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Vincent Martenet: “Separation of Powers and Antitrust”

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Dear readers, the Network Law Review is delighted to present you with this month's **guest article** by **Vincent Martenet**, Full Professor of Swiss and comparative constitutional law as well as competition law at the University of Lausanne, Switzerland; Dean of the Faculty of Law, Criminal Justice and Public Administration of the University of Lausanne; Deputy Justice, Swiss Federal Tribunal, the Supreme Court of Switzerland; and former President of the Swiss Competition Commission.

1. Concentration of Power

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. 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. For its part, antitrust 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?

2. Private Regulation and Digital Infrastructure of Democracy

On closer inspection, separation of powers and antitrust indeed share common ground. They are both focused on power and the risks arising from the concentration of it in one or a few hands. One relates first and foremost to state power and the other to economic power. The distinction between these two types of power, however, is, to a certain extent, blurred in a digital economy and society. For all that, antitrust does not aim to preserve separation of powers between the branches of government. In any event, antitrust agencies do not bear this responsibility in a democracy. The interactions between separation of powers and antitrust are to be sought elsewhere. The concentration of power in one company, including the power to adopt principles, community standards, codes of conduct, guidelines, or other rules that have a broad impact on society and can distort economic or political competition, raises questions not unlike some at the heart of the separation of powers principle. *Private regulation* having such an impact raises fundamental issues in a democracy, some of them being tackled by antitrust laws and policy. Indeed, antitrust may establish some requirements for checks and balances within or for a firm. The latter may even have to abandon the control over the content of important principles, rules, or codes.

The concentration of power in a few firms whose social networks or search engines are part of the electoral and democratic process and of the *digital infrastructure of democracy*, as well as the growing importance of data in this respect, also leads to a partial rethinking of the separation of powers principle. Data access, portability, sharing, and interoperability on one hand and nondiscrimination on the other become important issues, such as the relationship between data and political powers or, put another way, and actually more accurately, between platform and governmental powers. "Open up or break up" may become the alternative for these firms. The potential contribution of antitrust to this issue is quite limited but not insignificant, as the latter may render data and related services or products more accessible on a nondiscriminatory basis, if not completely open.

In sum, private regulation by dominant firms and the digital infrastructure of democracy controlled by some firms constitute the areas where the separation of

powers principle, envisaged in a broad sense, and antitrust may share much common ground. A single dominant digital firm may adopt private regulation affecting an entire industry and even society at large, be an important part of the digital infrastructure of democracy and, through many means including lobbying, exercise a significant influence on public decision-makers. Such a firm concentrates an immense amount of politico-economic powers. At the same time, it is subject to antitrust laws and relevant from a contemporary and prospective separation of powers' viewpoint.

3. Toward a New Separation of Powers

The challenge posed by the largest digital platforms and their related ecosystems goes beyond competition law and antitrust alone. Antitrust is no Swiss Army knife. A new and broader – politico-economic – separation of powers should deal especially with the control of the digital infrastructure of democracy, the prohibition of distortions of the electoral and democratic process, the conclusion of certain governmental contracts with firms owning and operating large or, *a fortiori*, dominant platforms, and the regulation of artificial intelligence or metaverse platforms. Moreover, particular attention should be paid to independent and impartial decision-making of antitrust and relevant regulatory agencies, as well as courts, from an institutional, procedural, personal, financial, or lobbying perspective. The risk of capture of political or administrative bodies by a firm or an industry is of special concern. At the end of the day, political or administrative decision-making should not be privatized.

Public enforcement should certainly continue to coexist with private enforcement, with some reinforced independence between them being desirable in order to increase the chances that major or, *a fortiori*, dominant platforms are effectively checked. Multilevel and multidimensional antitrust and regulatory enforcement constitutes a key component of a sound and viable architecture of powers of and in the digital and artificial intelligence era. In other words, multi-type, multilevel, and multidimensional checks and balances should be placed on these platforms. This need will only increase if certain companies acquire immense power in artificial intelligence or in the metaverse.

Furthermore, the “digital platform neutrality” of laws and regulations – *i.e.*, their application to all digital platforms – should be questioned and reassessed. There is

certainly a case for rules applying to certain digital platforms only, as recently witnessed in the European Union or Germany. Hence, those which form an important or, *a fortiori*, fundamental part of the electoral or democratic process and of the digital infrastructure of democracy should face specific obligations as well as checks and balances.

4. Antitrust for Trust

While the debate is broader and some needed reforms are no matter for antitrust, the latter may nevertheless play a role in this respect, especially in some cases when a dominant firm discriminates between political parties or candidates, or, in the future, if artificial intelligence or metaverse developments leads to an immense concentration of power generating collusive or abusive behaviors.

Thus, antitrust can help preserve or rebuild some trust within society and in democracy, though this should be considered as one of its rather indirect goals. Some separation between governmental power and platform power may, for instance, result from the involvement of antitrust agencies. In the same vein, checks and balances are needed for democracies to work in the digital and artificial intelligence era dominated by a few platforms. The time for platform democracy – not to mention democratic artificial intelligence – has probably not come yet, but it could be looming in the not-so-distant future. The call for platform democracy may become ever more insistent. True, antitrust is not meant to answer it but may help to partly address some related concerns. Antitrust could, in the end, contribute to democracy, to the separation of powers in the digital and artificial intelligence era and, ultimately, to trust. *Antitrust for trust*, or the ultimate apparent antitrust paradox.

See Vincent Martenet, [Separation of Powers and Antitrust](#), Cambridge University Press, 2024

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