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The New Brandeis Movement and International Antitrust Enforcement

BY YAIR EILAT *November 16, 2021*

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US competition authorities' top officials, being appointed by a recently-elected president to represent the will of the voters, have the legitimacy to use antitrust enforcement to achieve an abundance of societal goals. Enforcers in many other countries, who are more akin to career civil servants, do not. Forcing them to balance between non-efficiency-based goals may risk their independence from political meddling in their decisions.

It is no secret that many antitrust agencies, especially in smaller countries like Israel, look up to the United States (as well as to the European Union) as reference points for antitrust enforcement. But since the US is often viewed by outsiders—justifiably or not—as an extremely laissez-faire country, other countries often only use it as a starting point and then decide how many notches to shift towards a more activist approach to antitrust.

It is no wonder, then, that the quick rise of adherents of the New Brandeisian movement in Washington, DC—most notably, Federal Trade Commission chair Lina Khan, National Economic Council member Tim Wu, and Jonathan Kanter, the Biden administration's nominee to head the antitrust division at the Department of Justice—has triggered a revaluation of the approach to antitrust in countries that are not used to being less active on antitrust than the US.

In Israel, for instance, where I served as the chief economist of the Israeli Antitrust Authority, one influential financial newspaper (*TheMarker*) published a series of editorials on why the next Director General of the Competition Authority *has* to be a Khan-like figure, at the very least. This plea was echoed by consumer advocacy groups. Another major

Israeli financial newspaper (*Calcalist*) ranked Lina Khan as the 22nd most influential person in the Israeli economy in 2021, ahead of the chairman of the Israeli central bank. The winds blowing from Washington, DC have triggered the Israeli Competition Authority to rethink whether it has also been too lenient in its enforcement activity, with recent decisions made by the DOJ and FTC more closely followed than in the past.

Beyond Israel, discussion of the New Brandeisian ideas feature prominently in the conferences of international antitrust enforcers, both as part of the official agenda and in hallway discussions. For example, the upcoming OECD Best Practice Roundtables on Competition Policy includes among its topics issues such as environmental considerations in competition enforcement; the role of fairness, innovation, and economic concentration, and their trade-offs with competition; digital platforms' impact on news consumption and on incentives to amplify viral content and considering whether these issues can be addressed through competition law; and so on.

In this short column, I will not delve into the question of whether the new approach to antitrust is the right one for the US. Rather, I will discuss why in many countries, the institutional setting does not allow adopting at least one of the New Brandeisian movement's main tenets: the use of antitrust enforcement to achieve an abundance of goals such as social fairness, supporting small businesses, fair wages, environmental concerns, curbing corporations' political power, and other non-efficiency-based goals.

In many countries, antitrust regulators are more akin to career civil servants than in the US. Even if they are appointed by politicians, they are not necessarily politically aligned with the government appointing them, and importantly, their terms are lengthy and do not depend on the same government staying in power. That is, they often outlive the politicians who appointed them. The importance of this institutional difference is often under-appreciated.

The advantages of having an antitrust authority that decides on specific antitrust matters independently from politics are huge: Once politicians get involved in everyday antitrust decision making, the technical knowledge that is used for analyzing antitrust matters takes backstage in favor of, at best, potentially flawed intuition, publicity considerations and populist motives. At worst, business interests infiltrate antitrust decision making. But there is an important trade-off here: Civil servants are not well-positioned to make normative balances between considerations such as consumer welfare, income inequality, curbing the political power of businesses, and so on—this is a job for elected officials. You simply do not want a civil servant to hear the details of a matter and then decide what they feel is right based on their own norms and beliefs. This is especially pronounced for antitrust authorities in countries like Israel, in which the most senior official has exclusive authority to make decisions and is not subject to oversight by a commission.

In other words, civil servants must work according to set methodologies—*i.e.*, certain professional processes and sets of rules and principles (whether internal or public, such as the EU Guidelines on the Assessment of Horizontal Mergers or the Canadian Abuse of

Dominance Enforcement Guidelines). Even if they were tasked by the legislator with making decisions without having a proper methodology, that would not be sustainable. Sooner or later, politicians would figure out that since no professional knowledge is used for making the decisions, they are better suited to performing the normative balancing themselves, and they will extract the civil servants' authority.

Therefore, the key to keeping everyday antitrust decision-making independent from politics is working according to set methodologies that promote the goals determined by the legislator while being based on professional knowledge that can be used to apply these goals to specific matters. To be sure, no methodology is ever perfect. At the end, judgment calls always have to be made, and even civil servants are human and cannot—and, one could argue, *should not*—totally ignore various social considerations if they are very significant. But the methodology should ideally substantially narrow down the scope of judgement calls. It goes without saying that having a methodology is also crucial for making consistent decisions and for providing as much certainty to the business sector as possible.

Applying wide antitrust goals in countries in which antitrust authorities are purely part of the civil service and do not depend on election results is problematic, as there is simply no methodology for balancing many different goals for antitrust. The Israeli Competition Authority experienced this kind of difficulty in 2013, when it was tasked by the legislator with drafting a methodology for reducing "economy-wide concentration."[1]

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In 2017, I joined the Israeli Competition Authority and was handed over an earlier draft of such a methodology—it quickly became apparent to me that while it is intuitively clear that larger firms have, *on average*, more sway than smaller ones over political decision making, it is very hard to pinpoint the exact mechanism through which firm size translates into political power. As a result, it is hard to come up with a set of rules that would curb an elusive mechanism. For example, setting limits to firm size may be conceptually easy, but that would block efficient growth while ignoring some of the worst cases of business influence over politics that are not necessarily performed by the largest firms. Our extensive attempts to engage the economics academic community in developing a methodology that is grounded in empirical or theoretical knowledge were futile.

What was also apparent to me is that without a proper methodology, making decisions on specific matters that came in front of us without these decisions seeming arbitrary or ideologically motivated is hard. Developing a methodology for balancing many antitrust goals antitrust shares many similarities to curbing "economy-wide concentration" and may yet be even harder, as the difficulty increases with the number of goals. Such a

methodology would require identifying the mechanism in which a specific decision will affect these different goals, and then, assuming there will usually be some conflicts between the goals, finding ways to score each of them (at least heuristically) in order to do the proper balancing. I am not aware of any such methodology in existence.

American antitrust agencies may have struck a good balance between reflecting the voters' will and being independent of political meddling when making decisions on specific matters. Leaving aside the question of whether it is a good thing to have antitrust decisions being made without a clear methodology (I believe it is not), US competition authorities' top officials, being appointed by a recently-elected president to represent the will of the voters, at least have the legitimacy to make normative balances of the type the New Brandeisian approach requires. Civil servants in many other countries do not.

Perhaps some countries should consider revising their institutional settings in the same vein as the US, but that is a difficult and lengthy process. Until then, I believe it is better for such countries to keep the goals of antitrust focused and look for solutions to other societal ills elsewhere.

Disclosure: Yair Eilat is currently a Senior Consultant with the North American practice of Compass Lexecon. In this capacity, he advises companies in the US on various antitrust, competition, and policy matters. The views and opinions in this piece are the author's own and he did not consult any clients in preparing this article.

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1. *This refers to concentration across the economy as a whole and not in a specific market. Among other things, the law requires a government committee headed by the Director General of the Competition Authority to weigh in in cases in which governmental entities grant permits or licenses to large companies.*[↩]

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