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Attuning Big Tech regulation in light of data-driven markets

Adeguamento della regolamentazione delle big tech alla realtà dei mercati fondati sui dati

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Abstract

Empirical studies have observed rising concentrations of corporate power. Policymakers, in turn, have envisaged the restructuring of markets by breaking big technology companies up. The Privacy Fallacy persuasively argues that accountability for the consequences of corporate data practices entails creating a new type of tort liability that recognizes the value of privacy. But addressing the effects of digital technologies must also involve competition law, to enable consumers to challenge, contest, or modify their favoured product segments. This involves a sort of influence that enables consumers to meaningfully address the predicaments of digital technologies and making their use more profound.

Studi empirici hanno osservato una crescente concentrazione di potere aziendale. I politici, a loro volta, hanno previsto la ristrutturazione dei mercati attraverso la disgregazione delle grandi aziende tecnologiche. Il libro The Privacy Fallacy sostiene in modo convincente che la responsabilità per le conseguenze delle pratiche aziendali in materia di dati comporti la creazione di un nuovo tipo di responsabilità civile che riconosca il valore della privacy. Ma per affrontare gli effetti delle tecnologie digitali è necessario coinvolgere anche il diritto della concorrenza, per consentire ai consumatori di sfidare, contestare o modificare i segmenti di prodotto preferiti. Si tratta di un tipo di influenza che consente ai consumatori di affrontare in modo significativo le difficoltà delle tecnologie digitali e di renderne più approfondito l'uso.

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Summary: 1. The Existing Debate and Its Shortcomings. – 2. Giving Way to the Consumer's Voice in Theory. – 3. Giving Way to the Consumer's Voice in Practices. – 4. Conclusion.

1. The Existing Debate and Its Shortcomings.

The Privacy Fallacy reveals several fundamental problems with existing privacy frameworks. Amongst other things, it underscores a flaw in existing protection mechanisms that are centred on user control, such as data sovereignty, since the management of raw personal data fails to address the implications of inferences generated by AI technologies.[1] User agreements neglect inferences made about individuals – large, anonymized datasets that affect them – as well as information about users that others have agreed to share. Even when individuals consent to data sharing, they cannot anticipate how their data will be managed in conjunction with other datasets to produce insights beyond anything the individual might control.

But data-driven technologies, including AI-driven inferences, do not only predict individual behaviour. They also affect corporate strategies and consumer interactions on a broader scale. These technologies enable targeted advertising, affect insurance rates and access to financial services, determine loan approvals, and set insurance premiums without users' knowing just how or why particular decisions are reached.[2] At the core of this and other digital economy issues lies a moral hazard – a situation where big tech companies face minimal accountability for the risks they impose on users. The moral hazard in privacy, for example, stems from misaligned incentives between corporations seeking to maximize data profits and users wanting to participate in the information economy without exposing themselves to harm.[3]

Instead of grounding privacy law on contract law principles, which govern voluntary agreements, the Privacy Fallacy maintains that privacy should have its roots in tort law concepts, which deal with harm inflicted on others. This shift addresses the intuitive realities of our current digital environments. While contract law is effective for conventional transactions like grocery shopping or dry-cleaning services, it falls short in terms of privacy matters. The mutual understanding crucial to contract law is absent in privacy agreements, as people are often unaware of what they are surrendering in data interactions. Moreover, most companies collecting users' data have never directly engaged with the individuals whose information they process. By wielding influence over people both within and beyond these futile agreements, big tech

[1] I Cofone, *The Privacy Fallacy. Harm and Power in the Information Economy* (CUP 2024).
[2] E Mogaji, TO Soetan, TA Kieu, 'The Implications of Artificial Intelligence on the Digital Marketing of Financial Services to Vulnerable Customers' (2020) 29 Australasian Marketing Journal, 235.
[3] VP Crawford, JL Guasch, 'The Theory of Contracts and Agency' (1983) 65 American Journal of Agricultural Economics, 373.

companies can exploit individuals whose data they collect, analyse, and distribute, and can cause widespread harm beyond their user base.

Legal doctrine has divided up different tasks into doctrinal compartments. Those focused on individual and collective harm resulting from privacy violations have addressed how accountability can be rebuilt into our economies so that individuals can flourish and harm can be prevented.[4] Those interested in structural and systemic problems, meanwhile, have addressed how digital markets operate, especially through regulation and rights-based approaches.[5] One frequently ignored aspect in this debate, however, is how the law can help align technology more broadly with what individuals and societies value, accommodating market competition *and* addressing normative conflict. Just as the Privacy Fallacy convincingly does for tort law, I have argued that competition law serves exactly that broader purpose, although the common viewpoint is that competition law only aims to produce more corporate alternatives, by breaking big tech companies up and affording users a greater number of options in the market – a solution that cannot speak, however, to the deep consent-related flaws, information asymmetries and moral hazards inherent in present-day digital technologies. And using just as forceful an argument as the Privacy Fallacy, I have proposed that we need to reconsider the backbone of competition law to overcome the inconsistencies between the law's assumptions and social reality and to curb the ability of big tech companies to freely exploit consumers whose data they gather, administer and disseminate. The purpose of this contribution is to highlight one important feature that both research projects have in common: rather than foreground the assumption that people always willingly make certain choices and are relatively indifferent to other options, enabling them to rely primarily – if not solely – on the market's 'exit' option, the digital economy requires consumers to have the capacity to exercise a particular kind of 'voice' – a device that policymakers and theorists have long overlooked.[6]

2. Giving Way to the Consumer's Voice in Theory.

Where big tech companies offer consumers extractive and exploitative terms of service that are jarringly akin to one another, competition law, more often than is generally admitted, can work to authorize consumers to modify leading actors' terms and conditions of agreement, by *integrating* consumer preferences into leading actors' segments.[7] In the realm of privacy, an illustrative example is the German Federal Cartel Office's (FCO) investigation into Facebook's data-gathering activities in which the authority found that the company abused its dominant position by conditioning the use of the social network on the user's prior consent to merge third-party website data with the

[4] S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs 2019); MG Martinez Alles, *Torts and Retribution. The Case for Punitive Damages* (CUP 2025).
[5] A Bradford, *Digital Empires: The Global Battle to Regulate Technology* (OUP 2023).
[6] A Kuenzler, *Restoring Consumer Sovereignty. How Markets Manipulate Us and What the Law Can Do About It* (OUP 2017).
[7] A Kuenzler, 'On (Some Aspects of) Social Privacy in the Social Media Space' (2022) 12 International Data Privacy Law, 63.

personal information collected on Facebook's social media platform. Here, the FCO recognized that the most effective way to safeguard competition and to protect consumers' privacy was not to divest the company into several distinct units but to require Facebook to incorporate additional technological features into the platform, enabling users to opt out of the platform's data tracking.[8] The key question was whether users had been given an actual choice as to whether they would want to use the social network in a personalized manner – giving the platform potentially unlimited access to users' data on the internet – or whether they should be able to agree to a level of personalization based solely on data they have decided to share on Facebook. Since access to Facebook's network, in the authority's view, determines the ability of (at least some) consumers to participate in daily life, consumers could not simply be expected to relinquish their membership of it and switch to other platforms. Instead, the authority allowed consumers to help adjust the platform's terms and conditions of agreement, giving them the opportunity to choose between different distinct features of the services offered by the platform.[9]

More to the point, the authority recognized that where quality rather than price competition is at issue, consumers need not only *choice* but also *voice*.[10] This implies an expression of disappointment on the part of the consumer towards the dominant firm so that the firm is compelled to take part in an assessment of the basis of and possible remedies for the customer's dissatisfaction. When affording consumers 'voice', competition law has several advantages over existing proposals seeking to internalize the harms resulting from data-driven technologies. It targets moral hazard (and thus consumer exploitation) directly, readdresses market incentives by establishing an actual example of consumers' points of view, and shifts the focus onto structural and widespread systemic risks of digital technologies.[11] In so doing, competition law enables authorities and courts with technical expertise and fact-finding capabilities to flexibly address skewed incentives in a practical and level-headed manner rather than anticipating future harms that may end up being difficult to ascertain and measure.[12]

But how is such consumer influence justified in principle? This part identifies three reasons for competition authorities and courts to afford consumers a discrete form of voice in data-driven markets: a) loyalty, b) amalgamation, and c) engagement of collective interests.

a) Loyalty

In concentrated markets, platform operators increasingly gather representations of people engaging in particular activities via the design of their products. Consumers, as a result, are often limited in their ability to

[8] Bundeskartellamt, Decision of 6 February 2019, B6-22/16.
[9] Bundesgerichtshof (23 June 2020) KVR 69/19 DE:BGH:2020:230620BKVR69.19.0; CJEU Case C-252/21, *Meta Platforms*, 4 July 2023.
[10] A Kuenzler, 'Direct Consumer Influence – The Missing Strategy to Integrate Data Privacy Preferences into the Market' (2020) 39 Yearbook of European Law, 423.
[11] A Kuenzler, 'Competition Law as a Catalyst for Collective Market Governance: Gauging the Discursive Benefits of Intensified Administrative Action' (2022) 41 Yearbook of European Law, 252.
[12] A Kuenzler, 'Third-Generation Competition Law' (2023) 11 Journal of Antitrust Enforcement, 133.

determine the structure of markets directly, that is, by switching segments. Yet consumers nonetheless retain effective avenues of influence. Consumers are influential because they can play a vital part as members of a segment, rather than as outsiders who merely switch providers. Hence, the primary source of the consumer's influence as a result of integration is loyalty, induced by increased personalization and customization of a platform's service. Loyal customers are particularly dedicated allies of an organization, who will stay on and contest the company's failings, in the sensible belief that their voices will be heard and improvement can be achieved 'from within' rather than from outside their favoured segment. Loyalty, in this sense, entails leverage and creates room for distinct avenues of influence, exercising pressure towards a firm's improvement.

This sort of influence, whereby consumers make valid contributions to the company's own output, can have a significant impact, especially in data-driven markets. When consumers are offered goods and services for free, they are paying not with money but with attention, or with the disclosure of personal information. Online platforms collect increasingly vast amounts of user data from various sources in order to make decisions on how best to combine, categorize and tailor content to consumers' preferences. Such platforms repeatedly employ consumers' data to produce creative content or utilize consumers' personal information to proffer new services and products. Access to consumer data has thus quickly become a competitive necessity, and a firm's inability to collect such data on a sufficiently large scale translates into severe competitive shortcomings. This also means that switching by consumers simultaneously gives rise to a decline in quality, which may in turn lead to further switching by consumers, triggering additional quality deteriorations, and so on. It follows that when consumers are engaged in the production *and* consumption of a platform's output, loyalty – that is, consumers being conscious of and retreating from the consequences of switching – may prevent quality deteriorations from occurring. Loyalty thus not only complements switching as a corrective mechanism; it also becomes a valuable source of leverage for consumers to further their objectives.[13]

The kind of influence that loyalty bestows upon consumers is perhaps best understood as a sequential device for dealing with quality deteriorations in data-driven markets. The conventional view places an emphasis on the initial stage, of consumers bargaining with product manufacturers and sellers, and puts its faith in these consumers choosing between several alternative offers. But in digital markets, the consumer's influence only grows *after* they have chosen from a set of competing offers; consumers may correct a firm's course of action through intensified administrative action if the firm begins to move in an unsatisfactory direction. Prior to the FCO's investigation, for example, Facebook repeatedly sought to change its policy to gain ownership over any content users had uploaded to the network. As a result of growing opposition, Facebook revoked its changes and set out to actively involve consumers in helping to devise the platform's terms and conditions of agreement. However, the company's involvement of consumers turned out to be an abject failure,

[13] A Kuenzler, 'Advancing Quality Competition in Big Data Markets' (2019) 15 Journal of Competition Law and Economics, 500.

since it required users to vote on policies they were averse to reading and engaged consumers only in helping to revise the platform's terms of service to the extent that those terms were attuned to Facebook's advertising-driven business model.[14] Here, affording consumers a path of influence through public competition law enforcement was ultimately a far more viable response to the consumer's disappointment than any other form of influence, including switching: the FCO set out to investigate – *and effectively readdress* – the policies of the leading platform on behalf of consumers; it actively engaged the platform's users in helping to redraw Facebook's terms and conditions of agreement, further reinforcing their loyalty and assisting the firm in putting an end to their issues. In so doing, the authority worked to reinstate product quality when other forms of consumer influence were unavailable or ineffective.

Rather than choosing between different segments, loyal consumers acting as the platform's allies are not confined to bargaining for alternatives but instead may seek to modify and adjust their favoured segment. Where the nature of the consumers' discontentment arises or transforms over time – for example when consumers learn how AI-driven inferences can affect them in practice, making them uncomfortable with the leading platform's data surveillance – voice enables consumers to ensure that their demands can effectively reach the market, albeit that market leaders may attempt to suppress them. Consumers who are attuned to a segment may shift the bargaining process back to the leading platform, compelling it to meet their expectations. This will help improve quality across the market – by impelling other platforms to consider their requests as well. In this manner, loyalty – that is, users remaining customers of the firm longer than they would otherwise and attempting to reanimate rather than leave the organization's segment – creates market-wide incentives to maintain quality. In addition, loyalty puts authorities and courts in a position to devise precisely tailored remedies that are responsive to the distinctive challenges that data-driven marketplaces pose. In this sense, loyalty involves the creation of new avenues of influence through which consumers can effectively communicate their disappointment.

This aspect of loyalty reflects a general feature of consumer influence as a result of integration: it puts consumers in a position where they can express their concerns precisely in every case. As a result of an authority's intervention, the information supplied to the platform is specified and plentiful, in contrast to the bluntness and starkness of the sovereign consumer's switching. Switching may suppress the reasons behind the consumer's dissatisfaction, whereas the articulation of complaints through administrative action affords precise detail about the firm's shortcomings. Consumers who switch may express their views more starkly, but their discontent may also remain unheeded. This is why consumer influence through administrative action permits consumers to set the agenda:[15] loyal customers typically demand a modification of those features of a platform they deem most apposite in order to reinstate quality.

[14] J Wortham, 'Facebookers Approve the New Policy, but Still Hate Redesign' The New York Times (2009) 24 April, sec Technology.
[15] W Lippmann, *Public Opinion* (Harcourt Brace 1922).

b) Amalgamation

Another reason to afford consumers a discrete form of authority over product manufacturers' segments is amalgamation. Amalgamation denotes a market situation where a firm's output remains significant even after consumers decide to switch, so that switching, in effect, is 'unattainable' and the consumer persists as a member of the segment despite the decision to no longer utilize the firm's product.

Amalgamation pertains to digital platform ecosystems of complementary products and services, such as those created by Google, Apple, Facebook and Amazon, which have come to dominate markets in search, mobile operating systems, voice assistants and social networking. Here, the centralized power of the platform's core service has become so overwhelming that there often is 'no escape' from being a user of at least some other service rendered by it. Take as an example the complementary services offered by Google's search engine, such as browsers, video streaming, email, maps and shopping applications. If a consumer continues to make use of an email application run by a dominant search engine operator that they no longer endorse, the user may cease to be a member of the search service offered but cannot eschew their dissatisfaction as a user of the email application that continues to function based on the deteriorating search engine. Purely loyalist behaviour, as illustrated thus far, would induce the consumer not to switch to another product because of some 'moral' or 'material' anguish they would themselves have to sustain as a result of switching. However, loyal behaviour as a consequence of amalgamation is motivated by the consumer's anticipation that the segment to which they belong would deteriorate even further if they left it, with the consumer continuing to care about the (quality of the) segment even after they have switched. In most conventional consumer goods markets, this sort of behaviour would scarcely occur. If a consumer becomes disappointed with the brand of soap they ordinarily purchase, they do not expect their switching to produce a further deterioration in the quality of their regular brand; and they would presumably not care about it any further, once they ceased to use it. But in data-driven markets where consumers are quality-makers rather than quality-takers, consumers who decide to switch may well contribute to additional deteriorations in the firm's output. A search engine's quality, for instance, is likely to reduce if the number of users declines – because the search engine will lack valuable feedback and data by quality-making consumers. This will further lower demand from the remaining users, and lead to further quality deteriorations, and so forth.[16] What is more, the consumer will continue to care about this deterioration, whether or not they remain a user of the search engine, when they come to utilize complementary services from the same producer. A customer, in switching from one service to another, will not therefore cease to be part of the respective market on which the declining platform operates, such as when consumers avail themselves of complementary email, messaging or shopping applications offered by the same firm.

[16] J Crémer, Y de Montjoye, H Schweitzer, *Competition Policy for the Digital Era* (Brussels 2019).

While in traditional market settings, switching by dissatisfied consumers will typically cause prices to be lowered or quality to be improved, in data-driven markets, switching by quality-making customers may cause a further deterioration in the quality of the firm's output. This is precisely because consumers are involved in supply and demand at the same time, with the effect that the quality of the complementary service will simultaneously decline, and consumers who switch will continue to be affected by that deterioration. Product manufacturers that depend on consumers as their quality-generating constituency, on their part, appreciate the consumer's loyal behaviour even more highly when the output or quality of the firm matters to them even after they have switched. Hence, where 'complete' exit is impossible, consumers will care about the consequences of switching for reasons that are distinct from purely loyalist behaviour, to the point that the prospect of further quality deteriorations will keep them from running off.

The bottom line is that avoidance of additional quality deteriorations in digital markets may serve as a powerful reason for action to be taken by competition authorities and courts on behalf of consumers. Although this may at first blush appear counterintuitive, over time, this justification is likely to only grow in importance, along with the increased cost of switching, especially if the firm reaches some intolerable level of deterioration. As quality deteriorations occur, the motivation to switch may become even weaker because consumers become progressively dissatisfied. For instance, consumers who are dissatisfied with Google's or Apple's operating systems and devices but are subscribed to independent applications may nevertheless continue to use Google's or Apple's products to obtain the content they desire. Here, the only viable alternative for consumers involves resigning from the entire market rather than substituting the particular product or service.

Indeed, in *Facebook*, the FCO observed that the design of Facebook's platform imposed upon consumers the sort of all-or-nothing choice that left them either having to agree to unlimited data collection or avoiding using the platform altogether. Where consumers' choices in the digital economy involve weighing the costs of withdrawing from the market against the costs of widespread quality deteriorations, voice becomes increasingly relevant to avoid harm to the economy and society. The remedy, then, does not reside in switching and separation or observing purely loyalist behaviour – simply bearing with the situation and hoping for improvement – but in loyalty and voice – engaging authorities and courts on behalf of consumers to demand accountability and reform.

There are additional benefits to giving way to consumer influence as a result of amalgamation in that it casts the consumer's challenge to the leading actor's policy as a real-life example of their point of view. Real-world examples are constructive in policy debates, as any push for change must demonstrate whether a novel approach will function (and this aspect turns out to be especially important when it comes to interventions such as structural break-ups and separations). When consumers can put their preferences into effect in concentrated settings, they may redraw the politics of the feasible. [17]

[17] G Brennan, P Pettit, 'The Feasibility Issue', in F Jackson and M Smith (eds), *The Oxford Handbook of Contemporary Philosophy* (OUP 2005), 258.

Consumers can inform leading actors about how they envisage their favoured segment operating in practice, while communication of their dissatisfaction enables authorities and courts to put in place a competing vision of that segment. Consumer influence that takes this form therefore creates space for consideration of issues that would otherwise likely be disregarded. Product manufacturers are required to attend to concerns they have neglected, and the arguments that bother the dominant firm's customers are given concrete shape.

c) Collective Interests

In addition to the above, in the digital economy, deteriorations in product quality may cause harm to the market as a whole – beyond the injury inflicted by a firm that lowers the quality of its ecosystem of products – resulting in broader economic and societal repercussions.[18] Affording consumers the ability to exert an influence on product manufacturers' segments may then reasonably address such consequences, apart from those that ensue from the affected segment's deterioration.

Take search engines or social networking platforms as an example, whose business models simultaneously affect the quality of other businesses such as the newspaper publishing industry. Today, newspapers progressively create content that enables leading platforms to attract users, and digital platforms are an essential source of traffic for news publishers. But the data advantages and abilities of the biggest platforms to collect user information have become a threat to the monetization of newspapers' investments because those platforms increasingly control access to, and data of, publishers about their users, capturing the advertising returns that would otherwise accrue to them.[19] At the same time, AI-driven technologies put those platforms in a position whereby they can progressively create artificially cheap and abnormally popular alternatives to the content generated by publishers. If the services offered by big technology companies affect a wide range of other actors in this way, a deterioration in the quality of their services may well have broad economic and societal consequences. Amazon's e-commerce marketplace and cloud computing infrastructure, for instance, are utilized by countless businesses and retailers, ranging from videoconferencing websites and streaming services to online merchants. Other networks of pervasive interconnections include Google Maps' application programming interface, Google Tags' and Analytics' measurement, marketing optimization and advertising intermediation tools, and Apple's operating system. The implications of these complex interconnections became visible when CrowdStrike distributed a faulty update to its security software product that was used in conjunction with Microsoft Windows by global corporations in a variety of sectors in 2024, which led to worldwide IT outages affecting airports, airlines, banks, hotels, hospitals, stock markets, broadcasting, and retail stores as well as governmental and emergency services, with an estimated financial

[18] RN Nelson, 'The Economic System Question Revisited' (2022) 31 Industrial and Corporate Change, 591.
[19] A Kuenzler, 'What Competition Law Can Do for Data Privacy (and Vice Versa)' (2022) 47 Computer Law and Security Review, 105757, 1.

damage amounting to over US$10 billion.[20] These examples illustrate how quality deteriorations in data-driven markets can propagate across entire networks of different sectors rather than remain contained within a single firm or isolated market. They also reveal a previously unobserved systemic importance of a handful of leading services that other actors may have a hard time avoiding.

The presence of collective interests in data-driven markets therefore accounts for a source of consumer influence that is wholly different from switching. While switching is typically cast as a response to the consumers' dissatisfaction, communication of discontent towards the firm is a response to the emergence of those (dimensions of) products and services whose features may have widespread repercussions on the economy and society as a whole. The harm that results from the decreased quality of search engines or social media platforms, for example, is a compelling reason for authorities and courts to afford consumers voice and to integrate their preferences into leading actors' segments. Big technology companies progressively lay claim to public spaces and assume roles and responsibilities that involve broad collective interests. Here, consumers who assume the role of ally and contender prevent widespread negative externalities from unfolding, thus improving the quality of the affected public good. That type of influence differs considerably from the purely private actions that consumers who switch ordinarily pursue. Switching terminates the relationship with the platform, and consumers resign from the respective segment. Loyal customers who exert an influence on product manufacturers and sellers through administrative action, by contrast, wield pressure by calling forth private and collective interests when big technology firms are seen as melding private and public spaces together. Where the most severe consequences of data-driven technologies affect the economy and society as a whole – such as when digital platforms usurp newspapers' content, disintegrate it into a collection of disparate snippets, commoditize it for their profit, and run the risk of devaluing its underlying investments – reliance on consumers' autonomous decisions to switch may displace the more dispersed but equally urgent collective interests. Consumers who act as loyal allies to and contenders for leading platform operators, by contrast, act with an authority's permission to simultaneously convey their disagreement about the quality of the services that benefit all members of society. When collective interests are engaged, the consumer's loyalty is thus distinct from the consumer's loyalty that results from amalgamation: consumer influence arises as a result of widely shared demands for the market to be a receptive conduit to uphold, and defend, fundamental societal norms and values.

With amalgamation, users who are members of an ecosystem of products and services all benefit from a high-quality standard within that segment, and loyal behaviour on the part of consumers produces benefits that are frequently neglected when we contemplate only the private inconveniences consumers sustain due to their own private decisions (not) to switch. When collective interests are involved, loyal behaviour by consumers who at the same time

[20] LK Wee, 'Here Comes the Wave of Insurance Claims for the CrowdStrike Outage' (2024) Business Insider 22 July, Sec Tech.

voice their dissatisfaction is justified by the expectation that sole reliance on consumer switching would also affect a society's collective interest, not just the quality of the products and services in question. Loyal consumers are differently and more broadly invested than consumers who simply switch. They can avail themselves, at least partly, of a collective voice, albeit one that originates from wholly private interests.

3. Giving Way to the Consumer's Voice in Practice.

What are the practical consequences of affording voice to consumers in data-driven markets? When we think about the significance that digital technologies currently have in relation to our economies and societies, we instantly recognize that the ecosystems of dominant platforms progressively determine which innovations are brought to market, what goods and services are purchased, how revenues are distributed, and what choices consumers can make. This means that the incentives that big technology platforms possess crucially affect the economy and society at large, but these platforms do not necessarily take into account what consumers want and what society needs.

The larger point is that competition law can make technology *care* for societal goals if it can help the platforms better align their underlying incentives with the preferences of consumers, citizens, and, ultimately, society as a whole.[21] Authorities and courts investigate data-driven markets on behalf of consumers to make concentrated markets more responsive to consumer interests. Competition law necessitates product design based on the preferences of consumers and the platforms' user base, not just on those of advertisers and big technology firms themselves.[22]

To illustrate, consider again the FCO's investigation in *Facebook*. The investigation turned around Facebook's introduction of its Like, Share and Login buttons on its social media platform. The buttons were sold as products offered to independent businesses to improve their website functionality and increase revenue. If a user liked an article on, say, the *Economist's* website, Facebook would display the user's activity and inform their friends about the article. As a result, more users visited the *Economist*, which generated more income. According to Facebook, this would increase website traffic on average by 200–400%. Thousands of publishers and third-party websites and applications thus flocked to install Facebook plugins, hoping for incremental advertising revenue. However, Facebook plugins required independent businesses to install Facebook code on their own websites. This opened a backdoor means of communication between users' devices and Facebook's servers.[23] In this way, Facebook could glean users' data and behaviour. Many third-party websites and applications competed with Facebook on the

[21] A Kuenzler, 'Competition Law Enforcement on Digital Markets – Lessons from Recent EU Case Law' (2019) 7 Journal of Antitrust Enforcement, 249.
[22] A Kuenzler, 'Intellectual Property on the Cusp of the Intangible Economy' (2021) 16 Journal of Intellectual Property Law and Practice, 692.
[23] D Srinivasan, 'The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16 Berkeley Business Law Journal, 39–101.

advertising side of the market, but Facebook's collection of information about users could be utilized against competitors and consumers to weaken rivals' value and pricing power in relation to information about them. This market structure led to a sharp deterioration of the pricing power of actors across the horizontal market and resulted in Facebook's market dominance.

In its investigation, the FCO found that Facebook collected excessive amounts of user data without users' actual knowledge and consent. The remedy that the authority imposed required Facebook to give users more control over their private information, enabling them to withdraw their consent partially or completely and to turn off tracking across the horizontal market. This allowed consumers to limit the information that appeared and was disseminated on Facebook's platform. The remedy also benefited third-party websites and applications because they now remained the main gateway to discovering new products and content. Rather than breaking Facebook up, the platform could maintain its size, benefit from economies of scale and scope, including network effects, make new investments, and even add additional parties to its network.

Before the authority's intervention, Facebook simply looked at its incentives; it did not provide consumers with an opt-out right, although this would have been relatively simple to implement at scale. *After* the authority's intervention, the market grew more responsive to consumers' preferences. Consumers could control the platform's data tracking, and the significance of privacy was growing. Other companies that sought to accommodate a greater extent of privacy could benefit from doing so and could gain a competitive advantage relative to those that paid only minimal or no attention to what consumers were willing and able to demand. Some came up with novel technological features, others established alternative funding methods for advertising and monetization of digital content, and again others explored solutions that involved consumers in the sale, sharing and negotiation of fair market value for their personal information.

Importantly, when authorities and courts modify big technology companies' terms and conditions of agreement to afford consumers a greater extent of control over the public flow of personal information, those authorities also restrain the platform's own command over the information flows that shape social and political discourse. A higher degree of user control concerning such information may then also contribute to helping ensure a role for democratic values, pluralism and the political process, because such user control imposes additional restraints on the uninhibited spread of personal information. This is not to claim that competition law can solve the entire privacy problem or all problems relating to misinformation, but the FCO's investigation played a crucial role in significantly mitigating these issues for users, competitors and affected parts of the population.

We see something similar to *Facebook* when authorities and courts compel trusted search engine operators such as Google not to unduly diminish the visibility of competitors' offers in their search results, provided that such search results are expected to be ranked by relevance. Here, authorities put consumers in a position to 'vote with their fingers' for the editorial policy the platform purportedly adopts in hosting and amplifying user- and third-party-

generated content. Consumers can insist on the integrity and accuracy of (the part of) the platform's service that they truly value. In addition, such interventions contribute to restraining the extent to which those platforms are able to disproportionately influence public discourse by manipulating individual beliefs and personal behaviour.

The point is that the simple creation of more competition, achieved through break-ups or divestitures, will not always result in better policies. Given the economy's current backdrop of advertising-driven business models, more competition between multiple smaller platforms may, in fact, produce new companies that engage in an even greater extent of attention-seeking behaviour. By contrast, integration of consumer preferences into leading actors' businesses affords consumers the ability to articulate themselves effectively on behalf of the segment that they truly value.

There are several additional instances in which competition law contributes to positive technological change in this manner. For instance, Amazon's growing use of customer data has been challenged because the company exploited its position as a platform and a seller by appropriating the private business information of third-party dealers to privilege its private-label products and ultimately supplant the products of competitors.[24] Apple, on the other hand, has been accused of requiring independent developers to sell exclusively through its App Store and via its payment system, taking big cuts off each transaction. [25] In both cases, integration rather than separation appears to be more adequate to fully bring to bear the platforms' technological potential and to simultaneously cater to consumers' preferences. A narrowly tailored ban on product imitation and/or self-preferencing benefits all actors: it effectively targets the dubious practice while still allowing the promotion of a diversity of offers, reducing search costs for consumers and maintaining incentives for third parties to sell superior merchandise together with the platforms' private-label goods.

All this demonstrates that competition law can promote innovation and effectively contribute to the improvement of digital technologies. Competition law should thus be part of solving the problems inherent in the digital ecosystem. It is likely to be an effective tool together with other legal instruments such as tort, consumer and data protection law, including new regulatory measures. The most effective mechanisms may also turn out to be relatively modest competition law interventions – more often than break-ups or divestitures – but they can have an immensely beneficial impact on society, businesses and individuals.[26]

4. Conclusion.

Typically, policymakers and theorists envisage consumers exerting an influence on product manufacturers and sellers through switching, and

[24] EC AT.40462 and AT.40703 of 20 December 2022, Amazon Marketplace and Buy Box.
[25] EC AT.40437 of 4 March 2024, Apple (music streaming).
[26] D Acemoglu, S Johnson, *Power and Progress: Our Thousand-Year Struggle Over Technology and Prosperity* (Public Affairs 2023).

switching is a prerequisite for markets to operate effectively. But in the digital economy, market leaders may purposely degrade the quality of their products, triggering incentives for other actors to underinvest in quality, for instance by collecting a greater amount of personal data and maximizing their profits without supplying some cogent benefit to consumers.

Even when consumers have no trouble choosing between different alternatives, they are frequently unable to put their preferences into effect. With switching, the only competitive force at work is for leading actors to vie for market shares rather than for consumer preferences – a difference that matters a great deal in concentrated markets where advertising-driven business models prevail. Many customers see no benefit to that competition if they have strong preferences for privacy, diversity or editorial integrity – preferences that will scarcely be accounted for simply because more actors begin to compete.

Here, authorities and courts must increasingly work to readdress market incentives, by compelling big technology companies to integrate consumer preferences into leading actors' segments. This does not involve deposing or removing leading market actors or upending well-established ecosystems. Instead, when authorities and courts readdress incentives, market forces and self-interest will do the rest. Significantly, market dynamics will grow exceedingly more responsive to consumer interests, and other actors will show a greater willingness to act on them. Big technology companies, on their part, will progressively anticipate a future in which markets are receptive to the demands of their own customers, such as when they gradually care more about the collection, use and sale of personal information, because the majority of users can now act on those restrictions.