience. Therefore, media is often labeled as the fourth estate in a democracy. By creating a selected news service, there is a high risk that these news outlets will become a partisan echo chamber which favor a specific narrative. If Facebook can provide independent and unbiased standard seems unlikely at the moment. Besides, the increased power of disinformation on politics has been highlighted by many scholars.[101]

Google, to name a different example, is forcefully making its entrance in the health care market, starting by collecting citizens sensitive health data.[102] Scholars have pointed to the risk of sharing health data with private corporations.[103] By collecting sensitive health data, private corporations gain a dominant position towards citizens, similar to regulated health insurance providers. Typically, we would require that our health data is handled with the utmost care by independent State-observed entities. By placing health data in the hands of private corporations, it remains unclear under which confidentiality standards

[96] Oreste Pollicino & Giovanni De Gregorio, Shedding Light on the Darkness of Content Moderation: The First Decisions of the Facebook Oversight Board § 2021 (Verfassungsblog 2021).
[97] Lorenzo Gradoni, Constitutional Review via Facebook's Oversight Board see id. at.
[98] Karanicolas, PITTSBURGH JOURNAL OF TECHNOLOGY LAW & POLICY, p. 210 (2020).
[99] Brian Stelter, *Facebook News launches in testing phase as local newsrooms fear being left behind*, CNN BUSINESS, 2019.
[100] Stuart N. Soroka, *The Gatekeeping Function: Distribution of Information in Media and the Real World*, Volume 74 THE JOURNAL OF POLITICS (2012).
[101] Bobby Chesney, et al., *About That Pelosi Video: What to Do About 'Cheapfakes' in 2020* Cyber & Technology.
[102] Akanksha Rana & Noor Zainab Hussain, *Google taps fitness tracker market with $2.1 billion bid for Fitbit*, REUTERS TECHNOLOGY NEWS, 2019.
[103] Roisin Costello, *Personal DNA tests might help research – but they put your data at risk*.

this data is managed and who has access to it. It ultimately depends on the internal rules of the respective corporations.

Finally, these examples are only the tip of the iceberg regarding the horizontal expansion of the activities of big technological corporations into areas which were formerly under supervision of State-regulated entities. The recent Trump-Twitter dispute further highlighted that social media platforms have assumed quasi-State powers as their power allows them to censor the most powerful Head of State.[104] From a rule of law standpoint, it is highly questionable if a private corporation should be able to exercise that kind of censorship in the name of democracy.[105] We normally associate censorship with the governmental regime of authoritarian States. The power of big tech corporations has shifted the origin of this threat towards private actors that do not necessarily comply internally with the rule of law. It is therefore necessary to inquire about the internal rules that big tech intends to be bound by.

The Rule of Law of Privacy

"If you have something that you don't want anyone to know, maybe you shouldn't be doing it in the first place."[106]
– Eric Schmidt, Former CEO of Google

In the traditional sense, antitrust law's abilities to deal with this kind of conduct are somewhat limited. "Within the neoclassical model, there is little reason for government to limit a firm's collection, analysis and use of data."[107] Specifically, privacy, which is a core concern in many of the practices of big technological corporations, are currently inadequately included in antitrust law concepts. "Antitrust law has been slow to recognize privacy as a dimension of product quality, and the competition that antitrust promotes can do as much to trample privacy as to protect it."[108] As Pasquale argues, antitrust law and privacy law have the same aims regarding the consumer side of the equation between corporations and consumers. "The primary purposes of privacy law (as applied to corporations) and antitrust law is to deter and punish unfair, deceptive, or harmful behavior."[109] The monopolization of markets in the technology sector does not give consumers a choice in what level of protection of privacy they want. They either have to accept the level of privacy of the dominant firm or not use the service at all. In the case of Facebook, Google, and Amazon, it is hardly possible to avoid getting in contact with their

[104] Permanent suspension of @realDonaldTrump (Twitter Inc. 2021).
[105] Iván Schuliaquer, Can Twitter and Facebook censor Trump in the name of democracy? § 2021 (Open Democracy 2021).
[106] Richard Esguerra, *Google CEO Eric Schmidt Dismisses the Importance of Privacy*, ELECTRONIC FRONTIER FOUNDATION, 2009.
[107] Pasquale, GEORG MASON LAW REVIEW, P. 1009 (2013).
[108] Id. at, P. 1010.
[109] Id. at, P. 1011.

services when using the internet. In the end, consumers may have no choice concerning how their data is used. Louis Brandeis argued 1890 in his famous article 'The Right to Privacy' that "[t]he press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effront."[110] This assertation which was made 130 years ago remains valid for big tech's social media application today. Balkin has highlighted the analogies between the evolution of twentieth century print and broadcast media and the twenty-first century social media.[111] Therefore, and in analogy, the present article argues that in the world of today, big technological corporations are overstepping in every direction the bounds of privacy, and the private data of their users has become once again a trade for them. Further, and as Balkin highlights, "Facebook's and Google's control over digital advertising is made possible by their ability to collect and aggregate enormous amounts of end-user data, more than any other company. […] That is why it is so profitable for Facebook and Google to buy up so many different kinds of companies and applications, each of which collect data in different ways. More data means more power."[112] A discussion about data collection, privacy, and antitrust law is inherently connected to the question of which values antitrust law should protect. The present article argues that it is not necessary to go as far as including other fields of law into antitrust law's concept to ensure effective enforcement. Instead, the much more fundamental question of what rule of law conception we require an antitrust law regime to adhere to has to be defined.

An Authoritarian Rule of Law?

> *"[t]rue political power no longer resides in Washington, but in Silicon Valley. Big Tech now effectively decides who has the right to speak, who has the right to assemble online and who has the ability to build a business in the digital age."*[113] – Orrin Hatch, Former U.S. Senator

All of this leads to the question, what follows from private corporations that assume State-like functions? The fact that the leading corporate entities in new technologies are entirely privately controlled raises further questions about accountability and transparency and the role of human rights in regulating these actors. Scholars have pointed to the horizontal application of human rights as a way to regulate them.[114] For the purpose of this article, the author argues that if big technological corporations assume State-like functions it requires to analyze their internal rule of law, by analogy to their external rule of law adherence. In a liberal democracy, it requires that those corporations follow

[110] Louis Brandeis & Samuel Warren, *The Right to Privacy*, Volume 4 HARVARD LAW REVIEW, P. 196 (1890).
[111] Cf. Balkin. 2019.
[112] Id. at, p. 13.
[113] Hatch. 2021.
[114] Cf. MOLLY K. LAND & JAY D. ARONSON, NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE (Jay Aronson ed., Cambridge University Press. 2018).

the same rules that States do, internally as externally. Finally, it requires them to be bound by international law standards. Imagining big technological corporations as being a State actor, or a government requires additionally to an external rule of law adherence an internal rule of law adherence.

The critical observer might ask which concept of the rule of law the corporation is following internally? Is the way in which these corporations function internally based on prescribed rules which are applied independently? Or are these rules applied arbitrarily and self-righteously, or are there no rules at all? It is, therefore, consequential to inquire which conception of the rule of law these corporations are following internally. Potentially, the internal rule of law of those corporations is reflected in their external behavior towards rules and regulation. If a corporation follows an authoritarian set of rules internally, it is hardly imaginable that such a corporation has a positive influence on a liberal democracy in which it operates. Pasquale highlights in this regard that the founders of those corporations have made statements that highlight their totalitarian visions. "Companies like Facebook and Google have totalizing visions. Mark Zuckerberg want intimate details of the entire world on his social network. Sergey Brin has said that the ideal search engine would be 'like the mind of god.'"[115] Additionally, Jaron Lanier has highlighted the destructive influence on social connections and the society in general that comes with the extensive use of big tech platforms.[116]

Scholars have argued that there is an authoritarian personality, which shows specific behavioral patterns.[117] Such a personality may exercise dominant political or corporate power. In this regard, Tepper highlights the self-righteousness of the internal rule of big technological corporations. “Facebook decides what gets views and what doesn’t and captures all the profit.”[118] This conduct can well be compared to an autocratic State with well-working propaganda machinery. There does not seem to be an independent body that decides which kind of content is published. Instead, the work is done by a non-transparent algorithm. In fact, there are analogies to this practice in Orwell’s dystopian epos Nineteen eighty-four with the workings of the highly untransparent Ministry of Truth that controls all publications and media.[119] Judgment based on algorithms has been sharply criticized by many legal scholars due to its lacking compliance with the rule of law.[120] Tepper also highlights the unequal application of rules internally. Facebook has misreported metrics and therefore charged publishers more than they were supposed to pay. "Mysteriously, all errors in ad reporting have been in Facebook's favor

[115] Pasquale, GEORG MASON LAW REVIEW, P. 1023 (2013).
[116] See JARON LANIER, TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW (The Bodley Head. 2018).
[117] Michael Elias Shammas, *What’s Behind Rising Authoritarianism? Answers from Political Psychology & the Third Reich*.
[118] TEPPER & HEARN, P. 99. 2019.
[119] Cf. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Penguin Books in association with Martin Secker &. 1954).
[120] FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (Harvard University Press. 2016).

and none have been in the customer's favor."[121] This conduct is an indication that the rule of law within Facebook is apparently unequally applied and inherently biased towards Facebook's benefit.

Conclusion

It appears that big technological corporations have an inherent bias towards favoring their own benefit in applying internal rules. In contrast, recent efforts of big technological corporations point to the fact that these corporations have identified this issue and aim at curing it.[122] So how shall we understand the internal rule of law of big technological corporations at this stage? Martin Krygier's conceptualization of the rule of law can provide guidance here. In his article 'The Rule of Law: Legality, Teleology, Sociology' he distinguishes the form and the function of the rule of law.[123] While a legal system might follow the form of the rule of law (i.e., having a wide array of statutory rules), it might not fulfill the function of the rule of law (i.e., establishing the institutions which are following and applying the rules). First and foremost, a hostility to arbitrary power is at the heart of the rule of law, according to Krygier. The rule of law is a restraint to arbitrarily exercised power in society.[124] He establishes that the functioning of the rule of law is connected to the underlying values of a society.[125] The function will follow the values a society aspires to. He further argues that a society must define the *telos* of the rule of law by asking itself what it requires from the rule of law?[126] The *telos* of the rule of law of big technological corporations can be described as the internal company culture. The values that a company has and embodies. According to Krygier, a robust rule of law starts with function and then establishes its form.[127] The opposite might lead to a situation in which function will never follow form.[128] Regarding big technological corporations, the present article argues that big technological corporations recently started to establish the form of the rule of law by creating an internal mechanism (e.g., the Facebook Oversight Board). However, this is still an ongoing process and it will be crucial to see if the function will follow the form concerning big tech's internal rule of law.

[121] TEPPER & HEARN, P. 100. 2019.
[122] Murphy & Waters, THE FINANCIAL TIMES, 2019.
[123] Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, *in* RE-LOCATING THE RULE OF LAW (Gianluigi Palombella and Neil Walker ed. 2008).
[124] Id. at.
[125] Id. at.
[126] Id. at.
[127] Id. at.
[128] Bogaards, DEMOCRATIZATION, (2018).

V. The Historical Dimension of Antitrust law, the Rule of Law and Democracy

"Markets without competition are not markets at all, just as a one-party state cannot be a democracy."[129]

To better understand the relationship between the rule of law and antitrust law, it is helpful to analyze the ordoliberal thought on antitrust law. This analysis will be done in a two-step approach by first analyzing the interrelation between a declining rule of law, authoritarian rise, and weakening competition in Germany between 1910 – 1945 and an outlook on the theory of the ordoliberals which shaped German competition policy after 1945. The example of Germany is especially interesting since it demonstrates two extremes of antitrust laws relating to the rule of law. Between 1933 – 1945, antitrust law was a legalistic tool of an authoritarian government, while the ordoliberal thought from 1945 on constitutionalized antitrust law as an independent pillar of the State in Germany. Therefore, this article endeavors a German example to demonstrate the importance of humanistic principles in designing and implementing legal structures – contrasting pre-war and post-war systems.

Weakening Competition, Declining Rule of Law, and Authoritarian Rise

The example of Germany in the first decades of the last century is a specially striking case of the interplay between unrestricted corporate power and the decline of democracy into autocracy. Economic booms and busts characterized the Weimar years, and a steady economic uncertainty spurred by political uncertainty. The economy was characterized by a concentration and cartelization in the German industry. Gerber describes the merging between political and corporate power in times of uncertainty.[130] "This political and economic uncertainty profoundly affected the structure of Germany industry. As means of reducing risk, firms turned to cooperative agreements rather than competition. Cartels grew rapidly in numbers and size, particularly during the last years of the decade, and by the end of the decade most industries were heavily cartelized."[131] Those cartels then exercised their dominance and power by showing a predatory behavior against competitors and exercising pressure on the rule of law by influencing government to their favor. "Cartels, in turn, became increasingly aggressive in destroying competitors who refused to join them and in using their financial resources to influence government."[132] All this leads to the conclusion of heavy external pressure on democracy by corporate domination in markets. This development was spurred by the cartelization and lobby pressure of the German industry. After the takeover of the Weimar Republic by the Nazis, corporate capital and politics became even more intertwined. Frederic Clairmont describes the external pressure on

[129] Posner, et al., p. 203. 2019.
[130] Gerber, THE AMERICAN JOURNAL OF COMPARATIVE LAW, (1994).
[131] Id. at, P. 28.
[132] Id. at.

democracy by the example of the powerful IG Farben corporation in Germany at that time. “Wedded to its technology and vast capital resources, was the uninterrupted avalanche of state subsidies and tax exemptions.”[133] At a later point, the Nazi State openly provided IG Farben with slave labor. The corporation was factually a State monopoly and taking part in war crimes. “Slave labor that was always a vital component of IG’s labor force was now to swell to millions.”[134] Clairmont ends his observation with a very critical account concerning authoritarianism in politics and business. “The Hitlers could come and go but corporate capitalism and its leaders were the natural defenders of an inviolable social order that had always stood against the resurgent forces of international subversion.”[135] Germany between 1910 – 1945 is a prime example of the cartelization and domination of the market economy, which aided the rise of authoritarianism. Connecting this historical example to the theme of this article, it is interesting to identify the leading rule of law theory at that time.

Gerber notes that the leading school of legal thought at that time was legal positivism. Legal positivism was used as a tool of corporate influence and pressure. “Because the political system from which legislation emanated merely represented those private interests that were strongest at a particular time, legal positivism was perverted into a tool of those interests.”[136] The rule of law at that time was solely based on a concept of legality, without questioning the morality of the laws. This amorality enabled the destruction of a competitive economy, which lead to the rise of authoritarianism. “Under such circumstances, the idea that law was whatever the legislature said it was promoted chaos and injustice rather than legal security. Thus, legal positivism had allowed not only courts but society in general to lose sight of fundamental values and common objectives, and it helped pave the way for Nazism.”[137] The rule of law at that time was, as Gerber describes, that what the legislature wanted it to be, a purely literal interpretation of the laws, drafted by an autocratic regime that served the interest of economic and political monopolists. In turn, the antitrust law regime was an empty shell without practical meaning.

Constitutionalizing Antitrust law: An Ordoliberal Approach

After 1945, Germany followed the ordoliberal model of antitrust law. The ordoliberal thought is a school of antitrust law developed in the 1930s in Freiburg, Germany. This school had the aim to provide laws that would 'order' the market economy. However, this had to be done not in a paternalistic way of a State planned economy, instead to provide security for corporations and diminish the threat of monopolist power and corporate dominance. The ordoliberal thought in Germany places the values of

[133] F. Frederic Clairmont, *Against the Common Enemy: Nazidom and German Corporate Capital*, Vol. 30 ECONOMIC AND POLITICAL WEEKLY (1995).
[134] Id. at.
[135] Id. at.
[136] Gerber, THE AMERICAN JOURNAL OF COMPARATIVE LAW, P. 35 (1994).
[137] Id. at.

humanism at its core. The logical consequence is that consumers in an economy have to be seen as citizens in society. "It is important to recognize that the deepest wellsprings of ordoliberal thought were humanist values rather than efficiency or other purely economic concerns."[138] The power of the State as the independent guardian of the economy has to be unequaled by corporate power. "This meant that the state had to be strong enough to resist the influence of private power groups."[139] The ordoliberal thought further envisaged the market as to fulfill an integrating function of society. "[T]he economy was the primary means for integrating society around democratic and humane principles, but it could perform this role only if it had certain characteristics."[140] A primary principle was the general backstop to unrestricted corporate power. "[The ordoliberals] saw economic power as a major obstacle to social justice, because when private organisations or groups were powerful enough to interfere with the proper functioning of the competitive process, the market would not be perceived as fair and thus would not serve to integrate the community around it."[141] Walter Eucken, the founder of ordoliberal thought, favored economic policy with the aim of 'complete competition,' "that is, competition in which no firm in a market has power to coerce other firms in that market."[142] A concept which similar to the full economic competition in the US antitrust law.

In the ordoliberal thought antitrust law is described as law of constitutional dimension for the market. Antitrust law enforcement is based upon values defined by the political order. "The ordoliberals recognized that fundamental political choices created the basic structures of an economic system."[143] A stream of current scholarship on antitrust law argues quite the opposite that "[a]ny antitrust authority action aiming at protecting noneconomic goals contravenes the rule of law."[144] However, seeing antitrust law in a constitutional dimension, as the ordoliberals did, even requires antitrust law to have values that go beyond a limited economic analysis. The conceptualization of antitrust law as the constitution of the market "[turns] the core idea of classical liberalism – that the economy should be divorced from law and politics – on its head by arguing that the characteristics and the effectiveness of the economy depended on its relationship to the political and legal systems."[145] This argument is in the starkest contrast to the argument that any values of competition policy that go beyond economic goals violate the rule of law. The ordoliberal thought placed the rule of law as the superior goal of their policies.

[138] Id. at, P. 36.
[139] Id. at, P. 37.
[140] Id. at, P. 38.
[141] Id. at.
[142] Id. at, P. 43.
[143] Id. at, P. 45.
[144] Schrepel, P. 56. 2019.
[145] Gerber, THE AMERICAN JOURNAL OF COMPARATIVE LAW, P. 45 (1994).

Political choices entrenched in antitrust law had to abide by the rule of law. The ordoliberal thought was rooted in the German political theory of *Rechtsstaat* (or the rule of law). "The state has to provide a basic level of 'legal security' (*Rechtssicherheit*) by assuring law is knowable, dependable and not subject to manipulation. The ordoliberals used these ideas for their concept of *Ordnungspolitik."*[146] The intertwined relationship between the rule of law and antitrust law as the Constitution of the market economy is a fundamental underpinning of ordoliberal thought. "Law's roles were shaped by the characteristics desired for the economy system, but those characteristics were, in turn, shaped by the characteristics of the political and social system that was sought."[147] The ordoliberal ideas follow a conception of the rule of law in antitrust law, which is comparable to Waldron's conception of the rule of law, which is dependent on what the law ought to be. The entrenchment of antitrust law as a law of constitutional dimension follows logically from this. "The market economy could work properly only if laws related to it were applied within a constitutional framework, and this framework would then assure that government could not interfere with the operations of the economy." Also, the European Union's antitrust law regime finds its root in the ordoliberal thought. Notably, "[the EU's] antitrust law provisions were included in the Rome Treaty under German pressure."[148]

Constitutionalizing the economy through antitrust law has to be seen as an approach of giving antitrust law a meaningful entrenchment in the legal order of the State. "A constitutional framework for controlling the relationships between government and the economy has not been tried or seriously considered outside of Germany and, to a limited extent, the special circumstances of the European Community."[149] Gerber highlights the success of the approach, which seems to be reflected by the different attitudes of antitrust law enforcement in the EU and the US of today. "In both cases it has been surprisingly successful, and this alone should influence further consideration of its potential for adaptation to other situations."[150]At.

Concerning the difference to the US antitrust regime, Gerber highlights that the core concern of European competition policy is private economic power. "From the ordoliberal perspective, such power necessarily threatened the competitive process, and the primary function of antitrust law was to eliminate it or at least prevent harmful effects."[151] According to him, this distinguishes competition policy in the US and the EU of today. "This broad conception of economic power is one of the features of German and European antitrust law thinking that most clearly distinguishes it from U.S. antitrust law analogues."[152] It may well be said that while European competition policy converged towards a notion

[146] Id. at, P. 47.
[147] Id. at, P. 73.
[148] Id. at.
[149] Id. at, P. 77.
[150] Id. at.
[151] Id. at, P. 51.
[152] Id. at.

of the prevention of the accumulation of private economic power, which can threaten the political system, the US antitrust policy moved towards a competition policy solely based on the notion of consumer welfare, which approved private economic power as long as it serves the consumer. As a consequence, post-war antitrust law in the EU served the citizens and the polity whereas U.S. antitrust laws lost its inherent compass and diverged towards solely serving the market.

The ordoliberal theory, which combines economic and political values, is alien to the US distinction between political values and economic prosperity. “The ordoliberal emphasis on the interdependence between economic structures and human values is, for example, reminiscent of a type of discourse that (at least in the United States) has been relegated to political speeches and utopian pronouncements.”[153] Current Antitrust enforcement is mostly guided by economic theories that fail to take into account political values such as democracy and political freedom. "[Ordoliberal thought] fails to resonate with most level of current thought, where economic issues such as efficiency and wealth creation are ever more strictly divorced from non-economic issues such as political freedom.”[154] This digression on ordoliberal thought has demonstrated one model for giving antitrust law an essential underpinning in the rule of law as constitution of the market. However, the ordoliberal model which worked in Germany and the EU during post-war economic prosperity might not be the panacea for today's domination in the technological economy. Nevertheless, it shows the successful undertaking to accord a rule of law value to antitrust law, which underpins its enforcement. For today's domination in the technological economy, society via political actors has to find a meaningful rule of law concept which will reinforce antitrust law.

[153] Id. at, P. 75.
[154] Id. at.

VI. Antitrust law, the Rule of Law and Democracy

"We want a free market, but we know that the paradox of a 'free' market is that sometimes you have to intervene. You have to make sure it's not the law of the jungle but the laws of democracy that works."[155]
– Magarethe Vestager, European Commissioner for Competition

The present article proposes to shift the discourse on the reform of the current antitrust law enforcement away from an ideological debate about legislative intent towards a debate of what set of values we attach to the rule of law in our society. If we argue that we need stronger antitrust law enforcement against big technological corporations, we might need to have a prior debate about the conception of the rule of law we strive for. In this conclusion the various strains of the article shall be put together to flesh out the relationship between big tech, the rule of law and democracy. Comparing the three distinct conceptions of the rule of law previously described will help to understand the core argument of this article. The historical excerpt in the previous Section serves as a guidepost and mirror to the present debate as an example of changes in antitrust policy, enforcement and philosophy. It has further highlighted the dangers for democracy resulting from concentrated corporate power rivaling the States' prerogatives.

Following Tamanaha's conception of the rule of law and applying to the framework of antitrust law leads to an understanding of an antitrust enforcement which focusses exclusively on the literal breaches of competition statutes and does not include further legal dimensions such as privacy law or consumer protection. Reiterating his key phrase: The rule of law means that government officials and citizens are bound by and abide by the law, however, requires that consumers and big technological corporations are treated equally by the law. This principle of equal treatment is his uppermost maxim. Looking at the factors flashed out in the Section on the internal and external rule of law of big technological corporations it is visible that States may not treat big technological corporations equally to their peers. Instead, States may grant them special treatment when it comes to taxation, political influence and content moderation to just name a few examples. Therefore, a rule of law conception of antitrust law following Tamanaha's reasoning would at least require a given State to ensure full equality in applying antitrust statues to big technological corporations. Having said that, it would not attach any further valuable attributes relating to a liberal democratic order to the antitrust prism.

[155] Magarethe Vestager, Full transcript: European Union competition commissioner Margrethe Vestager on Recode Decode (Kara Swisher ed., Vox Recode 2017).

An understanding of the rule of law following Waldron's conception[156] would lead to a different outcome in antitrust policy and enforcement. It would automatically lead to an antitrust law enforcement, which is less based on the conception of the individual as a sole consumer, but instead as a citizen who has more desires than merely satisfying his consumer welfare. A consumer living in a liberal democracy may have as one of his interests the strengthening of democracy in the political system that she or he lives in. Big technological corporations, which are rivaling the power of States and which (intentionally or unintentionally) bending the application of the laws in that State to their favor, could be a threat to the preservation of this liberal democratic system. In consequence, it might be of the very interest of a consumer to restrict their power via the tool that is existing in the market economy of that that legal order, which is first and foremost antitrust law. Following this line of arguments, it could be the very interest of an antitrust agency to strengthen democracy in the market and the society via the tools available to them.

Fuller's conception of the rule of law entails eights strictly defined criteria to which the law should adhere to. His conception is therefore very practical and might appeal to antitrust law scholars. It allows to set predefined standards and criteria which make antitrust enforcement action foreseeable and calculatable. It could be a middle way between Tamanaha's frugal conception of the rule of law for antitrust (and antitrust only), and Waldron's thick conception for antitrust which allows antitrust law to be used for additional ends, such as fostering the common good and democracy. However, the analysis in the previous Section has also highlighted the shortcomings of Fuller's eight principles. They are very static and might conflict with standing antitrust doctrines and further contradict flexibility and discretion in antitrust enforcement. It would be a highly interesting experiment to define an antitrust regime that strictly adheres to Fuller's eight principles. In the current environment, it could help the legislator and the enforcers to find a middle ground when legally dealing with big technological corporations. It would allow more accountability of the actions of antitrust enforcement in the future, for big technological corporations and for consumers.

The Section of antitrust history in Germany through the 20th century has highlighted the implications and risk associated with a specific antitrust paradigm for a constitutional democracy. Concentrated corporate power may lead to a facilitation of authoritarian rise. Antitrust law appears as the natural structural remedy to address issues arising of concentrated corporate power. Stoller points out that "[a]ntitrust is one of the key bodies of law that is intended to constrain corporate power, from addressing restraints of trade and monopolization to mergers."[157] Further, Balkin notes that "[c]ompetition law has other purposes besides fostering economic competition, economic efficiency, and innovation. […] We

[156] Waldron, PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES (NEW YORK UNIVERSITY - SCHOOL OF LAW), (2008).
[157] Stoller, CONCURRENCES: COMPETITION LAW REVIEW, (2019).

might need new statues and regulatory schemes that focus on the special problem that digital companies pose for democracy."[158] As demonstrated in this article, the function of antitrust law as a bulwark for democratic values coincides with the intent of antitrust law to oppose monopolization. Only, if antitrust law will achieve to fulfill its role in constraining dominative power of big technological corporations, it fulfills the interest of a consumer, which is also a citizen of a liberal democracy.

In the European Union, a stream of antitrust law scholarship has argued that an active antitrust law enforcement, which is not solely based on purely economic goals, violates the rule of law.[159] "It follows that any authority action aiming at protecting noneconomic goals contravenes the rule of law."[160] Defining competition enforcement and litigation beyond economic goals as violating the rule of law is a perfunctory assessment. As Waldron notes, "[t]o count litigation as something contrary to the Rule of Law whenever it exasperates us is simply temperamental limits of our allegiance to the ideal."[161] As shown in the present article, it depends on the concept of the rule of law, which is followed in a legal system to determine the role antitrust law enforcement should fulfill in a market economy and in society. Arguing that a more litigative antitrust law enforcement is distancing itself from the rule of law is a limited argument. Specifically, if one only takes a formal conception of the rule of law into account as the above cited scholar does.[162]

The arguments in the present article led to another conclusion. We argue that an active antitrust law enforcement is strengthening the rule of law in a legal system. Interestingly, similar critics of antitrust law activism, as the previously mentioned, have existed at all times during the 20th century. Eleanor Fox notes in the 1980s that "[o]bservers fear that a clear antimonopoly law would be the worst of all possible worlds. Critics argue that government will 'poison the well' at trial by introducing evidence of bad conduct (defeating attempts at streamlining); that it will gerrymander markets to make every big firm look like a monopolist; and that it will thus posture itself for a massive break-up of big business."[163] These critics sound very similar to contemporary critics of a too active antitrust law enforcement and policy.[164]

The current debate about a reform of antitrust law seems to be captured by an ideological dispute between two schools of thought. One stream is favoring an antitrust law enforcement, which is based

[158] Balkin, p. 21. 2019.
[159] Schrepel. 2019.
[160] Id. at, P. 56.
[161] Waldron, LAW AND PHILOSOPHY, P. 147 (2002).
[162] In his article, warning of a romanticised competition law enforcement, Schrepel only takes the Oxford dictionary definition of the rule of law into account. Schrepel. 2019.
[163] Eleanor M. Fox, *Monopoly and Competition: Tilting the Law Towards a More Competitive Economy*, Volume 37 WASHINGTON AND LEE LAW REVIEW, P. 61 (1980).
[164] See Schrepel's critic of a romaticised competition law enforcement. Schrepel. 2019.

on a strictly literal interpretation of the law and the economic facts. This school sees antitrust law in the very narrow sense detached from the legal framework in which it operates. The other is favoring an antitrust law enforcement, which takes into account societal values that go beyond mere consumer welfare. This school regards antitrust law embedded in the constitutional framework of a liberal democracy that adheres to the rule of law.

Martin Krygier's conception of the difference between form and function of the rule of law helps understand the current debate and dispute about the rule of law concerning competition policy.[165] Authors have argued that active antitrust law enforcement has put the rule of law at risk.[166] The present article points to the opposite risk of corporate power, which exercises external and internal pressure on the rule of law and therefore leads to a decline in democracy. Krygier's differentiation of form and function allows identifying the difference between both arguments. While the stream of scholarship focusing on purely economic goals of antitrust law favors a formal rule of law, the stream of scholarship focusing on antitrust law enforcement to protect values going beyond economic goals favors the function of the rule of law.

Antitrust law may only fulfill the role of protecting democratic values when it fulfills both the form and the function of the rule of law. This article argues that it might be better to emphasize function (as seen in the EU) over form (as seen in the US) than the other way around. If a liberal society defines the protection of the democratic order as the telos of the rule of law, then the enforcement of antitrust law, which pursues a restriction of monopolistic power, is following the rule of law. In this case, an active enforcement would even strengthen the rule of law in the legal order. Ultimately, it remains to the legislator and the enforcement agencies to define their understanding of the rule of law and apply antitrust law accordingly.

[165] Krygier. 2008.
[166] Schrepel. 2019.

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