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Competition Law and Democracy: Markets as Institutions of Antipower*

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Introduction

The relationship between competition law and democracy may not be an obvious one, but it is by no means new. The idea that an unregulated market can be seen as a threat to democracy has been widely accepted in academic and political society. The underlying premise is straightforward: the concentration of private economic power constitutes a threat to democracy. By preventing this phenomenon, competition law assumes a central role in promotion of democracy and can even be perceived as an 'anti-power institution'.

Although this reasoning may appear self-evident, at no point has the doctrine addressed the issue, tending instead to presuppose the relationship as an unquestioned assumption. Elias Deutscher's contribution lies precisely in demonstrating how this link between competition law and democracy – the '*competition-democracy nexus*'[1], in his own words – has been constructed and reaffirmed over the course of history.

At first glance, the subject might appear somewhat dogmatic; however, the author does not confine himself to a purely theoretical approach. Based on European competition law and American anti-trust law, he illustrates how the legal mechanisms of these regimes – such as the prohibition of cartels or monopolies – have historically functioned to promote democracy.

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[1] The expression was first used for Elias Deutscher and S. Makris, in 2016, in "Exploring the ordoliberal paradigm: The competition-democracy nexus", *Competition Law Review* 11, no. 2 (2016): 181 *apud* Elias Deutscher, *Competition law and democracy: Markets as institutions of antipower*, 2.

Furthermore, he highlights the importance of this relationship for shaping the future reforms of competition law.

Deutscher develops his argument from a specific theoretical foundation: the republican conception of liberty. The central claim permeating the work is that freedom should be understood not merely as non-interference but also as non-domination. In fact, true liberty, in this sense, exists only in the absence of relations of subordination, since such relations themselves generate a state of unfreedom. On this basis, the author argues that the mere existence of concentrated economic power may constitute a democratic threat, even in circumstances where no immediate risk is visible in practice.

Nevertheless, the author concludes that competition law has undergone profound transformations in recent decades. These shifts have resulted in the abandonment of the republican conception of liberty in favour of a liberal notion of freedom as non-interference. This new paradigm has produced a more economic approach, primarily focused on consumer protection and market regulation. Such changes lead Deutscher to pose a central and enduring question: is it possible to revive the *competition-democracy nexus* within the contemporary paradigm? It is this inquiry that lies at the heart of his work.

Description and structure

Briefly, the present book seeks to make four contributions to the academic community: 1) demonstrate the roots and historical evolution of the *competition-democracy nexus*, relating it to the republican concept of liberty; 2) explain how this concept shaped the interpretation and application of American antitrust and European competition law until the end of the twentieth century; 3) show that this concept of liberty is obsolete today and to explain why; and 4) address the question of whether a return to a republican tradition antitrust is possible and desirable.

These four issues are examined in four distinct parts, each divided into several chapters. **Part I**, which is more historical and descriptive, comprises *Chapters 1 and 2*, where the author addresses the first issue. **Part II**, comprising *Chapters 3 to 5*, focuses on the practical application of the concepts of liberty – from a republican perspective – and *competition-democracy nexus*. **Part III**, which includes *Chapters 6 and 7*, explores the decline of the *competition-democracy nexus*; and finally, **Part IV**, which consists solely of *Chapter 8*, seeks solutions and proposes ways to revive this foundational connection within contemporary competition law.

The structure adopted is, in our opinion, highly coherent: each part corresponds directly to one of the book's objectives, thereby facilitating comprehension as well as the identification of specific points of interest. Moreover, the inclusion of a summary at the beginning of each chapter enhances accessibility and guides the reader through the argument.

Part I: The Historical and Conceptual Foundations of the Competition-Democracy Nexus

Part I, and particularly *Chapter 1*, traces the historical evolution of the *competition-democracy nexus*, seeking to identify its origins. The author distinguishes three moments in history that proved decisive for the development of the concept under analysis.

The first, in the sixteenth century, concerns *The Case of Monopolies* – a dispute over the monopoly on the production and sale of playing cards granted by patent under the Crown – where the British court held that monopolies were contrary to the common law. The second moment arises in the nineteenth century, when the term *trust* came to be associated with "(...) various types of conglomerates, mergers, cartels, and monopolies that fuelled the trend towards industrial concentration that engulfed the US economy in the late nineteenth century"[2]. The third moment is situated in the twentieth century, specifically in 1933, when Hitler promised industrialists the protection of private property and private interests in exchange for financial support for the National Socialist Party. This pact fostered and sponsored the development of conglomerates and cartels under the *Third Reich*.

What unites these episodes is the recurring problem of the concentration of private economic power – a problem that lies at the very heart of the *competition-democracy nexus*. In this chapter, the author seeks to demonstrate the evolution of the nexus, beginning with its most primitive forms and tracing it through to modern competition law, distinguishing three different nexuses corresponding to the historical junctures identified above. Across all three, one idea emerges with clarity: the concentration of economic power represents a threat to democracy, while competition law, conversely, is instrumental in sustaining and promoting democratic structures.

This theme is further developed in *Chapter 2*, where the author seeks to demonstrate how and why competition is a fundamental element of

[2] *Ibidem*, 14.

democracy. He does so by drawing on the republican ideal of liberty, understood in terms of non-domination. The analysis shows that, in each of the nexuses examined in *Chapter 1*, there exists both an obstruction of this kind of liberty, but also to the equalitarian dimension of economic liberty.

Part II: The Operationalisation of the Competition-Democracy Nexus

In Part II, the author moves away from a primarily dogmatic approach and adopts a more practical and policy-oriented perspective. Nonetheless, he begins with a theoretical component in *Chapter 3*, offering a literature review that examines the role of competitive markets at different stages of the *competition-democracy nexus*. He then outlines two principal strategies that have historically been employed to conceptualize competition law. While distinct in their methods, both share a common objective: to preserve polycentric competitive markets as an institution of anti-power.

Chapter 4 turns to a concrete analysis of how the *competition-democracy nexus* is reflected in antitrust policy, with particular attention to the case law of the European Court of Justice on competition law and to American antitrust jurisprudence. This inquiry is pursued further in *Chapter 5*, where the author investigates the extent to which U.S. antitrust law and E.U. competition law embody the republican ideal of liberty. To this end, he identifies three main policies of republican antitrust:

1. The presumptions of illegality, present in both EU law and US antitrust;
2. The standard of harm, also known as the "standard of proof"; and
3. The precautionary error-cost framework.

Part III: The Decline of the Competition-Democracy Nexus

What has been outlined thus far no longer enjoys the relevance one might expect in the contemporary context. In fact, modern antitrust law largely disregards economic liberty and democracy as objectives of competition law. *Chapter 6* focuses on explaining the causes of this decline, to the point that the author asserts that "(...) the edifice of republican antitrust has collapsed"[3].

[3] *Ibidem*, 221.

The explanation lies primarily in the emergence of the *Chicago School antitrust revolution*, which reconceptualized competition law as a purely economic field, oriented toward the promotion of welfare and efficiency. The influence of this school extended beyond the United States, shaping European developments as well, albeit somewhat later, with the advent of the so-called *More Economic Approach*.

Yet, the author argues that the roots of this paradigm shift are deeper. With an innovative perspective, he explores the underlying reasons for this transformation, locating them in the adoption of a new model of liberty. The republican conception of liberty was abandoned in favour of a liberal conception of liberty as non-interference. This shift gave rise to a *laissez-faire* approach to antitrust law, focused on consumer welfare and aimed at minimizing state intervention.

Chapter 7 examines how this paradigm shift has manifested in both U.S. antitrust law and E.U. competition law. The author identifies four dimensions of this transformation:

1. The elevation of consumer welfare as the central policy objective;
2. The reconfiguration of legal presumptions;
3. The reformulation of the standard of harm; and
4. A new understanding of the costs and benefits of antitrust enforcement.

Taken together, these four elements represent a reorientation of the principles that had previously defined republican antitrust – namely, presumptions of illegality, the standard of harm, and the precautionary error-cost framework. In effect, *Chapter 7* offers an update of the analysis presented in *Chapter 4*, but now situated within the context of a liberal conception of negative liberty. Only by recognizing this transformation can one fully understand the disappearance of the *competition-democracy nexus*.

Part IV: The Revival of the Competition-Democracy Nexus

The book concludes with its final and shortest section, in which the author shifts the focus towards the future. Accepting that the idea of a *competition-democracy nexus* constitutes a fundamental normative premise of competition law, the central question posed here is whether such a *nexus* can be revived through a reform of competition law. Put differently: is a return to a republican tradition of antitrust both possible and desirable?

And if so, which parameters of modern competition law would require adjustment?

Acknowledging the current framework of competition law enforcement, the author develops a positive vision for reintegrating social and political considerations into competition law, alongside the consumer welfare orthodoxy. This orthodoxy rests on the assumption that competition law should be confined to ensuring that markets provide consumers with goods and services of the best possible price and quality.

In view of the increasing concentration of economic power, the author further anticipates the possibility of a *Competition-Democracy Nexus 4.0* – a new historical moment that would add to the three earlier nexuses identified in *Chapter 1*, and that could inaugurate yet another era in the development of competition law. To this end, he advances five concrete proposals to render such a transformation achievable.

The author's final stance is clear: competition law serves both social and political functions and these functions do not necessarily entail a weakening of consumer protection. Nonetheless, he candidly acknowledges the difficulties of this proposal, noting that "(...) the essential challenge and task of competition law are to manage the republican paradox by clearly articulating trade-offs between liberty and efficiency" [4]. He concedes that efficiency may, at times, need to be sacrificed.

Ultimately, if such a transformation were possible, it would allow for a reconciliation between the broad economic orientation introduced by the Chicago School and the traditional republican conception of antitrust. In doing so, it would realise "the symbiosis between markets and republican democracy" [5].

Critical analysis

The book *Competition Law and Democracy: Markets as Institutions of Antipower*, by Elias Deutscher, stands out with a distinctive feature compared to what has hitherto been studied in academia. In seeking to understand the relationship between democracy and competition law, the author brings together, through an innovative approach – and a certain *je ne sais quoi*, as it were – two themes that, at first glance, might seem distant.

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[4] *Ibidem*, 349.

[5] *Ibidem.*

The invitation extended to us is thus to embark on a journey through the intricacies of these two seemingly antagonistic worlds, which reveals that competition law need not be a purely economic reality, focused solely on the consumer protection. Rather, it may also incorporate political and social dimensions. Furthermore, as the work under review demonstrates through the author's arguments, the liberal perspective does not necessarily have to exclude democratic objectives. We are not, therefore – and here we agree with the author – confronted with mutually exclusive realities.

This, then, is the ultimate aim of the work: to elevate to the forefront of discussion a theme often relegated to the background. Above all, however, it presents itself as a launchpad, suggesting that this *nexus* ought to be considered by the legislator and perhaps shape the future of competition law.