A Wider Lens: Neo-Brandeis and Ordoliberalism as Alternative Narratives that Liberate a Antitrust Thinking in the Developing World

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Thesis

At its origins, competition law was against power and for an environment safeguarding opportunity and nurturing ingenuity. In US, Justice Brandeis was a symbol. In Germany, Ordoliberalism stood for a market process order to control power and safeguard democracy.

To some extent modern competition systems have been captured by a conservative perspective of reluctance to enforce in the name of efficiency. This orthodoxy has been sold as “international standards.” Developing countries are not always served by the big-business-efficiency narrative. The world’s new regard for the values of Brandeis and Ordoliberalism liberates them to find their most fitting path.
Outline

1. Neo-Brandeis and Ordoliberalism ("NeoB&O") – two different schools
   • The influence of each on competition law/policy and narratives

2. What developing countries need and how NeoB&O map on
   • Within market analysis
   • Outside of market analysis

3. Implications of the mainstreaming of NeoB&O narratives for the design and enforcement of competition law/policy in the developing world
   • Support for rethinking: efficiency, fairness, Kaldor Hicks

4. Lessons from developing countries for the developed world
1. NeoB&O: two schools

Ordoliberal

To fight crises of Weimar Republic and Nazi Germany:
Institutional and self-executing, against power
For a democratic and free society
For markets with rules
[Also for equitable distribution]

Influence on competition law and policy of Germany, EU; ECJ, DMA
“Democracy rests upon two pillars: one, the principle that all men are equally entitled to life, liberty and the pursuit of happiness; and the other, the conviction that such equal opportunity will most advance civilization.”

Louis D. Brandeis

For: small business, workers, democracy, freedom
Against: the moneyed elites, privilege, great wealth in the hands of the few.
*Curse of Bigness* and *Other People’s Money*

Influence on competition law/policy – US: formation of FTC, Supreme Court; current rhetoric and debate
Developing country needs? The example of Africa

Deep poverty
Elites
Past exclusions
Colonized markets
Weak institutions
Need food, medicines, education, jobs,
the fair chance to participate
2. What developing countries need; How NeoB & Ordoliberalism Map on

- **Characteristics**

- **Analysis within the market**: how well the market works for their people
  - Inclusiveness, opportunity
  - Exploitation by creation of buyer power, including workers
    - Squeezing so much in value chain that contributors of value (farmers) cannot survive
  - Relation to trade and regulatory barriers and restraints: vested interests get protection
  - Relation to fairness, equality, sustainability, fair deal for workers, SMEs

- **Values outside of market analysis**
  - Fairness, equality, sustainability, fair deal for workers, SMEs: counting trade-off
3. Implications of mainstreaming Neo B & O narratives

• Suspicion of excessive economic concentration
  • This is helpful in *traditional* analysis, for developed and developing countries
    • having emerged from a period that tolerated too much power, lack of resiliency, broken markets, prices, scarcity
      • Mergers, cartels, monopolies – this is corrective

• Support for rethinking: What is efficiency that helps markets and people?

• Developing countries’ needs for fairer distribution:
  • **NeoB** supports considerations of justice and fairness, push back on systemic inequality and growing gap; winners and losers –not to stop at Kaldor Hicks
    • The limits to non-market values? Helping SMEs? Workers? Redistributing? Sustainability?
4. Lessons for developed countries?

- The limits of “consumer welfare”
- The value for markets: suspicion of excessive concentration
- Opportunity for more efficiency by more “open markets”
- A payoff in greater resiliency and democracy? -- bringing competition law closer to the people
CONCLUSION

• **NeoB and Ordoliberalism are pro-market policies**
  • They are against socialism and totalitarianism
    • Justice and equity are a subset, for legitimacy
  • Both originated when there was less appreciation for pro-market aspects of size
  Current applications need to take account

• Valuable in widening the lens, understanding the whole market picture

• The new mainstreaming: supportive of developing countries; sympathetic
  • But need to be conscious of tradeoffs