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## **“DIGITAL GANGSTERS”: ARE FACEBOOK AND GOOGLE A CHALLENGE TO DEMOCRACY?**

*Clara Alves Rodrigues \**

### **ABSTRACT**

This paper analyses how Facebook and Google’s innovative business models might be posing a threat to democracy. Their economic concentration has made them powerful enough to enforce a technological determinism: all technology that happens must happen as it does and could not have happened any other way. This determinism actively violates the principle of representative government because it gives regulatory power to non-elected private companies. Furthermore, the individual autonomy of citizens is violated by requiring consent to unfair user agreements which incorporate indiscriminate surveillance and data-mining which is able to predict and modify behaviour. This paper aims to generate public debate about Facebook and Google's challenges to democracy.

**Keywords:** Democracy, competition law, technology, regulation, autonomy, surveillance capitalism

### **I. Introduction**

This paper aims to analyse whether the disruptions Facebook and Google have made in law and technology are affecting democratic principles. Namely, it will assess whether these companies are going against the basic principles of representative government and individual self-governance. The principle of a representative government concerns the equal right of all citizens to take part in decisions governing them. The principle of self-governance or self-determination relates to the right of people to decide their destiny.<sup>1</sup> One right cannot exist without the other. Citizens cannot equally take part in a decision if they do not have the right to choose. Citizens do not have the right to choose if they cannot equally take part in deciding who or what governs them. Accordingly, this paper will examine whether these companies pose a threat to democracy by looking at the applicable law and its history; analysing existing case law and the current economic environment; and drawing up empirical evidence.

Although there may be other tech companies that are subverting the law and consequently, the principles of democracy, this paper focuses on Facebook and Google due to their uniquely

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\* Clara Alves Rodrigues is currently completing a master in International Technology Law at the Vrije Universiteit Amsterdam.

<sup>1</sup> Unrepresented Nations & Peoples Organisation, “Self Determination” at <https://unpo.org/article/4957>(accessed on 03.06.2019).

dangerous business model. This break-through business model is what Shoshana Zuboff<sup>2</sup> calls "Surveillance Capitalism"<sup>3</sup> and will be examined further in this paper.

The first section of this paper will look at how law has hibernated in the face of new technologies and how this goes against the principle of representative government. The hibernation of law is two-fold. First, this paper will examine how the law has failed to adapt to the exponential economic growth of Facebook and Google. This exponential growth has to do with the structure of the two companies, and will be analysed in light of applicable competition law regulation and its history. Relevant examples in existing case law will follow the doctrinal research and legal history of competition law. Tim Wu<sup>4</sup> analyses this in his book, "The curse of Bigness."<sup>5</sup> The paper will examine the danger of these companies and reflect on how current competition law should adapt to the disruptions they have caused. Secondly, the hibernation will be analysed from the perspective of the technologies Google and Facebook have created *per se* and how the law is having a hard time adapting to them. This hibernation has to do with "what" the companies have created and "how" they are subverting the law. Facebook and Google have stated that law cannot keep up as a way to defend technological determinism. In his next book, Professor Fairfield will provide an in-depth analysis of how this is theoretically and empirically untrue and explain how the issue of technological determinism should be addressed.<sup>6</sup> By drawing from Professor Fairfield's ideas, this paper will address the issue of legal adaptation.

The second part of this paper will look at how the uncontrolled behaviour of Facebook and Google may pose a threat to the autonomy of individuals. Since these two companies have almost monopolised the search engine and social media markets, they are the only ones who provide a service that is essential in the 21<sup>st</sup> century.<sup>7</sup> The first interference lays, therefore in the little choice citizens have in contracting with Facebook and Google and the lack of free will in what the contract stipulates. The second interference with the right of autonomy or freedom of the individual is the innovative business model that Facebook and Google have introduced. This business model functions by extracting and analysing the data of its users to predict their behaviour.

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<sup>2</sup>Shoshana Zuboff joined the Harvard Business School faculty in 1981 and was the Charles Edward Wilson Professor of Business Administration. In 2014 and 2015 she was a Faculty Associate at the Berkman Center for Internet and Society at Harvard Law School. Her career has been devoted to the study of the rise of the digital, its individual, organisational, and social consequences, and its relationship to the history and future of capitalism - <https://www.shoshanazuboff.com/new/about/>

<sup>3</sup> S. Zuboff, *The Age of Surveillance Capitalism*, London: Profile Books Ltd 2019.

<sup>4</sup> Tim Wu is a professor at Columbia Law School, and a contributing opinion writer for the *New York Times*. He is best known for his work on Net Neutrality theory. He is author of the books *The Master Switch*, and *The Attention Merchants*, along with *Network Neutrality*, *Broadband Discrimination*, *The Curse of Bigness* and other works. In 2013 he was named one of America's 100 Most Influential Lawyers, and in 2017 he was named to the American Academy of Arts and Sciences, <http://www.timwu.org/about.html>

<sup>5</sup> T. Wu, *The Curse of Bigness*, Columbia Global Reports, 2018.

<sup>6</sup> Professor Joshua Fairfield is an internationally recognised law and technology scholar, specialising in digital property, electronic contract, big data privacy, and virtual communities. He gave a talk to the Master of International Technology Law on "Can Law Keep Up With Technology?" After the talk, he gave access to his unpublished book on Google docs. The book centers on the need for the development of new language to tackle issues of technology and human cooperation. Many people with different backgrounds and fields of expertise have access to the book and can comment on it, portraying the spirit of public debate and cooperation the book calls for.

<sup>7</sup> S. Zuboff, *The Age of Surveillance Capitalism*, London: Profile Books Ltd 2019.

Consequently, due to its accurate predictions, it can modify behaviour. The manipulation of human behaviour is arguably the ultimate violation of individual autonomy because it makes a person take a decision without knowing of any interference. Based on the ideas of Shoshana Zuboff in her recent book “Surveillance Capitalism”, this paper will study the foundation of this business model and its implications.

With a foundation in the ideas of Shoshana Zuboff, Tim Wu and Joshua Fairfield, this paper aims to analyse the way technology has been developed as well as its legitimacy and dangers. By providing a review of the implications of modern technology this paper desires to provide a more thought-through future that is in conformity with the principles of democracy and protects the rights and freedoms of its citizens.

## II. Principle of Representative Government

### II.1. What is the Concern of Economic Concentration?

Competition law is meant to be a check on private power. It aims to guarantee that concentrated economic growth does not translate into a private power that can control the conditions in which the market operates and bears political influence. The European Commission has adopted a more economic approach (MEA) in the last few years. This approach has reduced the number of prohibited mergers.<sup>8</sup> When companies want to merge, they notify the Commission to review and approve the transaction. However, the referral mechanism only operates if the merger meets the turnover thresholds in the regulation.<sup>9</sup> Because services are given for free in the information technology (IT) world, and personal data is seen as currency, this leads to an underenforcement of law. For example, neither Facebook's acquisition of Instagram nor Google's acquisition of Waze met the turnover thresholds, yet neither was referred to the Commission.<sup>10</sup>

The Facebook WhatsApp merger was also cleared by the European Commission. WhatsApp is one of the most widely used messaging apps in the world. In the UK, for example, it is the most downloaded messaging app, and its monthly users top Facebook and Facebook messenger.<sup>11</sup> However, the European Commission argued that they were in different markets since Facebook uses advertisements, and WhatsApp does not. The Commission further justified the decision on the existence of other competition (like Telegram), on the fact that consumers use more than one app – meaning network effect would not pose too much of a barrier to entry or constitute a big expansion post-merger.<sup>12</sup> However, Facebook stated there was no technology available to match users and create a unified messaging platform. Facebook was later fined because, at the time, it already had people working on ways to match Facebook and WhatsApp.<sup>13</sup> This should not come as a surprise, given the substantial profit to be made from the transaction. WhatsApp was valued at ten million euros and Facebook ultimately bought it for 19 billion euros.<sup>14</sup> Ask any kid who has played the Monopoly game, and she would understand the clear power move this is and the risks of owning more of the same type of land. Inevitably, everyone will pass through your land, which makes it easier to invest in their exploitation.

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<sup>8</sup> Wu 2018, supra note 5.

<sup>9</sup> Council Regulation (E.C.) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (the E.C. Merger Regulation).

<sup>10</sup> A. Italianer, “Competition Merger Brief”, *European Commission*, 2015-1.

<sup>11</sup> B. Bucher, “WhatsApp Has Grown its User Base by 20% in the U.K.”, *Messenger People*, 2019 at: <https://www.messengerpeople.com/whatsapp-user-base-uk/> (accessed on 03.06.2019).

<sup>12</sup> Italianer 2015, supra note 9.

<sup>13</sup> Case No. M. 8228 (FACEBOOK / WHATSAPP), Merger Procedure, 17.5.2017.

<sup>14</sup> Italianer 2015, supra note 9.

Examples from the past shed light on the importance of checks on private power. The Gilded Age - the late 19<sup>th</sup> century in the United States - was a period characterised both by significant economic growth and by great income inequality. Companies like Standard Oil and US Steel bought every company to make their trusts and ensure their monopolies. The political ideology of "social Darwinism" - or survival of the fittest - enabled monopolies to do what they wanted and justify anti-competitive behaviours that destroyed any competition. For example, John Pierpont Morgan created US Steel by paying his competitor, Andrew Carnegie, so much money that he became the richest man in the world. Standard Oil used predatory pricing and bribed the government to pass laws to exclude any would-be competitor.<sup>15</sup> The Gilded Age was followed by the trustbuster period, which was started by President Roosevelt. Roosevelt understood that an oligarchy was against the basic principles of democracy. Since economic power inevitably translated into political power in the United States, it was transferred from elected representatives to companies.<sup>16</sup>

Competition law should be about more than prices and economic arguments. Democracy is a system that decentralises power and constraints authority so that citizens have power over who governs what. If an economic power is excessively concentrated in a few companies, the welfare of citizens is left in the private discretion of a few.<sup>17</sup> The reduced choice in an oligarchy market means that citizens cannot opt out of using the services of the few companies available. Consequently, the product is no longer dictated by the wants of the consumers but enforced by the remaining companies due to lack of competition. Furthermore, to maintain their dominance, as seen above, they aim to kill potential competition either by investing in barriers of entry or by buying out new companies. Facebook has bought 80 companies including Instagram and WhatsApp<sup>18</sup>. Google has purchased an astounding amount of 235 companies including YouTube, Double Click, Waze, Motorola Mobility and Deep Mind.<sup>19</sup> Consequently a vicious cycle of lack of competition where consolidated companies buy new companies and gain even more market power is created. Additionally, it preserves the wills of big companies in innovation and technology since small companies or start-ups know that the only way to be successful it to create a product that will be bought out by a big company. Consequently, even new companies act according to the wills of Facebook and Google and not the consumers.<sup>20</sup> This concentration is especially relevant for Google and Facebook because they are in control of how and for what purpose technology is created. The implications of this control will be discussed in the next section.

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<sup>15</sup> Wu 2018, supra note 5, p. 59.

<sup>16</sup> Wu 2018, supra note 5, p. 55.

<sup>17</sup> R. Pitofsky, "The Political Content of Antitrust", *University of Pennsylvania Law Review* 1979-127, at: [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4867&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4867&context=penn_law_review) - (accessed on 16.07.2019).

<sup>18</sup> "List of mergers and acquisitions by Facebook", Wikipedia, at: [https://en.wikipedia.org/wiki/List\\_of\\_mergers\\_and\\_acquisitions\\_by\\_Facebook-](https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Facebook-) (accessed on 16.07.2019).

<sup>19</sup> List of Google's Acquisitions, Crunchbase, at: [https://www.crunchbase.com/search/acquisitions/field/organizations/num\\_acquisitions/google](https://www.crunchbase.com/search/acquisitions/field/organizations/num_acquisitions/google) - (accessed on 16.07.2019).

<sup>20</sup> M. Vestager, "Shaping Competition Policy in the era of Digitalisation: Welcoming Speech", European Commission, 17.01.2019, at <https://webcast.ec.europa.eu/shaping-competition-policy-in-the-era-of-digitalisation>, (accessed on 16.07.2019).

Furthermore, concentration also makes it easier to organise political goals that create anti-democratic political pressure. Reports state that Facebook spent \$12.62 million dollars and Google \$21.2 million on lobbying the US government in 2018 to influence lawmakers and regulators on privacy and antitrust rules.<sup>21</sup> These numbers make them among the top spenders on lobbying in Washington. In Europe, leaked documents from a court case of the app developer six4Three against Facebook reported that the former threatened Europe of investing elsewhere if they were not given certain reassurances in 2013.<sup>22</sup> Although the GDPR was enforced, the documents reported a great relationship between Facebook and Enda Kenny the prime minister of the Irish Government. The document reports that due to his presidency, in 2013, the Irish prime minister could influence the European Data Directive Decisions, which were being discussed at the time.<sup>23</sup> Furthermore, after the GDPR entry into force the concern lies with the Irish data controller. Silicon Valley companies, of which also Facebook and Google, have chosen Ireland due to its promising favourable conditions. Since the lead regulator has to be in the country in which the countries have their data controller, Ireland's data protection commissioner acts for all 28 Member States.<sup>24</sup>

Economic concentration also leads to underenforcement of the law since fines are viewed as a business expense instead of a deterrent of behaviour. Due to their companies value Google was able to keep committing privacy infringement with Google street view even after several lawsuits.<sup>25</sup> Another more recent example is the fine Facebook received of \$5bn from the Federal Trade Commission in the United States for the Cambridge Analytica privacy violations.<sup>26</sup> Not only is this just one month of revenue for Facebook and less than a quarter of Facebook's annual profit but also, the share price actually went up after reports confirmed the amount of the fine, which was the amount that Facebook expected it to be.<sup>27</sup>

One solution to this, as argued by Wu, is to rely less on economics and have a stricter and broader standard in favour of competition law enforcement. For example, by setting a higher bar for giant mergers or having a *per se* ban to mergers that reduces competing firms to less than four.<sup>28</sup> This approach is one way to guarantee future competition and safeguarding innovation, which is extremely important in the technology world. By relying less on economic arguments, it is also easier to invite public debate and even allow the citizens to file complaints and intervene. Breakups should also be considered. Breaking up companies can make them more efficient, as

<sup>21</sup> P. Dave, "Google, Facebook spend big on U.S lobbying amid policy battles, Reuters, 23.01.2019, at: <https://www.reuters.com/article/us-tech-lobbying/google-facebook-spend-big-on-u-s-lobbying-amid-policy-battles-idUSKCN1PG2TD>, - (accessed on 16.07.2019).

<sup>22</sup> J. Edwards, "This is not a threat: Facebook denies it would have pulled investment from Europe and Canada if demands were not met", Business Insider, 04.03.2019 at: <https://www.businessinsider.nl/facebook-threatened-to-pull-investment-from-ireland-and-canada-2019-3/?international=true&r=US> - (accessed on 16.07.2019).

<sup>23</sup> C. Cadwalladr, "Revealed: Facebook's global lobbying against data privacy laws". The Guardian, 02.03.2019, at: <https://www.theguardian.com/technology/2019/mar/02/facebook-global-lobbying-campaign-against-data-privacy-laws-investment> - (accessed on 16.07.2019).

<sup>24</sup> N. Vinocur, "Millions of Americans rely on Europe's tough new privacy rules to safeguard their data, but the law's chief enforcer - Ireland - is in bed with the companies it regulates", 24.04.2019, at: <https://www.politico.eu/interactive/ireland-blocks-the-world-on-data-privacy/> - (accessed on 16.07.2019).

<sup>25</sup> S. Zuboff, "Big Other: Surveillance Capitalism and the Prospects of an Information Civilisation", *Journal of Information and Technology*, 2015-30

<sup>26</sup> <https://www.theguardian.com/technology/2019/jul/12/facebook-fine-ftc-privacy-violations> 16.07 - 13:52

<sup>27</sup> <https://www.marketwatch.com/story/facebook-stock-hits-highest-price-in-nearly-a-year-after-reports-of-5-billion-ftc-fine-2019-07-12> - (accessed on 16.07.2019).

<sup>28</sup> Wu 2018, *supra* note 5, p. 129.

was the case in the Standard Oil breakup. It can also raise the quality of competition with regard to privacy protections.<sup>29</sup> Corporate fines often seem to be of enormous magnitude, but when compared to the profits of major technology companies, they are insignificant. In practice, such fines are experienced more as a cost of business than a deterrent or sanction for illegal behaviour.<sup>30</sup> Furthermore, the European Commission when addressing anti-competitive behaviour only established behaviour commitments and no structural reliefs. When the Commission fined Google €4.34 billion for illegal practices regarding its use of Android mobile devices, it also required Google to stop the illegal conduct and refrain from similar abusive behaviour in the future.<sup>31</sup> Behaviour commitments are expensive, due to the constant monitoring they require. They are also reasonably inefficient when applied to companies of this magnitude, which have enough economic stability to bear comfortably the fines imposed in case of breach. This financial stability leads big tech companies to have little regard for the law and renders the judicial system ineffective. Structural remedies and breakups, on the other hand, are self-executing and consequently provide a more effective way to punish and deter the misbehaviour of companies like Google and Facebook.

An UK report sponsored by the government came out this March also recommending for a more frequent and firmer action to challenge mergers.<sup>32</sup> However, instead of break-ups, they propose a code of conduct and data mobility as means to deliver greater competition and innovation. Power would be disseminated as new players will enter the market provided with data and ensuring that there is no abusive behaviour from the tech giants. Although having effective competition is a good way to spread market power, these companies would still have the economic concentration to bear the costs of infringement. Hence, breakups could be a good first step to tackle the political concerns raised by the concentration of power into a single company or platform. The second would be data mobility to ensure democracy by decentralising market power.

## II.2. Who should regulate technology?

Facebook and Google have presented a story of technological inevitability to dismiss the law and any attempts at regulation. However, as Joshua Fairfield argues, this is just a story that serves as a great marketing campaign.<sup>33</sup> Consequently, there are many examples of how this is empirically not true. The most evident is the General Data Protection Regulation (GDPR). The GDPR comes into force after years of having privacy denied and unregulated, obliging Facebook and Google to comply with it. Even before the GDPR, the Court of Justice of the European Union (CJEU) ruled that Google had to admit requests from individuals to remove links to freely accessible web pages resulting from a search of their name.<sup>34</sup> Another example is the case of *Licra v. Yahoo*, where there was an open online auction of Nazi memorabilia, which is forbidden in France. Yahoo claimed that it was impossible for their company to ensure that no French citizens participated in the auction. However, experts argued that most French internet users could be

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<sup>29</sup> Wu, 2018, *supra* note 5, p. 133.

<sup>30</sup> S. Zuboff, "Big Other: Surveillance Capitalism and the Prospects of an Information Civilisation", *Journal of Information and Technology*, 2015-30, p. 75-89.

<sup>31</sup> European Commission, "Antitrust: Commission Fined Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine", *Press release*, 18 July 2018, at: [http://europa.eu/rapid/press-release\\_IP-18-4581\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4581_en.htm) (accessed on 03.06.2019).

<sup>32</sup> Digital Competition Expert Panel, "*Unlocking digital competition*", Crown copyright, March 2019

<sup>33</sup> Fairfield, *supra* note 6.

<sup>34</sup> Case C-131/12, *Google Spain and Google*, 2014.

identified with DNS databases. Yahoo was then forced by the court to deny access to French citizens based on their DNS databases.<sup>35</sup>

Theoretically, it is also impossible to claim that “law is dead” or that it cannot keep up. As Fairfield argues, law is the mere regulation of human behaviour and therefore, it develops with it. Technology also inevitably regulates human behaviour by determining what someone can and cannot do. Consequently, technology is never neutral, it has inherent “laws” that dictate what kind of behaviour is allowed. There is an inherent choice of values, rights and freedoms that are built into technology. In a revolutionary book, Lawrence Lessig has shown how the code behind technology is law, as it regulates human behaviour.<sup>36,37</sup> Therefore, the individuals responsible for engineering the code are those who decide what can and cannot be done – our liberties. Consequently, “law” is being created every day; however, it is in the hands of private companies, namely, Facebook and Google. As society goes from physical to digital, laws have to be made through the code underlying technology.

The concept of “smart cities” illustrates how the physical and digital world interacts the most. A “smart city” seeks to digitalise the city by incorporating sensors into objects, bodies and places. Furthermore, it collects and analyses the information to explore different solutions to urban issues and optimise its resources.<sup>38</sup> Due to the development and consequently, complexity of technology, it is unavoidable to create public-private partnerships to keep up with state-of-the-art ideas and systems. Consequently, the government acts more like a broker, buying and organising the services from the private sector.<sup>39</sup> The protection of human rights is therefore left in the hands of who designed the smart city. For example, the right to privacy can only be granted to citizens of Smart Cities if it is incorporated in the technology that governs it, producing privacy by design.

The technological approach to a smart city can be completely different. Toronto partnered up with Google’s parent company Alphabet. In the project proposal, there was an explicit guarantee to safeguard the right to privacy, but the project remained secretive. However, an advisor of the project quit due to lack of transparency and doubts that it would follow through.<sup>40</sup> On the other hand, there is the case of Barcelona where priority is being given to transparency. Transparency invites an information-sharing culture and public debate where the government, citizens and private entities are all involved in the decision-making process. Public debate has fostered innovation while guaranteeing respect for human rights.<sup>41</sup>

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<sup>35</sup> C. Duh, “Yahoo! Inc. LICRA”, *Berkeley Technology Law Journal*, 2002-1, p. 359-378.

<sup>36</sup> Lester Lawrence Lessig III is an American academic, attorney, and political activist. He is the Roy L. Furman Professor of Law at Harvard Law School and the former director of the Edmond J. Safra Center for Ethics at Harvard University.

<sup>37</sup> L. Lessig, *Code Version 2.0*, New York: Basic Books 2006, p. 4.

<sup>38</sup> IBM Institute of Business Value, “A Vision of Smart Cities, 2019, at: [https://www-03.ibm.com/press/attachments/IBV\\_Smarter\\_Cities\\_-\\_Final.pdf](https://www-03.ibm.com/press/attachments/IBV_Smarter_Cities_-_Final.pdf)

<sup>39</sup> R. Kitchin, P. Cardullo & C. Di Feliciano, “Citizenship, Justice and the Right to the Smart City”, *The Programmable City Working Paper* 2018-41.

<sup>40</sup> S. Fussell, 'The City of the Future is a Data-Collection Machine', *The Atlantic*, 21 November 2018, at: <https://www.theatlantic.com/technology/archive/2018/11/google-sidewalk-labs/575551> - (accessed on 03.06.2019).

<sup>41</sup> M. Dean, 'A digital right to the city: who defines democracy in smart cities?', at: <https://www.bangthetable.com/blog/digital-right-to-the-city/> (accessed on 03.06.2019).

How to regulate technology is a difficult but unavoidable question. Existing laws are hard to apply due to their disruptive business models that provide services for free and hard to define markets. New laws are also difficult to conceive due to the unknown implications.

Consequently, the best answer to how to regulate technology is through communication. There is a need to inform the citizens and involve them in the public debate. In a democracy, the state should not have the sole power to decide over the usage of technology. However, technology should also not be in the hands of a few tech companies and corporate profits as in Europe. The innovations in technology do not mean that we are on the right path. In the same way that continuing to drive your car through new roads does not mean you are on the right path, especially when you have not even decided where you want to go. You should stop, decide where to go and ask for directions. Technology is a social tool, and the only way to ensure that it is used for citizens' well-being is to have everyone involved in the decision-making process surrounding technology. Consequently, there should be regulations making sure this is not left solely in the hands of Facebook and Google.

### **III. Autonomy of Individuals**

#### **III.1. The Capacity to Choose**

Facebook and Google are almost indispensable in the 21<sup>st</sup> century. The issues of their indispensability joined with economic concentration have already been addressed in the first part of the paper. In this part, it will be addressed from a micro perspective, from the point of view of the "user" of such utilities.

Information and communication technologies are now more widespread than electricity.<sup>42</sup> They are a need in everyday life and social participation. Facebook owns 76,3 per cent of the market in social media in Europe and Google owns an astounding 93,85 per cent share in the search engine market in Europe. This dominant position and lack of real competition make it almost impossible to avoid these two companies on our day to day lives. Consequently, it is fair to say that any agreement to the "terms of service" or "privacy policy" is forced, due to lack of choices. The fear of forced consent is safeguarded in Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts. The directive stipulates that "user agreement" or "privacy policy" cannot be subjected to individual negotiation, and could be deemed illicit depending on the nature of the goods, services and context.<sup>43</sup> This directive has been made obsolete in the digital world because digital services cause disruption by being free. Therefore Clickwraps, agreements in which a user has to agree with the conditions to use the product or service, have been upheld by courts. However, an unfair practice justified by an agreement with no choice is an attack on individual autonomy. Therefore, to protect individual autonomy, these terms need to be heavily regulated, and its lawfulness regularly inquired in accordance to the GDPR.

There is a certain fear that by imposing laws on technology and making it less "free", this will stifle innovation and do more harm than good for society. However, in practice, what happens in the absence of the state? If we removed any control, for example by abolishing the constitution, would we be more or less free? Would we have more or fewer rights? It is easy to understand, from this perspective, how we would argue the latter. If there were no legal text establishing our rights and

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<sup>42</sup> S. Zuboff 2019, *supra* note 4, p.4

<sup>43</sup> Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts at: <https://publications.europa.eu/en/publication-detail/-/publication/58215d6f-381b-4ff1-8566-a32538137b22/language-en> (accessed on 03.06.2019).

freedoms and enforcing them, then they would not exist. We would consequently be at the mercy of the strongest and most powerful, be that the state, a private entity or an authoritative individual. Constitutions and regulations exist to guarantee and safeguard these rights, not to take them. Therefore, it can be argued that liberty is built on a particular kind of thought-through control.<sup>44</sup> So, when Facebook and Google advocate for freedom of law, they are advocating for the freedom to exploit you. Without the possibility of opting out of data-mining and surveillance practices, which will be discussed below, users have no choice but to consent to an abusive contract with Facebook and Google.

### III.2. The Capacity to Make a Decision

Here is where Facebook and Google diverge completely from other tech companies. Their business model is something completely new that has been named by Shoshana Zuboff as "Surveillance Capitalism".<sup>45</sup> It is important to note that the first crucial step is to give a name. As Fairfield has argued, change starts in a language and communities, only after can there be rules and enforcement in courts. To address an issue, we have to name it and define it. This definition is the first crucial step to start a discussion and to try to find solutions. Only then can we regulate.

Google and Facebook use the human experience as free raw material that is then transformed into behavioural data and sold. They profit from users' experience hence the name surveillance capitalism.<sup>46</sup> By collecting, processing and analysing users' data, they can predict and sell behavioural data (Big Data) to advertisers. Surveillance capitalism has brought three main disruptions. The first has to do with capitalism. In capitalism, the arguments are that due to the uncertainties of the market, it is better left alone. If market actors act freely with reigned by interest and uncertainty, the market will regulate itself.<sup>47</sup> We can, therefore, see an evident change in paradigm. Since Facebook and Google have access to informative data about its users, it is no longer reigned by uncertainty and ignorance. Therefore, they can act independently from the invisible forces of the market.<sup>48</sup>

Instead of trying to convince you to buy a specific thing, or take a specific action like a regular advertisement, it manipulates you into doing so. Manipulating means that it controls you to their advantage, which Zuboff calls "instrumentarian power", shaping human behaviour towards others' ends.<sup>49</sup> The theoretical understanding of this concept would be enough to comprehend the ultimate violation of personal autonomy. The user is not only faced with a choice of intrusion, like unfair user agreements, but she also does not even acknowledge that it is happening in the first place. It is poisoning the inward experience to form will.<sup>50</sup>

There is evidence to show how surveillance capitalism can damage a person's autonomy and attack democracy. The Cambridge Analytical Scandal revealed how data of millions of Facebook

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<sup>44</sup> Lessig 2006, *supra* note 24.

<sup>45</sup> Zuboff, 2019, *supra* note 4.

<sup>46</sup> J, Naughton, "The goal is to automate use: Welcome to the age of surveillance capitalism", *The Guardian*, 20.01.2019, at: <https://www.theguardian.com/technology/2019/jan/20/shoshana-zuboff-age-of-surveillance-capitalism-google-facebook>, (accessed on 17.07.2019)

<sup>47</sup> L. Yueh, *The Greatest Economists: How Their Ideas Can Help Us Today*, Penguin Random House, 2018, p.11.

<sup>48</sup> S. Zuboff 2019, *supra* note 4, p.497.

<sup>49</sup> *Idem*, p.13.

<sup>50</sup> *Idem*, p.521.

users were collected and used in a political campaign.<sup>51</sup> By harvesting millions of Facebook profiles, it is possible to identify the most persuadable voters and the issues they are concerned about to send them the right message at the right time. For example, it sent targeted advertisement to the African-American community with Clinton's reference to African-American youth as 'super predators'.<sup>52</sup> Google also knowingly accepted advertisement that falsely claimed it could solve mortgage problems during the 2011 crisis.<sup>53</sup>

The second disruption is the radical indifference to consumers. Users' data served as raw materials that are being analysed and sold. Since users are merely the means, not the end, there is no incentive in trying to better its platforms or improve the privacy services to please consumers. The third disruption is about product quality. What is relevant is that it is used by everyone, not that it needs to be the best. Since the interest is to have the biggest amount of people use the service, it incentivizes the creation of fake news, one of the biggest threats to freedom of expression. Surveillance capitalism, therefore, forms a disruption not only because it manipulates individual autonomy but also because it is indifferent to the needs and the best interests of the citizens and society.

In the face of the lack of competition in the tech market, it is practically impossible to not be a target of indiscriminate surveillance and data-mining in the digital sphere. Google has control over original equipment manufacturers such as smartphones, tablets, connected products, automobiles and even home equipment. The data collected is then sold and purchased in the tech monopoly world. For example, Google reportedly paid Apple \$9 billion in 2018 and \$12 billion in 2019 to be Safari's Default Search Engine.<sup>54</sup> Google deals with telecom providers, Original equipment manufactures and operating system manufacturers and also auctions of its product users to companies such as Baidu, a Chinese search engine which is state-owned.<sup>55</sup> These behaviours further ensure the tech monopolies since it is hard to enter the market without purchasing large quantities of data. New businesses have to gain access to the online marketplace by creating third-party apps distributed through Google, Apple and Microsoft's online app stores.<sup>56</sup> This is a clear disadvantage compared to pre-installed apps because billions of users use the default and pre-installed apps. The European Commission already fined Google once for requiring manufacturers to pre-install the Google Search app and browser app as a condition for licensing Google's app store.<sup>57</sup> To ensure fair competition, this bundling needs to be continuously fought.

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<sup>51</sup> H. Savies, "Ted Cruz using firm that harvested data on millions of unwitting Facebook users", *The Guardian*, 2015, at: <https://www.theguardian.com/us-news/2015/dec/11/senator-ted-cruz-president-campaign-facebook-user-data> (accessed on 03.06.2019).

<sup>52</sup> M. Lee, 'Surveillance Capitalism, Cambridge Analytica, and Data Security', 29 May 2018, at: <http://natoassociation.ca/surveillance-capitalism-cambridge-analytica-and-data-security/> (accessed on 03.06.2019).

<sup>53</sup> Zuboff 2019, *supra* note 4.

<sup>54</sup> L. Segarra, "Google to pay Apple \$12 Billion to Remain Safari's Default Search Engine in 2019: Report", *Fortune*, 20.09.2018, <https://fortune.com/2018/09/29/google-apple-safari-search-engine/> (accessed on 16.07.2019)

<sup>55</sup> R. Lee, "Telecom and Tech Giant Conflict of Interest and Competition Violations: Part 2", *The Epoch Times*, 01.02.2019, at: [https://www.theepochtimes.com/telecom-and-tech-giant-conflict-of-interest-and-competition-violations-part-2\\_2780223.html](https://www.theepochtimes.com/telecom-and-tech-giant-conflict-of-interest-and-competition-violations-part-2_2780223.html) (accessed on 16.07.2019)

<sup>56</sup> R. Lee, "Telecom and Tech Giant Conflict of Interest and Competition Violations: Part 2", *The Epoch Times*, 01.02.2019, at: [https://www.theepochtimes.com/telecom-and-tech-giant-conflict-of-interest-and-competition-violations-part-2\\_2780223.html](https://www.theepochtimes.com/telecom-and-tech-giant-conflict-of-interest-and-competition-violations-part-2_2780223.html) (accessed on 16.07.2019)

<sup>57</sup> European Commission, "Antitrust: Commission Fined Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine", *Press release*, 18 July 2018, at: [http://europa.eu/rapid/press-release\\_IP-18-4581\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4581_en.htm) (accessed on 03.06.2019).

Additionally, filters used in Facebook and Google create an isolated environment that interferes with our freedom of expression. As referred above, the interest lies within the usage of the platforms. Hence, the only goal is to maximise engagement.<sup>58</sup> This is best created with inflammatory material and even fake news that creates instant reactions. When these two effects are combined and complemented, it obscures users from other information and interferes with their freedom of expression and ability to form opinions.

Our autonomy has been tainted with unfair user agreements that leave us with no choice making the word "consent" void. These contracts have to be heavily regulated to ensure they do not compromise users' privacy and comply with the **GDPR**. Important developments have happened in Germany by. A court decision banned Facebook from combining users' data across its social platforms and gathering data from third-party websites without their consent.<sup>59</sup> Furthermore, the court clears out that data processing cannot be a precondition for using Facebook so that it is genuinely voluntary. It was deemed anti-competitive because it is using its dominant position to make exploitative business terms with consumers.<sup>60</sup>

With strict duties granting data rights, there can be general mitigation of the risks and harms Big Data pose to democracy. By limiting the aim of the data collected, by implementing communication between human rights advocates and data scientists (and other relevant technical specialists in the specific field), and by eventually considering an opt-in opt-out use of data.<sup>61</sup> Solutions are available, and there needs to be a vivid and open discussion to select the best ones.

#### IV. Conclusion

Facebook and Google's technology is challenging democracy. The capitalisation of human experience leads to significant disruptions that have to be carefully addressed. As Harari explains, property has always brought inequality. As humans gain ownership over things, hierarchies are formed. Consequently, only a small part of the population has wealth and power.<sup>62</sup> The industrial revolution disrupted this due to the increasing reliance on the masses. Thus, governments, liberal and communist, were concentrated on investing in the health, education and welfare of its citizens, to ensure healthy labourers and soldiers. However, surveillance capitalism has provided a new disruption. Since prosperity is no longer dependent on the masses, surveillance capitalism makes society increasingly unequal, once again concentrating power and wealth in the hands of a small elite. As shown above, citizens are forced to a tainted form of consent of power to non-elected private entities. This unconsented control gives rise to the Big Other- a sovereign power that acts independently from the government and the dynamism of market democracy.<sup>63</sup>

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<sup>58</sup> C. Doctorow, "Regulating Big Tech makes them stronger, so they need competition instead", *The Economist*, 06.06.2019, at: <https://www.economist.com/open-future/2019/06/06/regulating-big-tech-makes-them-stronger-so-they-need-competition-instead> (accessed on 03.06.2019).

<sup>59</sup> N. Lomas, "German antitrust office limits Facebook's data gathering", *TechCrunch*, 07 February 2019, at: <https://techcrunch.com/2019/02/07/german-antitrust-office-limits-facebooks-data-gathering/> (accessed on 03.06.2019).

<sup>60</sup> *Ibid.*

<sup>61</sup> G. Sarfaty, 'Can big data revolutionise international human rights law', *Penny Law: Legal Scholarship Repository*, 2018.

<sup>62</sup> Y. N. Harari, *21 Lessons for the 21<sup>st</sup> Century*, Jonathan Cape, 2018.

<sup>63</sup> Zuboff, 2015, *supra* note 19.

Surveillance capitalism is the most explicit attack on our autonomy. Public debate should be of top priority. First, to break the cycle of misinformation, Facebook and Google are spreading in society and second, to raise public debate as a means to address the issue. The public should be informed in order for them to start demanding a fight to this oppression and injustice. Society needs to question these activities and their dangers to democracy. It should be inquired whether this kind of advertisement is legal, considering the precision and manipulation it entails. It seems odd that there was a massive concern around subliminal marketing, something that has not even been proven to work, leading to bans in countries like Britain and Australia.<sup>64</sup> However, now we allow targeted advertisement that can form and substitute our own will and has even gone so far as to mess with democratic elections.

After regulating these manipulative advertisements, the focus should shift to unfair user agreements and privacy policies that require users forced consent. Compliance with the GDPR and analysis of the potential exploitative contents need to be continuously assessed to safeguard our autonomy. To understand the relevant issues and find its solutions, there needs to be an overview of all areas of Law as is demonstrated by new German case-law.

After protecting the will and autonomy of users, there needs to be a shift in control over who has power over technology. Facebook and Google are almost essential in the 21<sup>st</sup> century and therefore, cannot be in sole control over platforms that are now seen as public space.<sup>65</sup> It has already been evident that law can keep up with technology. Now, society needs to know how. Once again, there needs to be a public debate on how technology can be best used while safeguarding the users' autonomy. There needs to be a shift in who is in control. Otherwise, as it has been shown, Google and Facebook will have the freedom to continue exploiting the users as they wish.

Finally, economic concentration has to be dealt with. As Zuboff has stated in her book, addressing competition issues does not necessarily mean addressing surveillance capitalism and privacy concerns. A break up of Facebook and Google only means more companies in the business of surveillance capitalism. However, it has been shown that it certainly makes it easier to control companies if they are smaller first, because it is hard to make specific policy choices and meet political goals if there are many wills to agree instead of just one.<sup>66</sup> Second, because economic concentration makes it easier to bear fines, they could easily be seen as business expenses and not as a dissuasive practice. This indifference is evident; for example, Google had numerous cases of privacy infringement in Google Street View, where they paid the fines and continued to do precisely the same.<sup>67</sup> Breakups may be the first step to regain control and enforce the law.

In conclusion, there needs to be a public debate. Society, not Google and Facebook, needs to regain control. We need to find the answer on how and who must regulate these technological companies<sup>68</sup> Only with an informed and open public debate can law and jurisprudence find solutions to the challenges Facebook and Google pose to democracy.

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<sup>64</sup> S. Dwilson, 'Laws on Subliminal Marketing', *Chron*, at: <https://smallbusiness.chron.com/laws-subliminal-marketing-69892.html> (accessed on 03.06.2019).

<sup>65</sup> Zuboff 2019, *supra* note 4, pp. 521.

<sup>66</sup> Pitofsky, *supra* note 16.

<sup>67</sup> Zuboff, 2019, *supra* note 4.

<sup>68</sup> *Idem*, p. 521.