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PRESENTATION AGENDA

Integration of **public interest objectives** into the competition rules:

A German & Austrian perspective towards a **European** approach



The EU Legal Frame

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



CJEU, C-52/09, pt 22: "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"

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 EU Economic Frame

What is a “highly-competitive social market economy” ?



Consensus world-wide

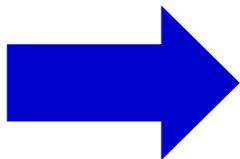
- **Market system:** effective instrument to meet the demand from consumers for goods and services
- Motivates **profit-maximising companies** to increase productivity, to expand, to innovate and to create jobs
- These exposed market forces are the **generator of prosperity** thereby creating **wealth**

Distribution of wealth:

no consensus



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



The “equality” principle makes a market *social*

- Generation of wealth in an international context
- Re-distribution of this wealth based on **Égalité** / Equality / Fairness principle

Re-Distribution Formula: "Well-Being"

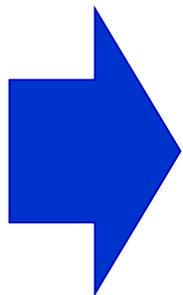


- Representation of **humanistic values in our society: well-being of people in the EU as the guiding principle**
- **Measurable** producer and consumer preferences by consumer surveys and market simulation models
- Search for equilibrium of **consumer/EU citizen interests** with profit-oriented efficiency enhancing **interests of companies**
- In the equilibrium: unification of the **equality** and **fairness objectives (FRAND)**

European School of Thought

The European model comprises of

- (1) a stable legal framework
- (2) a dynamic "well-being of people" - concept: well-being differs from generation to generation



Well-Being and European School

- **Article 101 (3)**
 - Equally and fair re-distribution of wealth
 - “Well-being of people in the EU”: consumers and citizens alike
- **Article 102**
 - Equal treatment of companies: non-dominant and dominant
- **Merger Regulation**
 - Need to maintain and develop effective competition ... in view of the market structure and the actual or potential competition from undertakings located either within or without the Community
 - A concentration which would not significantly impede effective competition (SIEC) as a result of the creation or strengthening of a dominant position

**German Facebook
Case**

**Reduction in freedom of choices has
anti-competitive effects**

=

Well-Being

Facebook Case: The Bundeskartellamt

The German Bundeskartellamt prohibited in 2019 that Facebook combines user data across different applications to increase its sales potential

Market definition and market power in the decision

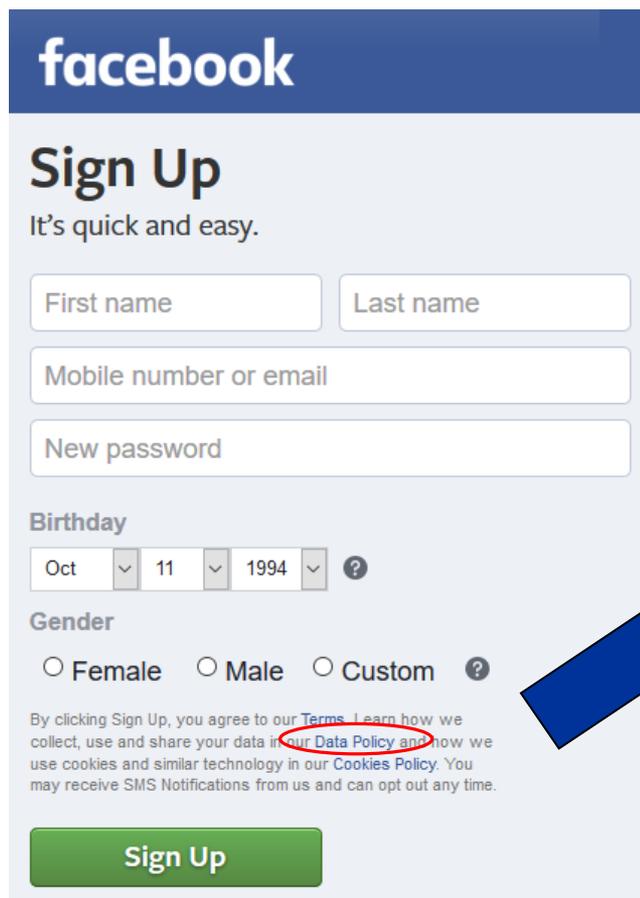
- **German private social network market**
- High market shares
 - daily active users: > 95%; monthly active users: > 80%
- Strong network and lock-in effects
 - 23 million daily active users and 32 million monthly active users

Data Protection Law: Facebook collects, combines and processes consumer data from different sources

- **On-Facebook data:**
 - User activities on Facebook
- **Off-Facebook data:**
 - Data from other Facebook services (WhatsApp, Instagram)
 - Third party websites and Apps via embedded API (social plugins, Facebook Login, Facebook Analytics)
 - Off-Facebook data is assigned to Facebook user account

The German Facebook Case

Data protection



facebook

Sign Up

It's quick and easy.

First name Last name

Mobile number or email

New password

Birthday
 Oct 11 1994 ?

Gender
 Female Male Custom ?

By clicking Sign Up, you agree to our [Terms](#). [Learn how we collect, use and share your data in our Data Policy](#) and how we use cookies and similar technology in our [Cookies Policy](#). You may receive SMS Notifications from us and can opt out any time.

Sign Up

Data Policy

What kinds of information do we collect?

Things you and others do and provide.

- **Information and content you provide.** We collect the content, communications and other information you provide when you use our Products, including when you sign up for an account, create or share content, and message or communicate with others. This can include information in or about the content you provide (like metadata), such

Device Information

As described below, we collect information from and about the computers, phones, connected TVs and other web-connected devices you use that integrate with our Products, and we combine this information across different devices you use. For example, we use

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 have no choice: they need to accept Facebook's terms of use

Bundeskartellamt

Facebook Case Legal Assessment

The authority applied new provisions of the German Competition Act (2017)

German Competition Law

*“Abuse may consist in imposing **business terms which differ** from those which would very likely arise if effective competition existed”*

Alleged abusive data policy

Abuse by imposing **inappropriate contractual terms** and conditions



Facebook as a dominant company has bargaining power over its users and is able to impose far-reaching data processing conditions, which users cannot prevent as they have no additional control mechanisms

Facebook Case: Legal Assessment

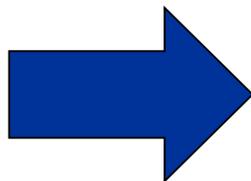
Data Protection Law served the Bundeskartellamt as benchmark for assessing inappropriate conditions

Data Protection Law/GDPR

- Amount of data collection and processing not required for functioning of Facebook
- No voluntary consent into data processing
- Weighing of interest of Facebook and users

Facebook Data

- **On-Facebook:**
 - Data-driven business model needs data processing
- **Off-Facebook:**
 - No reasonable exception of users concerning unlimited data processing



**Conclusion Bundeskartellamt:
Harm to users and competitors**

Facebook Case

Bundesgerichtshof (BGH) 23.06.2020

BGH: “There are neither serious doubts as to the dominant position of Facebook on the German market for social networks, nor that Facebook abuses this dominant position through the terms of service prohibited by the FCO.”

- BGH deviates significantly from the decision of the Higher Court in Düsseldorf
- BGH comes to the **same (preliminary) conclusion as the Bundeskartellamt** with a fundamentally different reasoning
 - BKartA: Facebook violated data protection law, which in turn amounts – in light of Facebook’s dominant position – to abusive behaviour in breach of competition law
- 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
 - only agree to a level of personalisation that is based on data that the users themselves release on Facebook.
- The BGH goes on to say that a dominant company has a **“special responsibility”** to preserve the competition still existing on the market



Well-Being



Facebook Case

Bundesgerichtshof (BGH)/2

BGH refrains from considering alleged infringements of the General Data Protection Regulation

BGH affirms the view of the Higher Regional Court in Düsseldorf on one issue namely that an **abuse requires competitive effects**

BGH on abuse

- **Exploitative abusive**

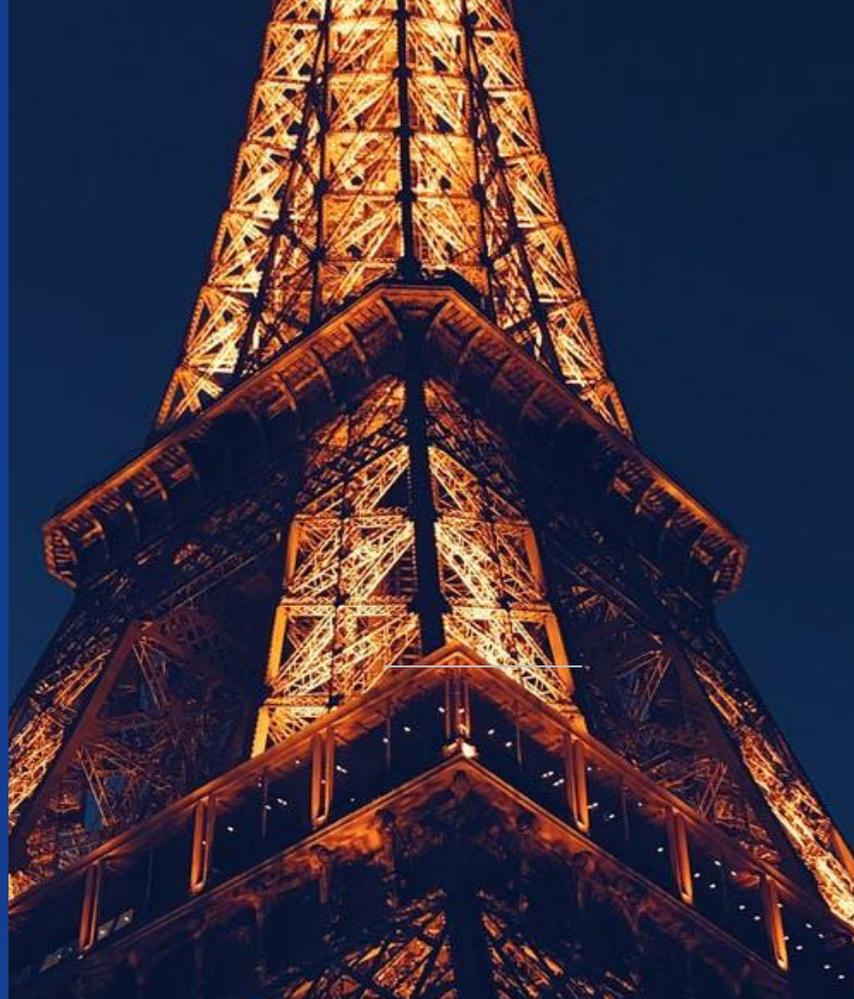
Competitive effects in the form of a **restriction of freedom of choice of the users** combined with the special responsibility incumbent on dominant companies

- **Exclusionary abuse**

- Strengthening the existing lock-in effects
- Improving Facebook's ability to finance its network with revenues from advertising contracts, which depend on the scale and quality of the accessible data;
- **Potential** abuse in the adjacent online advertising market, irrespective of whether or not Facebook would be dominant in such a market

Conclusions

- Public interests objectives on a general abstract level:
 - Exemption from national ministry/ EU council
- EU & national competition rules
 - Well-being of people at the heart of EU competition law because of Article 3 TEU
 - More comprehensive than just commercial price-focused end-consumers
 - Includes values like freedom of choice, protection from health risks, etc.
 - Concrete and dynamic interpretation
 - Solution: Application of the **European School of Thought**



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