# MARKET AND COMPETITION LAW REVIEW

M&CLR

VOLUME VII / No. 2
October 2023

UCP PRESS

*Market and Competition Law Review* / VOLUME VII / No. 2 / OCTOBER 2023

# Limits, Limitations, and Outer Boundaries of Antitrust: Censorship, Free Speech, and Dominance*

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ABSTRACT: Big Tech undertakings have much power over what information becomes available online. Concerns have been voiced in this context that some of their content moderation practices may amount to private censorship and a restriction of free speech. Antitrust enforcement could be looked at as one of possible remedies to the risks associated with the use of market power to stifle free speech, since the prohibition of abuse of dominant position is very open-textured. Still, even assuming that an undertaking is dominant, antitrust has its limits and limitations which put free speech cases closer to the outer boundaries of antitrust rather than its core. This article explores those outer boundaries of antitrust and speculates whether private censorship could be framed as an abuse of dominant position. To do so, it discusses the limits and limitations of antitrust and then provides five perspectives from which private censorship could be looked at under antitrust. It concludes that while free speech might seem to constitute a political interest of no relevance to orthodox antitrust enforcement, it is possible to consider it under antitrust to relieve some social tensions generated by mostly unchecked power of large undertakings over speech. While a classic consumer welfare standard perspective can be preserved, more novel types of approaches also remain available, yet they would likely face similar problems as those discussed in the article, i.e., the problem of designing workable standards of assessment.

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* Date of Reception: 26 June 2023. Date of Acceptance: 23 July 2023.
DOI: https://doi.org/10.34632/mclawreview.2023.15891.

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KEYWORDS: free speech, censorship, non-economic interests, public goals, consumer welfare

## *1. Introduction*

In a 2019 speech, Makan Delrahim, acting at that time as Assistant Attorney General for the Department of Justice Antitrust Division, made a suggestion that antitrust enforcement can support free speech.[1] The context of this remark was that in 2019 arguments were made that Big Techs may engage in private censorship and restrict free speech.[2] Delrahim's reasoning was that free speech can be seen as a quality improvement, and robust competition will likely bring more of it.

Not long after this remark, in 2021, Big Tech social media decided to ban Donald Trump.[3] This prompted, e.g., justice Clarence Thomas to ask what the limits of Big Tech power are and to what extent private censorship is a problem: being banned on social media does not mean free speech cannot be used elsewhere, yet by analogy swimming is not a real alternative to crossing a bridge.[4] From this angle, the question could go further than the remark made by Delrahim: if competition is already distorted because

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[1] Makan Delrahim, "'…And justice for all': Antitrust enforcement and digital gatekeepers", June 11, 2019, www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers.

[2] David Shepardson, "Facebook, Google accused of anti-conservative bias at U.S. Senate hearing", *Reuters*, April 10, 2019, https://www.reuters.com/article/us-usa-congress-socialmedia-idUSKCN-1RM2SJ; "The Technology 202: This is Ted Cruz's playbook to crack down on Big Tech for alleged anti-conservative bias", *The Washington Post*, April 11, 2019, https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2019/04/11/the-technology-202-this-is-ted-cruz-s-playbook-to-crack-down-on-big-tech-for-alleged-anti-conservative-bias/5cae7278a7a0a475985b-d3d3; Matt Kwong, "From Warren to Trump, how Big Tech became 'fashionable to hate' in Washington", *CBC*, June 12, 2019, https://www.cbc.ca/news/business/big-tech-washington-dc-hearings-hate-1.5171649. See also earlier concerns, e.g., Kalev Leetaru, "Is Twitter really censoring free speech?", *Forbes*, January 12, 2018, https://www.forbes.com/sites/kalevleetaru/2018/01/12/is-twitter-really-censoring-free-speech. See also Kyle Langvardt, "Regulating online content moderation", *The Georgetown Law Journal* 106 (2018).

[3] See, e.g., Hannah Denham, "These are the platforms that have banned Trump and his allies", *The Washington Post*, January 14, 2021, https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media; Joshua Foust and Simon Frankel Pratt, "Social media finally broke the public sphere", *Foreign Policy*, January 22, 2021, https://foreignpolicy.com/2021/01/22/social-media-broke-liberal-democracy-capitol-mob.

[4] *Biden v. Knight First Amendment Institute*, 593 U.S. _____ (2021), with justice Thomas saying that: "It changes nothing that these platforms are not the sole means for distributing speech or information. A person always could choose to avoid the toll bridge or train and instead swim the Charles

some undertaking enjoys a dominant position, can such an undertaking engage in private censorship without any limits set by antitrust?[5]

Ultimately, the question is also about the limits of antitrust itself. And while the issue of antitrust and free speech was first asked in the United States, it is no less relevant from the point of view antitrust enforcement in Europe, which over the last few years has seen antitrust interacting with, e.g., sustainability and privacy.[6]

This article has two goals. On a more theoretical level, it takes a look at private censorship and tests whether there are any ways in which this type of conduct can be analysed under antitrust. By conducting this exercise, it aims at investigating in a bottom-up manner the limits, limitations, and outer boundaries of antitrust. On a more practical level, it investigates whether antitrust could provide any sort of last resort measure against private censorship, especially in case no other measure is available.[7] The goal in that regard is not to offer a step-by-step manual on how to conduct an antitrust investigation concerning private censorship or draft a private lawsuit. The aim is rather to explore whether any framework can be developed in which such issues could be further worked on.

The article is divided into three parts. First, more background on private censorship as a market concern is provided. Then, a discussion follows on how the limits and limitations of antitrust might impact the prospects of

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River or hike the Oregon Trail. But in assessing whether a company exercises substantial market power, what matters is whether the alternatives are comparable".

[5] There is no universally agreed definition of "private censorship" and the term itself causes controversy as what appears to some as "censorship", to others remains a needed form of content moderation. In this article, "private censorship" is used to denote content moderation that might at least potentially go against free speech values.

[6] For sustainability, see, e.g., Giorgio Monti and Jotte Mulder, "Escaping the clutches of EU Competition Law: Pathways to assess private sustainability initiatives", *European Law Review* 5 (2017); Anna Gerbrandy, "Solving a sustainability-deficit in European competition law", *World Competition* 40, no. 4 (2017). For privacy, see, e.g., Dzhuliia Lypalo, "Can competition protect privacy? An analysis based on the German Facebook case", *World Competition* 44, no. 2 (2021); Christophe Carugati, "The antitrust privacy dilemma", *European Competition Journal* 19, no. 2 (2023).

[7] Regulation is an alternative. In the United States, this has been an issue in Texas and Florida, see Adam Liptak, "Supreme Court puts off considering State laws curbing Internet platforms", *The New York Times*, January 23, 2023, https://www.nytimes.com/2023/01/23/us/scotus-internet-florida-texas-speech.html. In Europe, this was speculated in Poland and Hungary, see Valerie Hopkins, James Shotter, and Javier Espinoza, "Hungary follows Poland in taking on Big Tech 'censors'", *Financial Times*, February 3, 2021, https://www.ft.com/content/6a315d26-c6fe-4906-886d-04cec27a6788.

covering private censorship under Article 102 TFEU. Subsequently, it is reflected upon how these limits and limitation can be handled. The article concludes that private censorship is a complex market problem, but not necessarily completely out of the scope of antitrust enforcement, even if one sticks to a more orthodox, consumer welfare-oriented idea of antitrust.

## *2. Context, or "long story short"*

### *2.1. Story so far*

Free speech might seem far beyond the scope of antitrust. Yet, the idea of putting these two areas side by side and investigating links between them is an old one.[8] In fact, there is more background to antitrust and free speech than there had been with regard to, e.g., antitrust interacting with sustainability and privacy, when those discussions started. For instance, a cautious reader of Bork's classic *The Antitrust Paradox* will stumble upon a number of critical references to antitrust and free speech both in the main body of his argument and in the closing remarks.[9]

The question whether there is any link between antitrust and free speech was first seriously considered by the US Supreme Court in *Associated Press* in 1945.[10] Since that time, the practical reason for considering free speech issues under antitrust has typically been that the First Amendment covers government censorship, but does not provide an easy ground to protect from restrictions imposed by private entities.[11] This is also similar in other

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[8] For a discussion of this historical context, see, e.g., Maurice Stucke and Allen Grunes, "Antitrust and the Marketplace of Ideas", *Antitrust Law Journal* 69 (2001); Gregory Day, "Monopolizing free speech", *Fordham Law Review* 88 (2020); Daniel Crane, "Collaboration and competition in information and news during antitrust's formative era", *Knight First Amendment Institute*, June 29, 2020, https://knightcolumbia.org/content/collaboration-andcompetition-in-information-and-news-during-antitrusts-formative-era; Jan Polański, "The marketplace of ideas and EU competition law: Can antitrust be used to protect the freedom of speech?", *YSEC Yearbook of Socio-Economic Constitutions* (2022).

[9] Robert Bork, *The antitrust paradox: A policy at war with itself* (Bork Publishing, 2021), 50, 67, 442. While it might seem puzzling how the last of these references made its way into the conclusion of Bork's *opus magnum*, his argument shows resemblance to a point made by his mentor, see Aaron Director, "The parity of the economic market place", *The University of Chicago Law School Record* 2, no. 3 (1953), using free speech rhetoric to argue for more laissez-faire.

[10] *Associated Press*, 326 U.S. 1 (1945). For a discussion of this case and its historical context, see Crane, "Collaboration and competition".

[11] Hence, some argue that the public forum doctrine, which can be invoked against government actors and protect free speech, is "dead" in cyberspace where infrastructure is owned by private

jurisdictions, with free speech guarantees generally envisaging remedies against government actions, not actions of private parties.[12]

Thus, in *Associated Press*, justices considered whether a restriction of competition with regard to a special type of product which plays a role from the point of view of free speech may justify more cautious analysis. In other words, the question was whether free speech may constitute a "plus factor" that triggers an antitrust prohibition quicker than in case of ordinary goods, taking into account that possible stakes are higher. Ultimately, *Associated Press*, followed by other judgements, led to an ambiguous conclusion that antitrust has a role in protecting "free speech values".[13] However, the precise meaning of this remained vague, apart from the fact that the First Amendment cannot be used as an antitrust defence.

Free speech largely vanished from case law after the triumph of the Chicago School. However, this did not prevent it from reappearing in the United States in various contexts. For instance, in the early 2000s, Pitofsky claimed that media markets, which are important for free speech, should receive extra attention in merger analysis.[14] Stucke and Grunes followed up on this claim by seemingly arguing that free speech can be seen as part of consumer welfare.[15] More recently, it became of controversy whether antitrust leaves enough space for economic protest that results in collective boycotts, and whether Big Techs may have incentives to form content moderation cartels.[16] Outside the United States, it has been considered whether misinformation (which can be seen as belonging to the area of free speech) by dominant undertakings can be an antitrust violation.[17] In Europe itself,

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actors, see Dawn Nunziato, "The death of the public forum in cyberspace", *Berkeley Technology Law Journal* 20 (2005).

[12] In Europe, an unsuccessful attempt to make a free speech argument with regard to actions of a private party was made under the European Convention on Human Rights in *Appleby and Others v. The United Kingdom*, no. 44306/98, 6 May 2003.

[13] Polański, "The marketplace of ideas", 212.

[14] Alec Klein, "A hard look at media mergers", *The Washington Post*, November 29, 2000, https://www.washingtonpost.com/archive/business/2000/11/29/a-hard-look-at-media-mergers/d8380c2d-92ee-4b1b-8ffd-f43893ab0055.

[15] Stucke and Grunes, "Antitrust and the marketplace of ideas", 279-281.

[16] Hillary Greene, "Antitrust censorship of economic protest", *Duke Law Journal* 59 (2010); Evelyn Douek, "The rise of content cartels", *Knight First Amendment Institute*, February 11, 2020, https://knightcolumbia.org/content/the-rise-of-content-cartels; Jan Polański, "Antitrust shrugged? Boycotts, content moderation, and free speech cartels", *European Competition Journal* 19, no. 2 (2023).

[17] Paula Mariane, "Telegram targeted in Brazil antitrust probe into online platform messages about content-moderation legislation", *mLex*, May 12, 2023, https://mlexmarketinsight.com/

free speech arguments made an unexpected appearance in a national level merger review concerning Orlen (a Polish State-owned oil company) and a Polish press conglomerate, which further led to an unprecedented case of a merger clearance being appealed by a human rights ombudsman.[18]

### *2.2. Story to be told*

Still, a unilateral action of an undertaking would be the most straightforward instance of private censorship – it would resemble the type of censorship that is unilaterally implemented by governments.

Generally, free speech is a broad subject, and such a unilateral action could take place in relation to various types of information, some of which would likely not be identified as "free speech" at first glance. For instance, outside the field of free speech scholarship, "commercial speech" (e.g., advertising, sharing information about products) would likely not be seen as a free speech issue, since it would clearly fall within the scope of antitrust, insofar restricting it could give rise to, e.g., an exclusionary conduct.[19] In consequence, there would be no reason to call it by any different name than "antitrust infringement", let alone "free speech". Likewise, removing applications that can serve a role from the point of view of free speech (which happened in relation to Parler, which was "de-platformed" by Amazon and Google) may have a free speech dimension, yet insofar applications are products developed by undertakings, such cases can still be easily seen as part of antitrust and thus not be labelled "free speech".[20]

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news/insight/telegram-targeted-in-brazil-antitrust-probe-into-online-platform-messages-about-content-moderation.

[18] Cezary Banasiński and Marcin Rojszczak, "The role of competition authorities in protecting freedom of speech: the PKN Orlen/Polska Press case", *European Competition Journal* 18, no. 2 (2022).

[19] For a discussion of commercial free speech, see, e.g., Edwin Baker, "The First Amendment and commercial speech", *Indiana Law Journal* 84 (2009). For a brief overview of commercial free speech in the European Union, see Joanna Krzeminska-Vamvaka, "Tobacco, market economy and market of ideas newest developments concerning freedom of commercial speech", *Amsterdam Law Forum* 2, no. 1 (2009), 119-122.

[20] However, it can be asked whether those free speech aspects should influence antitrust analysis, see Polański, "Antitrust shrugged?" for such a discussion in the context of Article 101 TFEU. For general information about Parler, see Robert Hart, "Parler sues Amazon again in wake of deplatforming", *Forbes*, March 3, 2021, https://www.forbes.com/sites/roberthart/2021/03/03/parler-sues-amazon-again-in-wake-of-deplatforming. See also Manoel Horta Ribeiro et al., "Deplatforming did not decrease Parler users' activity on fringe social media", *PNAS Nexus* 2, no. 3 (2023), for a discussion of possible effects of Parler's de-platforming.

Conversely, speech that consists in, e.g., expressing political opinions, using political advertising, and conducting political advocacy by politicians and citizens would more likely be seen as free speech, since all of such activities belong to what can be seen as the hard core of free speech.

On a practical level, "censorship" in a market context may amount to, e.g., outright bans imposed on social media users. As is often with free speech cases, they tend to centre around instances of speech that are controversial: speech which is not controversial rarely becomes restricted, since there is little reason to do so. Donald Trump's speech, which was mentioned in the introduction, can be seen as controversial, but the legal question behind Trump's bans remains relevant and unrelated to party politics.[21] A different instance of potential censorship had come into attention already during the US 2020 elections, when social media blocked users from sharing a press article, which had been considered unreliable.[22] Likewise, some EU antitrust authorities received complaints with regard to actions taken by social media in relation to information shared online.[23] In 2022, on the other hand, it was speculated that Elon Musk's Twitter may have prevented its users from sharing links to Mastodon, i.e., a competing service – a practice possibly not in line with the Digital Markets Act.[24] Concerns were also expressed by high ranking officials of the European Commission and EU Member States after Twitter started banning journalists who shared information about Elon Musk's private jet flights.[25]

Given that there are many types of speech, in the United States some conclude that US antitrust could be used in relation to commercial speech

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[21] A good example of how this topic is not exclusive to any political option comes from developments that took place during the US 2019 Democratic primaries, with Senator Warren's political advertisements concerning the break-up of Facebook being allegedly banned from Facebook, see Neil Chilson and Casey Mattox, "[The] breakup speech: Can antitrust fix the relationship between platforms and free speech values?", *Knight First Amendment Institute*, March 5, 2020, https://knightcolumbia.org/content/the-breakup-speech-can-antitrust-fix-the-relationship-between-platforms-and-free-speech-values.

[22] Hannah Murphy and Lauren Fedor, "Republicans grill ex-Twitter executives over handling of Hunter Biden story", *Financial Times*, February 8, 2023, https://www.ft.com/content/6c2e7ebe-00e6-4cfa-a2fc-968c641bed53.

[23] OECD, "Advantages and disadvantages of competition welfare standards – Note by Poland", DAF/COMP/WD(2023)34, paragraph 34.

[24] Ted Tatos, "The antitrust case against Elon Musk's Twitter", *The Sling*, December 20, 2022, https://www.thesling.org/the-antitrust-case-against-elon-musks-twitter.

[25] Clothilde Goujard, "Europe troubled but powerless over Twitter's journalist ban", *Politico*, December 16, 2022, https://www.politico.eu/article/europe-troubled-powerless-twitter-journalist-ban-elon-musk-media-freedom-disinformation.

insofar unilateral conduct is concerned, but not in relation to pure political speech (i.e., political speech not related to any economic activity, aside from the economic activity of the undertaking that engages in private censorship).[26] This is because section 2 of the Sherman Act speaks about attempts to "monopolize" and the US case law on unilateral practices focuses on attempts to exclude competitors.[27]

Yet, in the European Union the situation is different. The wording of Article 102 TFEU is very broad, as it simply speaks of "abuse" of dominance. Its scope is so broad that it once led Gregory Werden to conclude that had EU competition authorities desired so, they could hypothetically argue that providing a product in just black colour is abusive.[28] Such an interpretation would be excessive, but there is some truth to it: the language of Article 102 TFEU is exceptionally "open-textured". And given this broad scope, it can be asked whether any forms of private censorship would be caught by it – and if not, then why.

The remaining part of the article will discuss this issue from the point of view of private censorship directed at citizens, journalists (insofar their activity online is not strictly commercial), and politicians by, e.g., banning them. Conversely, it will not deal with censorship which is directed against other undertakings (e.g., Parler), including censorship of citizens which is ultimately aimed at excluding competitors (e.g., Mastodon). This is because this latter type of cases appears to be less controversial from the point of view of antitrust boundaries and hence less useful in testing them. However, the conclusions from this discussion will still be relevant to those more commercially-oriented cases: if private censorship aimed at political speech is an antitrust issue, then there are even more reasons to be cautious about those more commercial cases, insofar they may also impact political free speech. Dominance in the further parts of the discussion is assumed to exist – this way the focus will be on the limits and limitations of antitrust in terms of finding an abuse, not establishing a dominant position, which is ultimately an empirical exercise based on market data.

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[26] Day, "Monopolizing free speech".

[27] Day, "Monopolizing free speech", 1334-1336.

[28] Gregory Werden, "Essays on consumer welfare and competition policy", May 15, 2009, https://ssrn.com/abstract=1352032, 28.

## *3. Limits and limitations of antitrust*

Antitrust enforcement has proved to be an effective tool in preventing such classic competition infringements as, e.g., cartels. With antitrust being so effective in dealing with these types of restrictions, it has been recently criticised to go beyond this mandate by including more unorthodox cases into the area of interest of antitrust authorities.[29] This is partly because expanding the scope of enforcement can dilute the mission of antitrust enforcers, and partly because antitrust has its limits and limitations. At the end of the day, the limits and limitations of antitrust work as gravity, which pulls down any expansive conception of enforcement.

### *3.1. Limits*

All laws have limits, i.e., certain boundaries beyond which they have no effect.[30] The most natural boundary to every (statutory) law comes from its wording. As it was mentioned in Section 2, the literal scope of Article 102 TFEU is exceptionally broad. Taking this into account, its practical limits are also set through judicial developments and a practical need to make it administrable.

This happens at three levels: setting goals, standards, and evidentiary rules (although to some extent, and depending on jurisdiction, each of them can follow from statutory law).[31] Goals are most abstract and can be seen as guiding principles of enforcement. Standards are more concrete ways of assessing market issues from the point of view of antitrust. Evidentiary rules deal with, e.g., presumptions and the burden of proof.

Against this backdrop, there are two antitrust limits that are particularly relevant from the point of view of private censorship.

First, hypothetically, antitrust goals and standards may together rule out private censorship as an antitrust concern. A caveat should be made here that the goals and standards of antitrust are currently hotly debated: some believe that consumer welfare is the only goal and that the consumer welfare standard should apply; others argue against it.[32] Article 102 TFEU did

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[29] See, e.g., Jean Tirole, "Socially responsible agencies", *Competition Law & Policy Debate* 7, no. 4 (2023); Nicolas Petit, "A theory of antitrust limits", *George Mason Law Review* 28 (2021).

[30] Antitrust limits have been most recently discussed by Petit, "A theory of antitrust limits".

[31] OECD, "Consumer welfare standard: Advantages and disadvantages compared to alternative standards", OECD Competition Policy Roundtable Background Note, DAF/COMP(2023)4, 9-10.

[32] For an overview of these arguments, see OECD, "Consumer welfare standard".

not escape this fate, with the question of its ordoliberal roots and possible consequences of this heritage being one of the main issues.[33]

Second, legal systems need to be "workable", i.e., they need to allow predictable outcomes that are not based on arbitrary or highly discretionary choices of decision-makers. From this point of view, the main challenge for conceptualising private censorship as an abuse would be to frame it in a legal test that can be used in practice.

### *3.2. Limitations*

Antitrust is also subject to limitations. Limitations are related not to law itself, but rather to those who apply it, i.e., enforcers and judges.[34] Market reality is complex and grasping it properly is not easy. When it comes to private censorship, this happens at two levels: one is more classic, while the other one is more closely related to the nature of free speech issues.

On the more classic level, the difficulty comes from the fact that undertakings operate in much uncertainty and need to continuously adapt to what is happening in and around the market.[35] There are a number of reasons for which information can be suppressed, for instance: (a) consumer expectations; (b) advertisers' expectations; (c) corporate social responsibility; (d) strategic regulatory considerations.[36]

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[33] David Gerber, "Constitutionalizing the economy: German neo-liberalism, competition law and the 'new' Europe", *The American Journal of Comparative Law* 42, no. 1 (1994); Pinar Akman, "Searching for the long-lost soul of Article 82 EC", *Oxford Journal of Legal Studies* 29, no. 2 (2009); Peter Behrens, "The ordoliberal concept of 'abuse' of a dominant position and its impact on Article 102 TFEU", in *Abusive practices in competition law* ed. Fabiana Di Porto and Rupprecht Podszun (Edward Elgar Publishing, 2018); Elias Deutscher and Stavros Makris, "Exploring the ordoliberal paradigm: The competition-democracy nexus", *The Competition Law Review* 11, no. 2 (2016); Matthew Cole and Sören Hartmann, "Ordoliberalism: What we know and what we think we know", *The Modern Law Review* (2023).

[34] "Limitations" were discussed by, e.g., Easterbrook, yet under the label of "limits", see Frank Easterbrook, "The limits of antitrust", *Texas Law Review* 63, no. 1 (1984). However, a more appropriate term for the topic covered by him would be "limitations", see Petit, "A theory of antitrust limits", 1399.

[35] A discussion of the role of uncertainty from the point of view of competition is available in Nicolas Petit and Thibault Schrepel, "Complexity-minded antitrust", *Journal of Evolutionary Economics* 33 (2023), 551-553.

[36] Polański, "Antitrust shrugged?", 338-339. Exclusionary strategies are also possible, but this was excluded from the scope of discussion in this article (see Section 2.2). "Consumer expectations" come down to the fact that certain kinds of information (e.g., fake news, adult content on general purpose social media) are not desired by consumers. "Advertisers' expectations" are related to the fact that advertisers aggregate to some extent the needs of consumers and are also not indifferent

From the point of view of a decision-maker who is faced with a case of private censorship, this leads to the first complex issue that needs to be resolved. There is a market decision made by an undertaking to restrict the flow of information, and this decision might be based on a number of reasons. Some of these reasons might be incorrect (e.g., an undertaking makes incorrect assessment of what consumers want) or "wrong" (e.g., an undertaking decides to censor users, as it is afraid that otherwise regulators may step in, generating collateral damage for its business), yet all possibly remain part of experimentation that is inherent to business and market activity. At the same time, there are costs of making wrong decisions by government authorities. In consequence, in particular in the Chicago School, there was a preference towards inaction, based on an assumption that even if this inaction will lead to inefficient results, the market will self-correct over time (although it is of controversy how much time for such a self-correction is acceptable).[37]

Insofar private censorship is concerned, there is a second level to the problem of limitations. It is the problem of speech acts themselves – and free speech is an area notoriously full of controversial decisions.[38] Nudity rules on social media may serve as an example of this issue, with clear reasons for which undertakings might be unwilling to allow pornography, but then facing a dilemma whether the same nudity rules apply to, e.g., breast-feeding photos, erotic art, or classic art resembling, e.g., *Liberty Leading the People*. Same would apply to "hate speech" rules. It is a problem which might provide incentives to Big Techs to have broad discretionary powers so that specific cases can be solved under "I know it when I see it" basis, or the opposite: over-inclusive rules which may give rise to results that seem like "censorship" when looked at in isolation, but which turn out to belong to some broadly defined group enforced on a *dura lex*, *sed lex* basis. Both may easily lead to controversies.

In the area of public censorship, the general conclusion reached over centuries was that governments are not best-placed to make decisions over banning speech. Hence, in the liberal democratic world, free speech

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to how their advertisements are presented. "Corporate social responsibility" and "strategic regulatory considerations" will be covered more broadly in Section 4.1.2.

[37] On Chicagoan views, see Frank Easterbrook, "Workable antitrust policy", *Michigan Law Review* 84 (1986).

[38] Some of those controversies, which often come down to speech offending someone and leading to harm, are discussed by Timothy Garton Ash, *Free speech: Ten principles for a connected world* (Atlantic Books, 2017), 86-95.

guarantees are generally strong, and it is for the "market" (or rather the "marketplace of ideas", as it is called in free speech scholarship) to decide which speech deserves to be further replicated.[39] When it comes to private censorship, this picture becomes more complicated. Undertakings that make decisions over what information is available become quasi-regulators of free speech and face similar problems as governments. Ash calls them "cats", as opposed to "mice" (users) and "dogs" (governments).[40]

The dilemma from this point of view is thus following. On the one hand, insofar one subscribes to the Chicago School's view that government authorities should prefer false negative errors of enforcement hoping that market will self-correct, one might be willing to accept more private censorship. On the other hand, insofar one concludes that undertakings with much power over speech effectively act as quasi-regulators of free speech, one might be willing to keep private censorship in check, preferring that those who "listen" (i.e., consumers) in a wide marketplace of ideas decide which speech they deem useful. The clash is thus between a policy of cautious inactivity of government agencies (the "dogs") so that a "narrow" market (the "cats") tries to arrive at an optimal solution by "filtering" more speech, and a more proactive policy that aims at providing more power to consumers (the "mice").

In any case, the risk of analysing private censorship under antitrust (apart from classic false positive errors that come down to, e.g., damaging efficient business models) is allowing more harmful speech, which can be seen as a separate type of damage.

### *3.3. Free speech as an outer boundary*

Taking into account these limits and limitations, there are two major objections against considering free speech cases under antitrust. Addressing these objections may also create a pathway (framework) for analysing private censorship under Article 102 TFEU.

The first obstacle is more abstract and follows from antitrust limits. It is a question of **justification**. It can be summarised as: "free speech is not about competition, thus it is not an antitrust issue". This is particularly

[39] For a general discussion of the concept of the marketplace of ideas, see, e.g., Jill Gordon, "John Stuart Mill and the 'marketplace of ideas'", *Social Theory and Practice* 23, no. 2 (1997). For a discussion from an antitrust point of view, see Stucke and Grunes, "Antitrust and the marketplace of ideas"; Polański, "The marketplace of ideas".

[40] Ash, *Free speech*, 26.

relevant insofar private censorship takes place in relation to citizens and politicians, and there is no impact on undertakings that compete with the dominant undertaking. As it was indicated earlier, this became an issue in the United States, with private censorship not necessarily leading to "monopolisation of free speech". A related concern is that private censorship, which is not part of an exclusionary strategy, is not necessarily intended to generate supra-competitive profits.[41] While Article 102 TFEU does not require proof of monopoly profit, it can be argued that general intuition when it comes to abuses of dominance is that abusive conduct takes place to increase or secure supra-competitive profits associated with holding a dominant position. If there is no reason to believe that an action was taken to increase profits, then possibly it was taken in the interest of consumers, and hence is not abusive.

The second obstacle is more practical. It is a question of **administrability**. It combines elements of both antitrust limits and antitrust limitations. The objection is that dealing with private censorship under Article 102 TFEU would require an approach that provides a workable way of making legal assessments (which addresses the antitrust limits) and thus decreases the risks of undesirable enforcement (which addresses the antitrust limitations).

A way to start addressing these concerns could be through top-down analysis. One could try to establish that antitrust goals include the protection of free speech. For instance, it could be argued that antitrust follows ordoliberal ideals, "ensuring democracy" is one of antitrust goals, and free speech constitutes a subgoal within this broader goal. A standard of assessment that allows taking free speech into account would further be needed.[42] Such an approach would largely fall within the scope of the current discussion over the shape of antitrust, which itself can be seen as an interaction between two tides: a more political one (which was outlined above in this paragraph) and a more economic one (which has largely dominated antitrust since the Chicago revolution).[43] Keeping with the poetic of limits and limitations of antitrust, such a top-down approach would amount to

[41] This does not mean that it is never related to ordinary profit-making. Such ordinary profit-making may concern suppressing controversial speech to satisfy the needs of advertisers and thus possibly increase revenues.

[42] This could be, for instance, a "citizen welfare standard". For an overview of such proposals, see OECD, "Consumer welfare standard", 16-17.

[43] Jan Polański, "A positive program for antitrust? Enforcement in times of political tides", *World Competition* 45, no. 2 (2022).

exploring its "upper boundary", i.e., the *limes superior* of antitrust – an uncharted area of what antitrust could possibly be.[44]

A different way of thinking would be to focus on the *limes inferior*, i.e., the minimum which is agreed upon about antitrust today by both proponents of the more economic and more political approach. How could this be done?

A few years ago, when commenting on the current debate over antitrust, Jones and Kovacic observed that the modern critique of antitrust often brushes away the problem of implementation, as a technical detail.[45] They pointed out that the situation resembles spaceflight in the 1960s when the physics of space flying were clear, but the engineering part was the real obstacle. When it comes to private censorship, the idea of having it covered under antitrust might feel alien, as it is not a classic type of infringement. Yet, when an unknown is met, it is a common way to proceed by comparing it to what is already known and through reference to past experience. Thus, to extend Jones and Kovacic's metaphor, one could think of a spaceflight technique known as "gravity assist". Gravity assist is used to save fuel, and to instead rely on the force of gravity of large objects to move in space. The next part will thus look for similarities between existing ways of thinking about antitrust cases and private censorship to see whether there is any room for an evolutionary approach rather than a more revolutionary one that would come down to significantly revamping antitrust goals and standards.

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[44] The word "*superior*", and the word "*inferior*" which follows, should not be understood as indicating high and low quality. "*Limes inferior*" and its counterpart "*limes superior*" originate from Latin and denote "lower" and "upper" boundary, as seen in the field of mathematics (and in a similar way as the Roman Empire had its *limes*). My use of "*limes*" in the passage above comes from "*limes*" being the root word for the English "limit" and "limitation". "*Limes inferior*" itself is the title of a dystopian novel by Janusz Zajdel.

[45] Alison Jones and William Kovacic, "Antitrust's implementation blind side: Challenges to major expansion of U.S. competition policy", *The Antitrust Bulletin* 65, no. 2 (2020). In their article, however, "limitations" are rather associated with obstacles such as judicial resistance, political backlash, and opposition towards legislative reforms.

## *4. Crossing the lower boundary*

### *4.1. Justification*

#### *4.1.1. Consumer welfare is a flexible concept*

Consumer welfare and the consumer welfare standard are often presented as obstacles to discussing less orthodox harms under antitrust.[46] Yet, consumer welfare and the consumer welfare standard are generally flexible concepts.[47]

To justify antitrust scrutiny, market conduct that appears to be problematic is typically framed into a theory of harm. Exclusionary and exploitative abuses are two standard categories. There are also proposals to distinguish single market and discriminatory abuses – the latter of which are of more interest in this article.[48]

**Exclusionary conduct** is associated with actions aimed at competitors, so that competition can be restricted, and with consumer welfare decreasing as the result of less intense competition in the market. This group of theories of harm will not be of primary interest in the context of private censorship covered in this article (as explained in Section 2.2, to explore the outer boundaries of antitrust, this article specifically looks at the most controversial types of private censorship, which however are not directed at competitors), yet it is also an area in which the largest number of legal tests were developed – hence, its existence should be kept in mind.

**Exploitation** comes down to using market power in a way that allows attaining one's objectives at the expense of consumers. Excessive pricing is the most straightforward example of an exploitative conduct. Excessive pricing requires an output restriction which is correlated with a price increase for those consumers that still keep buying the product – the sales that are forgone constitute the deadweight loss. Exploitative theories are

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[46] See, e.g., Sandeep Vaheesan, "The twilight of the technocrats' monopoly on antitrust?", *The Yale Law Journal Forum* 127 (2018).

[47] In fact, they are flexible enough to attract criticism precisely on this point, see Jonathan Kanter, "Remarks at New York City Bar Association's Milton Handler lecture", May 18, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association, saying: "To its defenders, the 'consumer welfare standard' is a remarkably flexible term. With every criticism, we get a new definition of consumer welfare that carries the term further from the meaning of the actual words 'consumer' and 'welfare'. At the end of the day, if you ask five antitrust experts what the consumer welfare standard means, you will often get six different answers".

[48] For an outline of all these types of abuses, see, e.g., Alison Jones and Brenda Surfin, *EU competition law* (Oxford University Press, 2011), 358-364.

more controversial than exclusionary ones.[49] Still, some enforcers have recently argued that it would be useful to further explore them.[50]

**Discrimination** also causes controversy. Some (nominally) discriminatory types of conduct, like, e.g., price discrimination, may serve as a tool of exclusionary strategy or a means of exploitation (e.g., first degree price discrimination). Against this backdrop, it might be more useful to think of discriminatory conduct as a type of infringement that does not easily fall within the two other categories. For instance, the case of a dominant undertaking discriminating consumers based on their nationality can be seen as a discriminatory conduct.[51]

The fact that Article 102 TFEU covers exploitative and discriminatory conduct means that somewhat contrary to its name, EU competition law is not only concerned with competition itself seen as a market process, but also with the negative consequences of the lack of effective competition. This should be kept in mind whenever dealing with the concern that "free speech is not competition".

Still, as long as we move around the lower boundary of antitrust mentioned in Section 3.3, an anticompetitive conduct should also be linked with consumer welfare to remain within the limits of antitrust. From this point of view, free speech is a powerful narrative that can easily overshadow the technicalities behind it: if something is free speech it is "clearly" about more elusive and greater interests than simply those of consumers trading in markets. Yet, in a market perspective, free speech can be seen as part of product characteristics, i.e., quality that was mentioned by, e.g., Delrahim. If free speech is seen by consumers as desirable, the market can be expected to deliver it.[52] There appears to be some limited empirical evidence that

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[49] For reasons of those controversies see Richard Whish and David Bailey, *Competition law* (Oxford University Press, 2015), 759-761. See also Section 4.1.3.

[50] Martijn Snoep, "'Plugging gaps' in antitrust enforcement", March 2, 2023, https://www.acm.nl/en/publications/speech-martijn-snoep-plugging-gaps-antitrust-enforcement.

[51] See CJEU, Case 7/82, *GVL*, ECLI:EU:C:1983:52, paragraph 56. See also case IV/26760, *GEMA*.

[52] A few remarks seem warranted here. First, this does not mean that all undertakings need to deliver wide free speech options, as in a competitive market there is room for product differentiation and testing various business models; here, however, the assumption is that competition in the market is already weakened by the existence of a dominant position. Second, it could be argued that large enough groups of consumers might expect less free speech, as they might find certain views unpleasant to read. This is true, yet one could also expect that in a competitive market undertakings would have incentives to innovate and provide technological solutions that allow easy (manual or automatic) filtering – by doing so, an undertaking could broaden its consumer base, which in turn could be monetised.

might support this view, as more content moderation on Big Tech social media created a niche for such services as, e.g., Parler, Mastodon, or even Trump's TruthSocial.[53]

Looked at from this angle, it can be further considered to what extent private censorship could be framed into antitrust analysis. Excessive pricing deals specifically with prices that are offered by undertakings, yet in fact all product characteristics ultimately come down to prices, with "price" simply serving as a shorthand for all product characteristics. There is no difference between, on the one hand, raising prices to an excessive level, while maintaining the same product quality, and on the other hand, keeping the same price and "excessively" lowering the quality of the product. The result of these two actions will be the same for consumers. In consequence, one way to look at private censorship at the theoretical level could be to see it as if it was a certain form "excessive degradation" of quality. It would be a mirror reflection of a conduct well-known under antitrust, i.e., excessive pricing, yet here aimed at quality, since free speech itself would be seen as the "quality" part of consumer welfare. As it will be discussed in Section 4.2.1, there are however certain limitations when it comes to this approach.

A different option that is still open is discrimination. And indeed, when private censorship concerns are voiced, they are often combined with allegations of bias.[54] Discrimination will be further discussed in Section 4.2.3.

*4.1.2. Motivations of undertakings are complex*

Intent is not a prerequisite of establishing liability under Article 102 TFEU, but the fact that private censorship does not lead to easily observable gains for a dominant undertaking can be taken as an indication that it is ultimately aimed at increasing consumer welfare. This might be especially true in relation to exploitative conduct, since "exploitation" suggests a transfer of some value. Furthermore, private censorship often takes place on social media, and insofar banning users can be construed as a "restriction of output", it does not lead to higher prices to other users (especially,

[53] Admittedly, the emergence of these platforms can be used to argue that private censorship is not an antitrust problem, as apparently "the market" delivers alternatives, yet it should be recalled that the mere existence of alternatives does not necessarily lead to no antitrust concerns (Google's famed "competition is one click away" argument is a good example of this). The example of Parler (see Section 2.2) also shows why market entry might be difficult.

[54] And this, in fact, works both ways, i.e., both the right and left claiming that their views are suppressed, see Chilson and Mattox, "[The] breakup speech", 4-5.

taking into account that social media are typically zero-price products) or advertisers (if anything, banning actual users, i.e., not bots, lowers the consumer base, and hence might go against the interest of the dominant undertaking itself).[55]

In consequence, private censorship directed at consumers or politicians can be seen as a form of "non-commercially motivated" conduct that could be argued to remain outside the scope of antitrust.[56] And indeed, so far under antitrust, the main subject of interest have been actions intended to bring monopoly profits and the deadweight loss which comes as the result. To put it short, anticompetitive conduct is implemented to either extract monopoly profit or protect it. Still, as was pointed out in Section 3.2, there are a number of reasons for which dominant undertakings may suppress information. Two of them are of particular interest from the point of view of private censorship: (a) corporate social responsibility; and (b) strategic regulatory considerations.

Corporate social responsibility (CSR) was famously criticised by Milton Friedman, whose views can be taken as an example of a Chicago position on this issue.[57] The idea behind CSR has been that certain social goals should be followed by corporate entities as a sort of "moral obligation", even if no law requires action in that regard. This can be understood also more broadly, i.e., not just as "social responsibility", but also personal views of executives (e.g., Elon Musk pursuing through corporate entities his own personal goals, which do not have to align with profit-maximisation). Friedman objected and argued further that CSR would only be possible when engaged into by monopolists (who, contrary to undertakings that operate in competitive environment, have enough power to alter terms of exchange).[58] His position was that undertakings should only be concerned with profit-making. Still, in the 2020s, CSR is widespread, and since it may motivate market actions of undertakings, it could be considered to what

[55] One should keep in mind, however, that aside from price-level concerns, quality is still an issue.

[56] For both an overview and critique of general arguments concerning non-commercially motivated restraints, see Lee Goldman, "The politically correct corporation and the antitrust laws: The proper treatment of noneconomic or social welfare justifications under Section 1 of The Sherman Act", *Yale Law & Policy Review* 13 (1995).

[57] Milton Friedman, "A Friedman doctrine: The social responsibility of business is to increase its profits", *The New York Times*, September 13, 1970, www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

[58] Milton Friedman, *Capitalism and freedom* (Chicago: The University of Chicago Press, 2020), 145.

extent it explains the motivation behind private censorship. Obviously, CSR is generally aimed at bringing positive changes (thus, e.g., CSR might provide additional incentives to fight fake news), yet in a similar way governments typically justify free speech restrictions with laudable goals – "the road to hell is paved with good intentions". In consequence, some have argued that "politically correct corporations" should not enjoy antitrust immunity, since their actions may still adversely impact consumers.[59]

When it comes to strategic regulatory considerations (SRC) they might be concerning in a different way. SRC might resemble CSR when it comes to results, but is more profit-oriented and connected with regulatory actions outside the market.[60] To prevent market regulation, undertakings might be interested in SRC so that no regulation is implemented. From the point of view of free speech, however, there is a risk associated with that. Any market regulation would require broad democratic consensus and would need to comply with free speech guarantees that governments must respect. SRC, on the other hand, may be harder to challenge and may be less responsive to free speech considerations, especially if they are implemented by a monopolist or collectively.[61] Furthermore, knowing that government regulation of free speech might be difficult, public actors may have incentives to (informally) push market actors to impose private measures that simply replace government regulations.[62]

To conclude, what is relevant from the point of view of antitrust limits is that while the lack of clear monetary profit can be taken as indicative of no antitrust concern (which in turn brings private censorship outside

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[59] Lee Goldman, "The politically correct corporation". Arguments have also been made, however, that corporations hold a different position than individuals and that they should implement CSR. This does not mean that all their CSR actions taken unilaterally or collectively should enjoy antitrust immunity, but some may, see, e.g., Rutger Claassen and Anna Gerbrandy, "Doing Good Together: Competition Law and the Political Legitimacy of Interfirm Cooperation", *Business Ethics Quarterly* 28, no. 4 (2018).

[60] Jean Tirole and Roland Bénabou, "Individual and corporate social responsibility", *Economica* 77, 1 (2010), 10.

[61] For collective actions, see Douek, "The rise of content cartels"; Polański, "Antitrust shrugged?".

[62] See Douek, "The rise of content cartels", 9 for an example of self-regulation calls in the European Union. For an example of Facebook being informally pushed to censor content, see David Molloy, "Zuckerberg tells Rogan FBI warning prompted Biden laptop story censorship", *BBC*, August 26, 2022, https://www.bbc.com/news/world-us-canada-62688532. See also a letter of a number of CEE governments to Big Techs, calling for more social responsibility: "An open letter to big social media tech", The Chancellery of the Prime Minister of Poland, accessed June 10, 2023, https://www.gov.pl/web/primeminister/an-open-letter-to-big-social-media-tech.

the limits of antitrust), there are other possible reasons that are of no less concern, i.e., that in a world of CSR culture, there might be non-monetary incentives to restrict output – and consumers might be losing in all of these scenarios.

*4.1.3. Controversies*

Taking into account this discussion, one could argue that private censorship remains within the limits of antitrust or at least can be considered as an antitrust issue, even if just the lower boundary of antitrust is taken into account. However, the example of excessive pricing also shows how the limits of antitrust become more challenging when specific instances of conduct are looked at, not just general types of conduct.

High prices can be seen as the most straightforward result of using market power. However, while excessive pricing is easy to explain on paper, it is not a common type of antitrust investigation. There are two major obstacles in that regard: (a) saying that a given price is unfair might indirectly suggest that the antitrust authority knows the proper price level; (b) excessive pricing is somewhat counterintuitive, in the sense that dominance itself is not prohibited – there is no reason to see monopoly prices as illegal, and if the "unfair" price is a price higher than the monopoly price, it is unclear why a monopolist would charge a price which is higher than the profit-maximising one (i.e., the monopoly one).

In consequence, Bishop and Walker, for instance, conclude that discussing excessive pricing may appear "surprising", since "even though excessive pricing would seem to be the most direct form of abuse (…), there are few pure excessive pricing cases in the case law".[63] More recently, Advocate-General Pitruzzella discussed this issue in more detail, observing that while excessive pricing cases appear to be resurging in case law, establishing that a price is unfair is "an extremely difficult process and one that is fraught with the risk of false positives".[64] In consequence, there is always a risk that an antitrust investigation concerning excessive pricing will turn into a certain form of "dirigisme", rather than properly understood antitrust enforcement.

This should be treated as a warning sign and reminder that markets are complex phenomena. While the problems outlined above can be seen as

[63] Simon Bishop and Mike Walker, *The economics of EC Competition Law: Concepts, application and measurement* (London: Sweet & Maxwell, 2010), 244.

[64] Opinion of Advocate General Pitruzzella, case C-372/19, *SABAM*, EU:C:2020:598, paragraph 22.

still connected to the limits of antitrust (its administrability and the question of whether a specific conduct, not just type of conduct falls within the remit of antitrust), they are also connected with antitrust limitations (i.e., what decision-makers can realistically do, taking into account limited information). For this reason, this issue will be continued in the next subsection.

### *4.2. Administrability*

To see whether private censorship could be analysed under a more structured legal test, this subsection looks at it from five points of views:

1. The hypothesis of "excessive quality degradation";
2. A remodelled essential facilities doctrine;
3. Discrimination;
4. A remodelled competition on the merits reasoning;
5. Fair terms and conditions.

#### *4.2.1. Excessive quality degradation*

This way of approaching private censorship was foreshadowed in Section 4.1. It allows one to look at private censorship from an angle that frames it into a more economic context.[65] However, it also introduces one of the basic problems with designing a workable assessment method for private censorship, i.e., measurability. This is already an issue in classic excessive pricing cases, and if prices are substituted with more intangible "quality", the task becomes even more difficult.

Is it possible to overcome this issue in any way? Generally, one option is already known from classic excessive pricing cases and comes down to designing yardstick and benchmarking tests.[66]

Yet, it might be that a better question is whether the quality degradation hypothesis should be treated as a decisive test, or maybe it is better that it merely remains a way of explaining how free speech could be seen as part of antitrust under its lower boundary. This is because the quantification of harm is not inherently tied to the consumer welfare standard, even despite the fact that sometimes it is presented as such.[67] In other words,

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[65] Following a classic line from *The Untouchables*, one can call it "the Chicago way".

[66] Whish and Bailey, *Competition Law*, 764.

[67] The controversies surrounding quantification can be seen in, e.g., Kanter, "Remarks", who called the consumer welfare standard "the central planning standard". Still, even Bork himself criticised

more probabilistic approaches to cases are possible under the consumer welfare standard.[68]

The most extreme form of such a "probabilistic" approach would be to assume that *all* attempts to stifle speech are harmful, unless an objective justification is provided – legally, there is no objective, "scientific" criterium that says at what level of risk an evidentiary rule should apply and how to calculate such a risk.[69] Still, one can reasonably assume that such a "paranoid rule" would likely do more harm than good, taking into account that, as it was discussed earlier, there might be good reasons to suppress some forms of speech. The question might thus be how to create a probabilistic approach that puts some more burden of proof on an antitrust agency or private plaintiff. Two such tests will be discussed in Section 4.2.2 and 4.2.3, and then two other options in Section 4.2.4 and 4.2.5.

*4.2.2. Essential forum doctrine*

The essential facilities doctrine constitutes one of the most prominent examples of antitrust frameworks of analysis. The essential facilities doctrine is applicable in relation to exclusionary conduct. As explained in Section 4.1.1, exclusionary theories of harm are not applicable to the types of private censorship covered in this article. However, the logic of the doctrine is not necessarily without relevance.

The essential facilities doctrine is used in refusal to deal cases.[70] The logic of the doctrine is that a dominant undertaking can be expected to provide access to its infrastructure to a competitor (it is generally assumed that such access will be beneficial for competition, and no quantification of negative effects of no access are needed). Still, this should happen only exceptionally. This is to ensure that competitors do not free ride on investments. Thus, generally the doctrine requires proving that the infrastructure is indispensable and cannot be easily replicated, and in case of

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attempts to quantify welfare losses, concluding that they lead to an "economic extravaganza", see Bork, "The antitrust paradox", 118, 126, 129.

[68] See Petit, "A theory of antitrust limits", 1439, saying, e.g., "Comparing the US and EU law (…) we are struck by the different attitude towards uncertainty. EU competition doctrine is more probabilistic. Intervention is permitted at higher thresholds of uncertainty". See also: OECD, "Consumer welfare standard", 9, 29 on the use of presumptions.

[69] On the role of probability and risk in shaping antitrust, see Polański, "Positive program", 260-261.

[70] For a general discussion of the doctrine and relevant case law, see, e.g., Whish and Bailey, *Competition law*, 737-750.

intellectual property rights it is further expected that the application of the doctrine will lead to a new product.

While exclusionary cases concern actions taken against competitors, refusal to deal is also what happens in case of private censorship. If someone is banned, he or she is prevented from using a certain "facility", e.g., a social media platform. Still, we also saw that there might be important pro-consumer interests behind suppressing information. Against this backdrop, if private censorship is considered as an abuse of dominance, one could think of such a test that also creates a high threshold of applicability.

Free speech scholarship has its own doctrine which is somewhat similar to the essential facilities doctrine. It is called the public *forum* doctrine.[71] The public forum doctrine is generally applicable in relation to free speech restrictions imposed by governments. To put it in simple terms, the idea behind it is that governments cannot restrict speech in areas that serve as "public forum", e.g., a public square as opposed to the house of parliament, where speech is moderated by the house speaker. In the United States there have been attempts to expand this doctrine to private actors (which to a large extent could have prevented private censorship issues to arise in the area of Big Tech activity), but the applicability of the doctrine to such cases is limited. The prime example of such a case is the 1946 *Marsh* case, where an individual was prohibited by a private town from political (religious) advocacy on its streets.[72] The US Supreme Court ruled that the First Amendment covered this situation, although not without controversy, since apart from the fact that the town was private (and the First Amendment refers to government actions), there was a government-owned street nearby, and one could argue that the company premises were not "essential" to exercise free speech.

A similar problem arose in a human rights case, *Appleby*, heard by the ECHR.[73] In *Appleby*, a group of citizens had been prevented from political advocacy on the premises of a shopping mall. The ECHR did not consider this to be a restriction of free speech, since there had been other options of political advocacy available (an additional controversy was also again that the premises had been private). A dissenting judge pointed out, however, that the majority erred insofar it did not properly take into account

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[71] For a discussion of the public forum doctrine, in particular from the point of view of private actors, see Nunziato, "The death of the public forum".

[72] *Marsh*, 326 U.S. 501 (1946).

[73] See n. 12.

discrimination which might have taken place (while the shopping mall had prevented the group of citizens from their advocacy, it had afforded such a possibility to other groups).

The requirement of indispensability, if applied to private censorship, could prevent over-enforcement, but it might at the same time render such cases highly unlikely: not only an undertaking would need to be dominant, its infrastructure would need to be indispensable, and there are many options to exercise free speech outside any specific social media platform. In consequence, if one considers the essential facilities doctrine as a reference point or an inspiration for a private censorship-oriented test, one might consider whether "indispensability" is an appropriate requirement, or whether a test of "essential *forum*", as opposed to "essential *facilities*", should rely on some lower threshold. A possible reason for such a relaxation in comparison to the classic essential facilities doctrine could be that while the latter concerns dealing with a competitor, the type of private censorship covered in this article is related to merely serving consumers.

The requirement of there being a "new" product also includes parallels to free speech scholarship. A more or less literal transposition of this requirement into the private censorship context would mean that whatever speech is going to be protected, it needs to be somehow "new". This might seem strange at first, but both in terms of **justification** for such a test and in terms of existing **free speech literature** it is not without logic.

In terms of **justification** for such a requirement, it serves mostly as a safeguard against over-enforcement and false positives. Since we move around the idea that private censorship *might* lower quality (and thus, under a probabilistic approach, consumer welfare), there is a higher chance that this risk will actually materialise if speech is "new", rather than repetitive: if it is repetitive, consumers get more of the same, and if this speech is banned, then they will still have alternative speech of similar sort; if it is "new", they might actually lose something. In terms of probability, it is thus not a bad rule.

When it comes to **free speech scholarship**, Tim Wu's discussion of free speech in the context of fake news is interesting.[74] Wu refers to a classic observation made by Meiklejohn that: "What is essential is not that everyone shall speak, but that everything worth saying shall be said", and argues that bearing in mind that free speech is supposed to serve

[74] Tim Wu, "Is the First Amendment obsolete?", *Michigan Law Review* 117, no. 3 (2018), 576-578.

democratic purposes (allow views to be heard and considered), one might wonder whether speech should be protected in absolute terms, or whether maybe it is just important that citizens (consumers) receive enough speech of adequate quality to make up their minds.[75] The context here is that troll farms often rely on flooding the public with false information so that reliable information is no longer visible. This is further based on a conception of free speech as a tool relevant for democratic governance; one should be aware, though, that there are also other concepts of free speech, e.g., justifying free speech in terms of self-expression.[76] In practical terms, the requirement of speech being "new" could be used to more easily ensure that, e.g., the free speech of candidates in elections is protected (they are the only ones who actually present their views in a campaign; the context of their speech is their political campaign and the fact that they run for office), but speech of anonymous users is not necessarily covered (their speech is often not "new" in the sense that it is just one example out of thousands of similar anonymous opinions).

The advantage of this way of reasoning about private censorship under Article 102 TFEU would be thus that antitrust enforcement could be limited to most controversial types of cases. It would create a seemingly low initial barrier to claim that abuse took place (proving that there was refusal, i.e., a ban), but it would require explaining why a specific platform was an "essential forum" and how speech that was supposed to be presented was of extra value to consumers.

#### *4.2.3. Discrimination*

A different type of legal test could be discrimination. It would create a higher initial barrier than the refusal to deal type of reasoning. This is because not only a user would need to be banned, but the user would also need to show that some other group of users or a different user was not banned, despite the similarity of circumstances. Thus, e.g., Donald Trump used to be banned from Twitter, but at a similar time Twitter tolerated Taliban accounts.[77] This discriminatory character of the test might be

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[75] Alexander Meiklejohn, *Free speech and its relation to self-government* (New York: Harper & Brothers Publishers, 1948), 25.

[76] Other justifications also include confronting ideas and facilitating the functioning of increasingly more diverse societies, see Ash, *Free speech*, 73.

[77] Jemima McEvoy, "Parler criticizes Twitter for allowing Taliban accounts: 'Terrorists should not be given free rein on social media'", *Forbes*, August 18, 2021, https://www.forbes.com/sites/jemi-

appealing to a legal mind, as discrimination is generally a well-recognised type of issue in legal scholarship and lawyers are trained in comparing two situations to then identify differences and arrive at a "fair" ruling.[78]

More recently, the discriminatory type of reasoning has attracted some attention in antitrust literature insofar Neobrandeisian views are concerned. For instance, Barry Lynn discussed antidiscrimination rules as a means of ensuring equal service to everyone.[79] Matt Stoller recalled Martin Luther King making analogies between antitrust and antidiscrimination laws and spoke about non-discrimination requirements that were imposed under the Civil Rights Act, and which consisted in designing public accommodation rules.[80]

Discrimination would require comparing at least two similar groups of users and proving that one of them was treated worse without any adequate justification. In *GVL*, part of the controversy was discrimination based on nationality; a natural parallel could be discrimination based on the content of speech concerning the same topic (e.g., content regarding financial instruments such as stocks is allowed, but content regarding cryptocurrencies is not; content regarding pro-vaccination campaigns is allowed, but content regarding anti-vaccination is not; content regarding right-leaning policies is allowed, but left-leaning is not).[81] While exploitation brings forward the issue of someone benefiting in some way (hence "exploiting" others), discrimination can be seen as more objective and not connected to subjective gains; this can be possibly strengthened by the fact that the concept of "abuse" under Article 102 TFEU is objective in the sense that no intent needs to be proven.

While this test is not specifically designed to address issues such as "false positive errors" or generally "administrability", which both gained

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mamcevoy/2021/08/18/parler-criticizes-twitter-for-allowing-taliban-accounts-terrorists-should-not-be-given-free-rein-on-social-media.

[78] Some of this sentiment can be seen in a response once given by Martijn Snoep, the head of the Netherlands' competition authority, in the context of fairness: "For the economists in the room: lawyers were thinking about 'fairness' long before economics was considered a science", as quoted by Cory Doctorow (@doctorow), March 2, 2023, Twitter, https://twitter.com/doctorow/status/1631251485903278080.

[79] Barry Lynn, *Liberty from All masters* (New York: St. Martin's Press, 2020), 50-54.

[80] Matt Stoller, *Goliath: The 100-year war between monopoly power and democracy* (New York: Simon & Schuster, 2019), 244-245.

[81] For case law references, see n 49. For Big Tech suppressing information about cryptocurrencies, see Thibault Schrepel, "The complex relationship between Web2 giants and Web3 projects", *Computer Law & Security Review* 50 (2023).

a special meaning in antitrust enforcement, the discrimination type of reasoning might minimise such errors and support arriving at acceptable conclusions. If a platform does allow certain type of content, then apparently it finds it welfare-enhancing and good for consumers. If it does not allow some other content which prima facie appears similar, this creates a ground to verify reasons for different treatment. If those reasons do not seem to be legally acceptable ("unfair", "discriminatory") and cannot be objectively justified, then the conduct in question is considered illegal. In a way, the discrimination type of reasoning is similar to what economists see as benchmarking: if there is no easy way to measure or quantify something in abstract terms, benchmarking delivers a reference point to approximate desirable results.

*4.2.4. Trading on the merits*

In more recent case law, there has been a trend to more often frame exclusionary cases as "competition on the merits" rather than classic refusal to deal.[82] The competition on the merits type of reasoning has not been yet clearly structured into a legal test. It appears to rest on an assumption that certain types of conduct are so clearly "not on the merits" that they do not require an elaborate argument. Thus, e.g., in *Lithuanian Railways*, the court found it sufficiently clear that dismantling rail tracks is an "abusive" conduct, while in *ENEL*, the court hinted that actions that were clearly running against procompetitive regulatory measures might be abusive even if their impact on actual competition could have been small.

This could too theoretically be used as a reference point for a remodelled test. While the discrimination type of reasoning was based on the idea that there needs to be some case that one can make a comparison to, under a test modelled upon the "competition on the merits" there would be no need for an actual reference point (although such a reference point could be used). Such a "*trading* on the merits" test could aim at identifying types of actions that go beyond what is strictly necessary to attain a legitimate objective. Insofar we deal with government actions and criminal law, sanctions need to be clearly defined and lifetime punishments are typically rare. If we look at, for instance, how Big Tech's tackled Trump's bans, the amount of discretion in that regard seemed almost arbitrary, e.g., Mark

[82] CJEU, Case C-42/21 P, *Lietuvos geležinkeliai*, EU:C:2023:12; CJEU, Case C-377/20, *ENEL*, EU:C:2022:379.

Zuckerberg initially declared that Trump would remain banned "indefinitely" but "at least (…) until the peaceful transition of power is complete" – the decision was then changed in 2023 after Facebook's own internal reviews.[83]

*4.2.5. Terms and conditions*

The fifth way to make private censorship more administrable as an abuse would be to drop the idea of looking at specific instances of private censorship altogether (at least in the context of this test). Instead, one can look at what makes private censorship possible, i.e., terms and conditions. This completely removes the need to make assessments with regard to specific cases of users being banned and replaces it with a need to make an assessment with regard to "due process" afforded by an undertaking. As it was mentioned in Section 3.2, dominant undertakings can be seen as quasi-regulators of free speech. Since it can be argued that Big Techs that engage in private censorship take actions similar to those taken by governments, one could also argue that they should provide "due process" to users that are banned. Due process means that the risk of suppressing free speech is lower, and that only the most harmful types of speech are suppressed.

Such an approach would generally fall into a category of abuses explicitly mentioned in Article 102 TFEU ("imposing unfair trading conditions"). Some inspiration for this type of reasoning can be looked for in the German Facebook case, in which the German NCA concluded that users were in fact forced to accept terms and conditions.[84] If terms and conditions are phrased in a way that introduces much imbalance between users and platforms, this can be seen as problematic, bearing in mind that we operate under an assumption that competition is already distorted by the existence of a dominant position (e.g., consumers cannot easily switch; in a competitive market such unbalanced terms and conditions could theoretically also be introduced, but users could be expected to be able to switch more easily, for instance from Facebook to Parler).

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[83] James Clayton, Leo Kelion, and David Molloy, "Trump allowed back onto Twitter", *BBC*, January 8, 2021, https://www.bbc.com/news/technology-55569604; Nick Clegg, "Ending suspension of Trump's accounts with new guardrails to deter repeat offenses", January 25, 2023, https://about.fb.com/news/2023/01/trump-facebook-instagram-account-suspension.

[84] Bundeskartellamt, case B6-22/16, *Facebook*.

## *5. Conclusion*

Markets are a complex subject – and so is free speech. In this context, it is understandable that private censorship raises concerns. On the one hand, it comes down to using market power in a way that impacts free speech, which itself remains a special value. On the other hand, even undertakings that wield much market power need to adapt to market circumstances, in particular, ensure that harmful speech does not drive consumers away from their services – some might even argue that the need to delete harmful content should not merely follow from economic incentives but also corporate social responsibility.

Antitrust was not specifically designed to protect free speech. Yet, this does not mean that antitrust should be indifferent to free speech concerns and that private censorship is outside its boundaries. From the antitrust point of view, private censorship can be looked at from two angles: the lower boundary of antitrust (its *limes inferior*) and its upper boundary (its *limes superior*). The former can be seen as focusing on existing approach to antitrust; the latter represents more novel theories. This article attempted to frame private censorship as an antitrust issue under the *limes inferior* of antitrust, and this exercise justifies at least three conclusions.

First, there seem to be no reasons to easily dismiss private censorship and free speech as antitrust concerns. This, however, requires some explanation. The term "free speech" can be used to easily grasp the subject of interest from the point of view of policy-setting and public communication, yet on the technical level free speech remains of interest under the lower boundary of antitrust, because it can be seen as part of product quality. In other words, from this angle, free speech is more of a narrative tool rather than a standalone goal.

Second, insofar private censorship amounts to unilateral actions aimed at, e.g., banning politicians, citizens' speech, or generally stifling public debate, it could be considered under exploitative or discriminatory theories of harm (with the latter being likely more workable). However, while possible, this is also challenging. The challenge comes not so much from free speech itself, but the fact that exploitative and discriminatory theories under antitrust are generally more difficult and (possibly) underdeveloped. This leads to another conclusion. With free speech being an important value and private censorship being a challenging issue under exploitative and discriminatory theories of harm, antitrust authorities might want to be particularly cautious when they see market developments signalling *exclusionary* conduct.

In other words, if an antitrust authority observes that large undertakings take steps that may exclude from the market undertakings who offer more room for free speech, it might want to strongly prioritise such cases and pursue them under classic exclusionary theories of harm. Indirectly, this might contribute to more free speech in the future and fewer concerns over private censorship. This does not mean that exploitative or discriminatory cases cannot be pursued, but it might be simply more cost-effective to act early on – "prevention is better than cure".

Third, it is still possible to approach private censorship under the upper boundary of antitrust, i.e., its *limes superior*. This could be productive, in particular as regards establishing dominance, which in this article was assumed to exist. This includes both questions concerning the general definition of power and the issue of such legal concepts as "collective dominance".[85] When it comes to conduct itself, dealing with private censorship under the upper boundary of antitrust may include similar challenges as those discussed in this article. This is because assessing particular instances of conduct ultimately encounters antitrust limits and limitations which are more technical and thus neutral. One would still need to define some legal test to filter cases and the change of antitrust goals or standards might not significantly alter this dimension. Such changes may provide more reasons to establish certain evidentiary rules, presumptions, or more generally a more probabilistic approach, but at the end of the day the primary issue remains: certain forms of suppressing information might seem like "censorship", yet consumers might expect them, even unconsciously and contrary to their declaratory statements.

These three conclusions lead back to the more fundamental question: should antitrust concern itself with free speech? The answer to this question exceeds the bounds of antitrust and might depend on one's more general beliefs over effective ways of dealing with power (both public and private). As discussed in this article, antitrust could play *some* role with regard to private censorship. This does not mean that antitrust can be expected to remove all concerns arising with regard to private censorship, yet this also means that most extreme social tensions might be alleviated, either because of actual

[85] For an attempt to reconceptualise power, see, e.g., Anna Gerbrandy and Pauline Phoa, "The power of big tech corporations as modern bigness and a vocabulary for shaping competition law as counter-power" in *Wealth and power*, ed. Michael Bennett, Huub Brouwer, Rutger Claassen (New York: Routledge, 2022). See also, Snoep, "Plugging gaps", on deficiencies with regard to collective dominance.

instances of enforcement or purely on deterrence basis, with undertakings becoming more responsive to free speech concerns. No role at all, on the other hand, might give rise to a sort of an "antitrust vacuum", creating in the long term more reasons to opt for hard regulatory measures to appease concerns. Whether from a market perspective, more regulation rather than antitrust enforcement would be a preferred route could be subject to a further debate.

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