

Introduction

The separation of powers principle and antitrust both relate to power and, notably, deal with the concentration of power. However, they are usually conceptualized, analyzed, and promoted separately. Separation of powers primarily refers to the branches of government or the main functions of the state and, in this respect, to public or state power or powers, while the economic power of private or, to a lesser extent, public firms is at the core of antitrust. Though appealing, this distinction is not clear-cut. These powers interact with one another. The concentration of political power in one or a few hands may typically denote an authoritarian regime. By contrast, the same cannot automatically be said about the concentration of economic power. Still, the latter may facilitate the emergence or the strengthening of such a regime.¹ Accordingly, a correlation or even a cause may exist in this regard.

The separation of powers principle does not seem to have any economic content. Theorists of this principle often do not consider the concentration of economic power in the hands of one or a few persons or firms. On closer inspection, however, at least some of them see, in such a concentration, similar dangers to those that they attribute to the absence of separation or division of powers with respect to branches of government or state functions. Therefore, some connection – albeit implicit – may be established between separation of powers and antitrust.

Antitrust, for its part, seems to be focused on economic power – more precisely on market power. Nevertheless, from a historical perspective, antitrust had a political content or even purpose in several jurisdictions. Has this dimension of antitrust completely and permanently disappeared? This question must be assessed prospectively, in light of the digitalization of the economy and the challenges linked to it. One of the goals of this book is to investigate whether separation of powers and antitrust are – at least partly – based on common grounds from a historical and prospective perspective. Are we currently witnessing some actual or potential convergence or interactions between them in the digital era or in

¹ See Crane, “Instrument of Democracy,” 24–28.

the age of artificial intelligence?² This yet-to-be-examined question must first be addressed under the existing antitrust and competition laws. An unsatisfactory response possibly demonstrates the need for legislative reform. The next challenge is to determine which is more appropriate to deal with the politico-economic issues raised by the digitalization of the economy – antitrust or specific regulation.

The concentration of politico-economic power in one or a few hands also raises fundamental issues in a democracy. Although this book is not directly about the latter, it is partly underpinned by considerations on liberty, conflicts of interest, and, ultimately, democracy, so that the analysis includes developments upon them. The threat to democracy is duly considered and actually forms the backdrop of the book but is sometimes put to the forefront when and where it is appropriate. Currently, and in the future, special attention must be given to the fact that a few digital platforms contribute to the digital infrastructure of democracy, with the internet having been described as “the most powerful tool in human history”³ and criticized for concentrating power, rather than dispersing it.⁴ This continuing evolution needs to be addressed from a mingled separation of power and antitrust or regulatory perspective. In this regard, pieces of legislation recently adopted or proposed in several jurisdictions can be compared, as different democracies face, or may face, similar issues. This invites an analysis on how some of these issues are addressed by constitutional law, regulation, or antitrust from a comparative point of view.

The terms *antitrust* or *competition law and policy* are mostly used in this book interchangeably. *Competition law and policy* is broader and used in many jurisdictions, while *antitrust* is a term used mainly in the United States, where the interactions between political and economic powers have been explored probably more than in any other country. One should note, however, that this term can also be found in other jurisdictions, for instance in the European Union.⁵ As this book explores the foundations of antitrust laws, the term *antitrust* reflects this and, therefore, is chosen in the title, though the analysis will actually encompass what is usually understood as *competition law and policy* and will also include illustrations or considerations on what would qualify as antimonopoly – and not just antitrust – legislation in the United States.

For its part, the term *digital platform*, widely used in the book, notably refers to the “major digital platforms that have drawn so much media and political attention”⁶ – especially Alibaba, Amazon, Apple (mostly with respect to its app ecosystem),

² The “Age of AI” (Kissinger, Schmidt & Huttenlocher, *Age of AI*) is itself digital, at least to a great extent. Issues specifically relating to artificial intelligence will also be addressed.

³ Hoffman, *Forces*, 35.

⁴ Narula, *Society*, 194–99; Fukuyama, *Liberalism*, 104–5 & 109.

⁵ In the European Union, see, for example, https://ec.europa.eu/competition-policy/antitrust_en. Regarding anticompetitive agreements and abuses of dominant position specifically, see Combe, *Concurrence*, 219. In the present book, merger control is included in a broad notion of *antitrust*.

⁶ Hovenkamp, “Antitrust and Platform Monopoly,” 1956.

Facebook, and Google. Of course, other platforms such as Baidu, Instagram, KakaoTalk, LinkedIn, TikTok, Twitter, YouTube, WeChat, or WhatsApp and, more recently, developments relating to the gaming industry, artificial intelligence, or the metaverse will also be considered. The fact that several platforms belong to the same company – Facebook, Instagram, Messenger, and WhatsApp to Meta Platforms, Inc.; Google, Bard, and YouTube to Alphabet Inc.; Bing, LinkedIn, and the Microsoft Gaming division to Microsoft Corporation, not to mention its partnership with OpenAI; WeChat and Tencent Interactive Entertainment Group, with its subdivision Tencent Games, to Tencent Holdings Ltd. – also matters. The use of the term *digital platforms* in connection with all of these, and other, firms is widespread and well established.⁷

In a nutshell, digital platforms have the following main characteristics:

Digital platforms bring together individuals and organizations so they can innovate or interact in ways not otherwise possible, using modern software, hardware, and networking technology [...]. Digital platforms aim to connect two or more market actors (market sides) and generate positive feedback loops among or across users in ways that bring increasing value to platform participants (network effects).⁸

As far as antitrust is concerned, the notion of *dominant digital platform* or *dominant platform* will be used throughout this book, as it is relevant in many jurisdictions,⁹ including in the United States.¹⁰ This book does not attempt to determine which firms have a dominant position in one or several digital markets. This question is currently the subject of numerous proceedings in many jurisdictions. Each market requires a careful analysis, and great caution is needed in this respect. This implies avoiding any abrupt and summarily reasoned conclusion as to the existence or not of a dominant position of a firm in a given market. When the adjective *dominant* is used in the book, it means, in principle, that the firm at stake has a dominant position

⁷ See, e.g., Jenny, “Digital Ecosystems,” 1144–46; Cusumano, Gawer & Yoffie, “Self-Regulation,” 1260–62; Parker, Petropoulos & Van Alstyne, “Platform Mergers,” 1310–22. Regarding the United States, see, for instance, U.S. House of Representatives – Subcommittee on Antitrust, Commercial and Administrative Law, *Digital Markets*, 132–376 (qualifying Facebook, Google, Amazon, and Apple as dominant online platforms). Regarding Germany, see, for instance, Monopolkommission, *Wettbewerb 2020*, 22–51 (with a summary in English on pp. 25–26). For a narrower approach, see Schrepel, “Platforms or Aggregators,” 1–3 (arguing that Google.com, Facebook.com, Twitter.com, Amazon.com, Netflix, Uber and Airbnb are aggregators, not platforms, and that “only cases dealing with platforms [and not with aggregators] should point towards reduced consumer choice to signal anticompetitive practices” [quotation from p. 2]). However, if an “aggregator” provides its users with partial information, is the latter’s choice not *de facto* reduced?

⁸ Cusumano, Gawer & Yoffie, “Self-Regulation,” 1260 (quotation) and *Business of Platforms*, 13. Regarding “platforms,” see OECD, *Handbook*, 10 (“Platforms are firms that provide different services to different groups of interconnected consumers”). Regarding “network platforms,” see Kissinger, Schmidt & Huttenlocher, *Age of AI*, 94 (“[D]igital services that provide value to their users by aggregating those users in large numbers, often at a transnational and global scale”).

⁹ See OECD, *Ex Ante Regulation*, 9–10; UNCTAD, *Digital Era*, 2–5 & 10.

¹⁰ See, e.g., Hovenkamp, “Monopolizing,” 1680–81.

within the meaning of, for example, Article 102 of the Treaty on the Functioning of the European Union (TFEU) or may fall under, for instance, Section 2 of the Sherman Act in the United States.

The methodology followed in the book can be qualified as doctrinal. Indeed, it is based on the study of – and reflections on – the foundations of both the separation of powers principle and antitrust; it intends to investigate whether they historically and contemporaneously share some common ground. Methodologically, after having (re)examined the foundations on which the separations of powers principle and antitrust rest, and from which they can evolve, the book evaluates the interactions between them as well as their actual and possible convergence. The interactions are carefully analyzed through the lens of both the separation of powers principle and antitrust. The analysis is not, however, a purely abstract exercise. On the contrary, historical developments, assessments of legislative proposals, case studies, and observations on the concrete functioning of digital markets and democracy in the digital and artificial intelligence era supplement and support the doctrinal method. In other words, this study takes a theoretical approach, but, at the same time, it is based on practical considerations and addresses current issues on antitrust and regulatory matters. These issues are delineated from numerous legislative proposals, reports, books, scholarly and press articles, and other publications such as entries in specialized blogs relating to digital platforms. This set of generally accessible data, gathered over several years and quoted throughout the book, allows defining some contours of a new separation of powers in the digital era and in the age of artificial intelligence while identifying or synthesizing the actual or potential contribution – if any – of specific regulations or antitrust in this regard.

By contrast, this book does not primarily deal with checks and balances in antitrust enforcement and to the related institutional choices, as abundant literature¹¹ and numerous reports on that subject currently exist or are forthcoming, for instance, from the Organisation for Economic Co-operation and Development (OECD).¹² However, some comments on the institutional aspect of antitrust or regulatory agencies will have a place in the last chapter. Neither does this book specifically question, from an institutional perspective, the sweeping language used in several key antitrust provisions in the United States,¹³ Europe,¹⁴ or elsewhere. Granted, too much leeway or discretion for antitrust agencies and courts can raise rule of law and separation of powers concerns.¹⁵ Before changing this paradigm of antitrust, from the onset, a note of caution is warranted: all things considered, but without further elaboration,

¹¹ See, e.g., Sokol & Guzman (eds.), *Antitrust Procedural Fairness*; Nihoul & Skoczny (eds.), *Procedural Fairness*.

¹² See, e.g., OECD, *Standard of Review and Procedural Fairness and Transparency*.

¹³ See Khan, “Antitrust History,” 1677–82.

¹⁴ See, e.g., Lévêque, *Entreprises hyperpuissantes*, 111–12.

¹⁵ See, e.g., Tucker, “Antitrust” (“[T]he equilibrium is vague statutes that allow bureaucrats and judges to shift high policy while virtuously claiming fidelity to the law”); Crane, “Antitrust and Democracy,” 8.

the openness, flexibility, and transversality across sectors and industries, as well as the adaptability of antitrust,¹⁶ should not be sacrificed before a thorough examination of an alternative, more convincing regime. Napoléon Bonaparte warned that “[t]he laws of circumstances are abolished by new circumstances.”¹⁷

This book is divided into three parts. Part I focuses on the foundations of antitrust and the separation of powers principle, not only from a historical viewpoint but also from a contemporary one in the digital and artificial intelligence era. Democracy serves, to a certain extent, as a backdrop to the analysis, since the concentration of politico-economic power is often viewed as a threat to it. Part II evaluates the actual or possible convergence – if any – of the separation of powers principle and antitrust *de lege lata*, as well as the interactions between them. The approach taken is rather unique, as it shows that two of the main instruments against concentration of powers – the separation of powers and antitrust – share a common basis and may interact in both ways in the digital and artificial intelligence era. This leads, in Part III, to a new view on the separation of powers principle and to a reflection on the potential contribution of antitrust *de lege ferenda* – or at least significantly reinterpreted – and specific regulation to it. The new separation of powers implies a multidimensional appraisal of this principle that takes account of the politico-economic power of digital platforms and the ways to regulate them through constitutional law, antitrust, or specific regulations, as Jamie Susskind also envisioned.¹⁸ From the perspectives of the separation of powers principle and antitrust in the digital era or in the age of artificial intelligence, the approach followed helps one to arrive at the tenet of some reinforced separation between political and economic powers or, put another way, between governmental and platform powers. Platform power, as used throughout the book, relates to the multidimensional power of digital platforms, especially in democratic regimes. As highlighted in the Conclusion, antitrust may actually contribute to separation of powers in a digital and artificial intelligence era, as well as, ultimately, to trust within society and in democracy.

¹⁶ See, for instance, Hovenkamp, “Antitrust and Platform Monopoly,” 2050 (“Competition problems in digital platforms present some novel challenges, but most are within reach of antitrust law’s capacity to handle them”); see also Jean, *Algorithmes*, 21 & 142–44.

¹⁷ Bonaparte, *Maximes et pensées*, 110 (translation).

¹⁸ Susskind, *Future Politics*, 358–59 and *Digital Republic*, 175–210 (“Counterpower”) & 245–47.

PART I

Foundations

This first part of the book focuses on the foundations of the separation of powers principle and those of antitrust. Chapter 1 emphasizes that both notions refer to questions of power(s). Chapter 2 demonstrates that a few theorists of separation of powers and other authors have also based some of their analyses on economic considerations. Chapters 3 and 4 highlight the historical and prospective political content of antitrust and lead to the fundamental observation that the digital infrastructure of democracy is – at least partly – in private hands and, more precisely, in those of firms subject to antitrust and competition laws.

1

Power

The separation of powers principle and antitrust both relate to power – a multidimensional, multifactorial, contextual, and evolutive notion (Section 1.1) – and notably deal with the concentration or the abuse of power (Section 1.2). The separation of powers principle primarily relates to the branches of government and state functions (Section 1.3). For its part, antitrust is linked to economic power (Section 1.4).

1.1 A MULTIFACTORIAL, MULTIDIMENSIONAL, CONTEXTUAL, AND EVOLUTIVE NOTION

Power should always be understood in its context and based on the specificities of the system at hand. Separation of powers and antitrust usually address different issues relating to power, even though they may sometimes share similar concerns or even overlap. Therefore, they should not merge.

A general theory of power seems out of reach and would inevitably be fragmented into several components, aspects, or dimensions. The search for a universally satisfactory definition of power also constitutes a herculean task.¹ The noun *power* has many meanings – forty according to the *Oxford English Dictionary*.² It primarily pertains to ability, control, strength, authority, or influence.³

Power is exercised over institutions, authorities, persons, or firms, but the locution “power over” only partially covers the notion at stake, since power is also understood

¹ Regarding the “conceptual problem of power,” see already White, “Problem of Power,” 479–90 (concluding, on p. 490, that “no universally satisfactory account of the meaning of power is possible”).

² See *Oxford English Dictionary*, which lists forty meanings for the noun *power*.

³ See *Cambridge English Dictionary*, first four meanings of power; *Oxford English Dictionary*, first seven meanings of power (meanings I.1.a and b; I.2.a, b, c, d, and e). Regarding ability, see, for instance, Morriss, *Power*, 13 & 48–106. Regarding influence, see, for instance, Castelfranchi, “Constitution of Power,” 225–28; Wrong, *Power*, 23–24; Dahl, “Power,” 201–15. For a critical account of Dahl’s evolving view of power, see, e.g., Lukes, “Dahl on Power,” 261–71 (concluding, on p. 270, that “[b]y conflating power and influence, it fails to see power as dispositional and thus not needing to be activated to have significant effects”).

as an ability or a capacity to effect outcomes (“power to”).⁴ These two forms of power are, to a large extent, connected and involved in a complex dialectic.⁵ Furthermore, power changes the real and virtual environment faced by every person, every firm, every government, etc.⁶ When power is – directly or indirectly, through circumstance, for example – relative to others,⁷ the idea of absolute power can, to a wide extent, be regarded as an oxymoron. Indeed, power is usually caught in a web of interactions.

Several main characteristics of power can be highlighted in the issue at hand. First, power is multifactorial⁸ – or, in other words, multisource and multicausal – and multidimensional, as it is a complex and protean phenomenon. State and economic powers can be distinguished, even though they interact one with another and are, to some extent, interdependent. In the words of Milton Friedman, “economic power can be a check to political power instead of an addition to it.”⁹ The reverse is certainly also true. It is therefore important not only to adopt an encompassing vision of power but also to clearly determine the dimensions¹⁰ and characteristics of the power one is benefiting, facing, or simply analyzing. Moreover, the source of power may be of a different nature than its manifestation. A dominant firm’s economic power may, for instance, generate societal or political power. From this perspective, power potentially has a transformative effect.¹¹ In addition to this, the power held by some digital firms can be characterized as politico-economic because its economic and political dimensions are actually – at least for a good part – meshed together.¹²

Second, power is contextual.¹³ The circumstances in which power is exercised or simply being felt considerably matter. The relevant constitutional and statutory framework may significantly or enormously differ from one country to another, but

⁴ See Morriss, *Power*, 32–35. For an exchange on this issue, see Pansardi, “Power,” 73–89 (arguing that both *power over* and *power to* refer to social relations); Morriss, “Response to Pansardi,” 91–99; Pansardi, “Reply to Morriss,” 493–97.

⁵ See, for instance, Hearn, *Power*, 6–7 & 16–17.

⁶ See, e.g., Popitz, *Phenomena of Power*, 15–18 (noting, on p. 17, that “[w]e are affected by power via technical action because we are bound to an artificially modified world of objects, which has always been entirely or partly produced by others”).

⁷ See, e.g., Benkler, “Freedom, Power,” 19 (“By *power*, I mean the capacity of an entity to alter the behaviors, beliefs, outcomes, or configurations of some other entity”).

⁸ Regarding “platform power,” see Busch, Graef, Hofmann & Gawer, *Platform Power*, 5–14.

⁹ Friedman, “Capitalism and Freedom,” 7 (quotation) and *Capitalism and Freedom*, 15.

¹⁰ From a sociological perspective, see Lukes, “Power and Economics,” 20–25.

¹¹ See, e.g., Ezrachi & Stucke, *Barons*, 130; Stucke, *Breaking Away*, 243; Susskind, *Digital Republic*, 238; Fishkin & Forbath, *Constitution*, 230 (“Capitalist wealth has an inevitable tendency to convert economic into political domination”), 314 (quoting Wendell Berge, who served as head of the Antitrust Division of the U.S. Department of Justice from 1943 to 1947), 413–14, 422, 436–37 & 475; Eifert, Metzger, Schweitzer & Wagner, “Taming the Giants,” 991; Steinbaum & Stucke, “Standard,” 603.

¹² See *infra* Chapter 4.

¹³ See, for instance, Castelfranchi, “Constitution of Power,” 235–36.

the study of a governmental body's or a firm's power should go beyond this framework and look at the whole context in which this power operates or produces its influence. This comment relates, in particular, to governmental or, more broadly, state power and to economic power.

Third, power is evolutive,¹⁴ as the influence or perception of a given power – of religious or economic nature, for instance – can vary considerably over time. A government body or a firm can see their power increase or decrease in a changing political or economic environment. Power may prove stable or, on the contrary, unstable. The dynamics of a given power or between powers is of special interest in this context.¹⁵ The potentialities of power – in a way, the power of power – should therefore be integrated into the analysis.

These various characteristics can relate either to the power or powers at the core of the separation of powers principle or at the one of antitrust. Indeed, both refer to a multidimensional, multifactorial, contextual, and evolutive conception of power. Separation of powers and antitrust have greatly evolved since the times of Montesquieu or Senator Sherman, but some of the fundamental issues they addressed are timeless and have stood the test of time, such as the risks of abuse associated with the concentration of political or economic power.

1.2 CONCENTRATION AND ABUSE

Power as such is an institutional, economic, social, or – without any claim of completeness – interpersonal phenomenon. It is subject to multiple types and forms of regulation. One of the law's functions is to regulate power in countless settings or situations and for different purposes. More precisely, the purpose of many international, constitutional, or statutory norms, as well as fundamental principles, aims, among other things, at avoiding the concentration or the abuse of power.¹⁶ In other words, power is also viewed as a threat or a danger, notably because it does not tend to balance, but rather to concentrate and, potentially, lead to inequality.¹⁷ Accordingly, it should be framed and constrained by law.

Moreover, the concentration of power can also threaten individual freedom and, ultimately, democracy or even the rule of law, including when a vast amount of politico-economic power lies in private hands, as stressed in the Executive Order on Promoting Competition in the American Economy adopted by U.S. President Joe Biden on 9 July 2021:

¹⁴ Regarding “platform power,” see Busch, Graef, Hofmann & Gawer, *Platform Power*, 6–7.

¹⁵ See, for instance, Castelfranchi, “Constitution of Power,” 236–37.

¹⁶ Regarding platform industries in the United States, see, e.g., Sitaraman, “Foreign Platforms,” 1141 (“Sectoral regulations in platform industries have often been adopted to prevent the abuse of economic and political power”).

¹⁷ Castelfranchi, “Constitution of Power,” 261.

A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.¹⁸

Freedom itself is multidimensional and includes – among other – political, social, and economic dimensions. Besides, power and freedom form a complex relationship with one another,¹⁹ though they are neither identical nor opposite concepts. On the one hand, freedom is necessary in order to be able to utilize one’s own powers to achieve one’s own purposes.²⁰ On the other hand, the exercise of power usually restricts others’ freedom. However, it can be misleading to claim that “[a]ll exercise of power is a limitation of freedom.”²¹ Power may actually be used to protect the effective freedom of many, especially vulnerable persons. Furthermore, one can neither theoretically nor empirically demonstrate that the more power is concentrated, the less effective individual freedom is in all circumstances, and vice versa.²² The last part of this assertion should probably be reformulated to state that the more power is concentrated, the greater is, *ceteris paribus*, the risk to freedom, at least from a significant level of power concentration.²³ In the same vein, competition in politics, in cultural life or in economic relations can be regarded as a fundamental prerequisite of freedom.²⁴

In sum, the more economic power is concentrated, the less its regulation can be left, *ceteris paribus*, to the market,²⁵ and the more countering power or powers

¹⁸ President Joseph R. Biden Jr., *Executive Order on Promoting Competition in the American Economy*, The White House, 9 July 2021, Section 1 *in initio*. On this order, see Hovenkamp, “Executive Order,” 386–87 (noting that the order is “hardly an endorsement of the proposition that antitrust should ignore economic concerns in favor of political ones” [quotation from p. 387]). See also U.S. House of Representatives – Subcommittee on Antitrust, Commercial and Administrative Law, *Digital Markets*, 20 & 391–92 (recommending to reassert the anti-monopoly goals of the antitrust laws and “their centrality to ensuring a healthy and vibrant democracy”). Regarding Facebook, see Simons & Ghosh, *Utilities for Democracy*, 6–8 (“Because Facebook has unilateral control over so much of the algorithmic infrastructure of our public sphere, Facebook can simply impose its own approach to the design of our public sphere, free from any obligation to reflect or represent deep disagreements about the governance of public debate. Without regulatory oversight or democratic accountability, regardless of the particular algorithms or policies Facebook develops, that kind of unilateral control over important social infrastructure is, in a democracy, objectionable on its own” [quotation from p. 6]).

¹⁹ See, for instance, Morriss, *Power*, 116–22.

²⁰ Beetham, *Legitimation of Power*, 43.

²¹ Popitz, *Phenomena of Power*, 6.

²² See Susskind, *Digital Republic*, 245.

²³ Simons & Ghosh, *Utilities for Democracy*, 7 & 11 (“antitrust protects competition not just for narrow economic reasons of consumer welfare and market efficiency, but also for reasons of political liberty and self-government, because private powers which control important forms of public infrastructure should be subject to clear structures of accountability” [quotation from p. 7]).

²⁴ Andriychuk, *Foundations*, 260.

²⁵ See already Galbraith, *Power*, 120 & 182 (noting, on p. 182, that “[t]he concentration of industrial power can be seen in the mere handful of huge organizations that now dominate modern economic activity [...]. This is in overwhelming contrast to the wide distribution of economic activity in the