

**Thirteenth Session of the UNCTAD Research Partnership Platform**

**Intergovernmental Group of Experts**

**20 July 2022**

**Room XVII, Palais des Nations, Geneva**

**New Brandeis Movement and Ordo-liberalism  
and the Impact of this Movement on the Enforcement of  
Competition Policy Worldwide**

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EE and MC*

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**Thirteenth Meeting  
of the UNCTAD  
Research  
Partnership Platform**

**Wednesday, 20 July  
2022**

**10:00 - 12:00 CEST**

**Palais des Nations,  
Room XVII (First  
floor) and online**

# PRESENTATION AGENDA

New Brandeis movement &  
Ordo-liberalism and the impact of  
this movement on the enforcement  
of competition policy worldwide



# Antitrust economics

Wealth needs to be created in the first place

consensus  
world-wide



## Creation of wealth

- **Market system:** effective instrument to meet the demand from consumers for goods and services
- Motivates **profit-maximising companies** to increase productivity, to expand, to innovate and to create jobs
- These exposed market forces are the **generator of prosperity** thereby creating **wealth**

no consensus  
world-wide



## Distribution of wealth

- **Liberalism:** Focus on efficiency without an equitable share
- **Socialism:** Equitable development without efficiencies
- **Social Market Economy:** Efficiencies and Equality





# *Antitrust Law*

## New Brandeis / Neo-Brandeis movement

Louis Brandeis (1856-1941) was Justice at the US Supreme Court

### **Original Brandeis**

- Concern about high economic concentration “The Curse of Bigness”
- Against monopolies that naturally concentrate power harming the competitiveness of markets and welfare
- Request for improving business market structures that positively affect market competition and income equality

### **New Brandeis**

- Global industries are controlled by just a few giant firms such as big banks, big pharma, and big tech etc.
- Concern that tolerance of inequality and failing to control excessive corporate power may prompt the rise of populism, nationalism, extremist politicians, and fascist regimes even **threatening democracy itself**



**Today, Brandeis ideas have spilled over with speed into US antitrust policy and US politics**

# Antitrust Law

## Original Ordoliberalism

Economist Walter Eucken (1881-1950) developed with others the „Freiburg School of Thought“ during World War II

### Background

- Bad experiences with excessive capitalism in the 19<sup>th</sup> century
- WW II: easy transformation of large German companies into “war machines”

### Logic

- Market **order**: a “frame” organised by the state guaranteeing free economic activities
- Objective: hindering the creation and/or abuse of market power
- Tool: antitrust laws to organise and monitor a free market order
- Focus: preferences of the individual members of society such as companies and households; in fact, common interests of individuals
- Social market economy that is not a welfare state



**Fairness and equality are the “social” aspects**

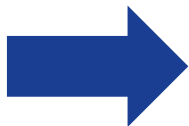
# *Antitrust Law*

## New Ordo-Competition

Both concepts - New Brandeis and new Ordo-Competition – shape antitrust policy today

### **New Ordo-competition**

- Monitoring economic positions of power
- Consistent suppression of the search for privileges of individual groups and special interests
- Push for performance competition promising success to actors who provide benefits to the needs of others
- Rewarding entrepreneurial decisions that correspond to the common interests of the citizens
- System combining the objectives of social policy, environmental protection or intergenerational justice
- Means for shaping a modern democratic society
- Contrasting US „laissez-faire“ policy
- Contrasting US Chicago School thinking that advocate for „big is beautiful“ because of alleged efficiency gains that might be passed on to consumers / consumer welfare standard



**Ordo-competition serves the well-being of people**

# Antitrust Economics

## Impact of Ordo-Competition

Post-Lisbon, the well-being of the people of the EU is the new guiding principle in the application of EU competition law

### Article 3 Treaty on European Union (TEU)

1. Union's aim is to promote ... the **well-being of its peoples**

2. ...

3. **The Union** shall establish an internal market.

The Union **shall work for** the sustainable development of Europe based on balanced economic growth and price stability, **a highly competitive social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.



*"The function of those rules is precisely to prevent competition from being distorted to the **detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union**"*

*CJEU, C-52/09, February 17<sup>th</sup> 2011, pt 22*



## Re-Distribution of wealth: “Well-Being” in EU

European Well-Being-concept is unique

- **Value-based:** Humanistic / Religious
- **Measurable** effects
- Search for an **equilibrium** between society interests on one hand and profit-oriented interests of companies on the other hand
- **Equality** and **fairness objectives** determine the equilibrium:
- **Balancing ...**

*“where a competition authority demonstrates that **such conduct is likely to affect the structure** of effective competition on the relevant market, unless the dominant undertaking concerned demonstrates that the anti-competitive effects which may result from that practice are offset or even exceeded by **positive effects on consumers**, in particular as regards **prices, choice, quality and innovation.**”*

CJEU, C-377/20, May 12<sup>th</sup> 2022, pt. 48

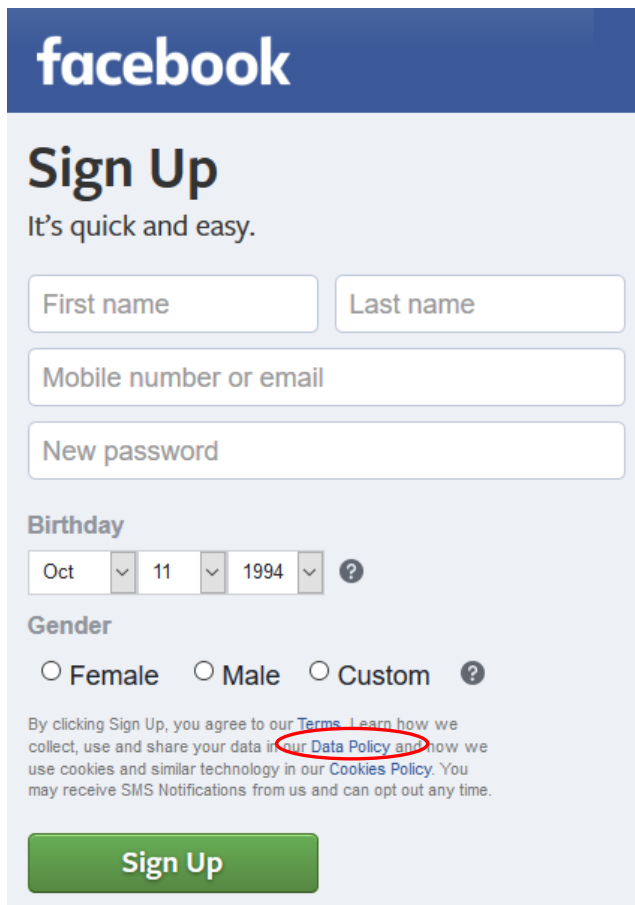
### European School of thought

(1) Stable antitrust law

(2) Dynamic “well-being of people”- concept

# The German Facebook Case: On-Facebook and Off-Facebook

## Data protection



**facebook**

### Sign Up

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 Oct  11  1994  ?

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### Information from partners.

Advertisers, app developers, and publishers can send us information through [Facebook Business Tools](#) they use, including our social plug-ins (such as the Like button), Facebook Login, our [APIs and SDKs](#), or the [Facebook pixel](#). These partners provide information about your activities off Facebook—including information about your device, websites you visit, purchases you make, the ads you see, and how you use their services—whether or not you have a Facebook account or are logged into Facebook. For example, a game developer could use our API to tell us

**Users had no choice: they need to accept Facebook's terms of use**

# Facebook Case

## Federal Court of Justice (BGH) 23.06.2020

BGH: the determining factor is not whether the processing and use of off-Facebook data is data protection law-compliant, but rather that **Facebook's terms of service do not leave users a choice** as to

- whether they **want to use the network** on the basis of a more intense personalisation of the user experience, including potentially unlimited access to elements of their off-Facebook internet use; or
- Whether they **only agree to a level** of personalisation that is based on data that the users themselves release on Facebook.

Qualified by the BGH as exploitative abusive:

Anti-competitive effects in the form of a **restriction of freedom of choice of the users** combined with the special responsibility of dominant companies



**Well-Being**



*SINCE*  
*1992*

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