

Danish Competition Law Society

Digital competition, Facebook-decision and the future: Final Report of the German Commission of Competition Law Experts 4.0

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Bundeskartellamt

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1. Digital Economy and Competition Law

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Digitalization ...

- is a cross-sectional issue and generates new business models
- platforms and networks emerge; direct and indirect network effects have a large impact
- ad-financed and data-driven business models are arising
- with ‚zero-price‘ markets on the user side of multi-sided markets
- data access becomes an increasingly relevant issue
- cross-market digital ecosystems have developed

... and Competition Law

- Competition Authorities invest in understanding digital business models
- bring cases in order to develop theories of harm to grasp and react to market developments
- Law makers, academics and practitioners are discussing new tools

2. The Facebook case

Business model and scope of data collection

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Facebook – a success story

- founded in 2004
- 2012: buys Instagram for \$1 billion
- 2015 buys WhatsApp for \$19 billion
- revenues increasing significantly per year (\$ 55 billion in 2018);
- 98% add funded

Facebook's data collection practice so far

- Facebook collects data
 - on Facebook (within the social network)
 - off Facebook (outside the social network)
 - via other corporate services (e.g. WhatsApp, Instagram)
 - via third-party websites or apps (e.g. using „like buttons“)
- and combines it with and assigns it to users' Facebook accounts
- Users have no choice: “consent“ is prerequisite for using social network

2. The Facebook case

Business model and scope of data collection – signing up

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For signing up with Facebook

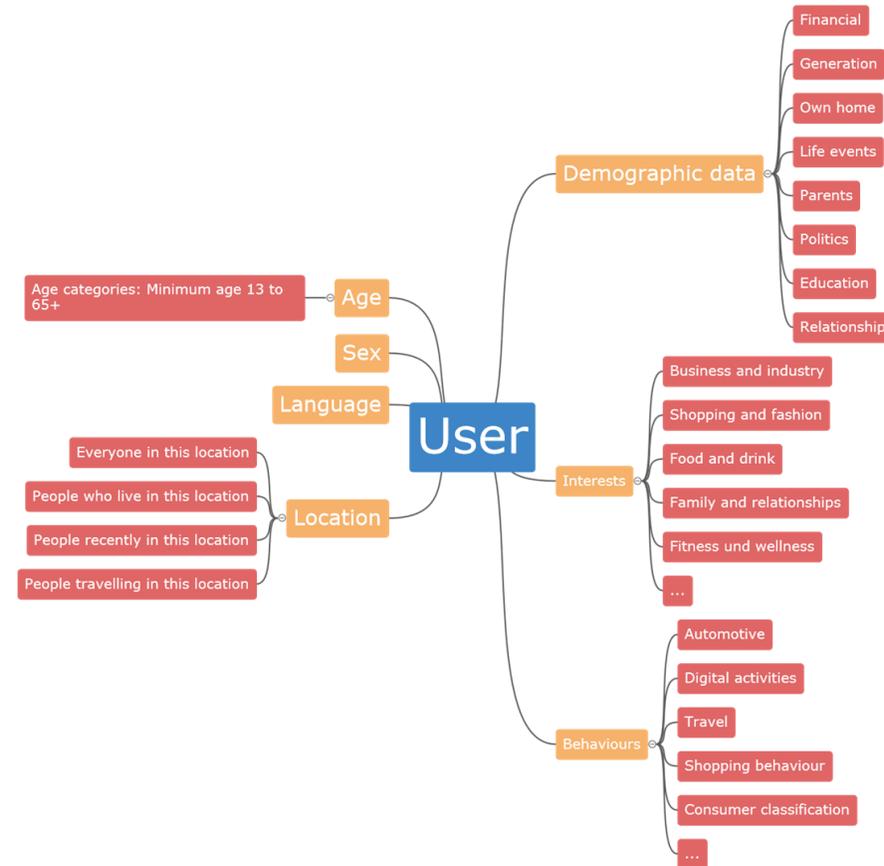
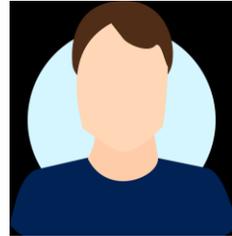
- you are asked for personal details (name, email or mobile number, birthday, gender)
- Text above the Sign-up Button:
„By clicking the sign-up-button, you agree to our [Terms](#). Learn how we collect, use and share your data in our [Data Policy](#) and how we use cookies and similar technology in our [Cookies Policy](#). You may receive SMS Notifications from us and opt out any time.“

2. The Facebook case

Business model and scope of data collection – Example of profiling

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- *Male, aged 24,*
- *married since 6 months*
- *father of 3 months old child*
- *lives within 5 miles of Copenhagen*
- *studied at Copenhagen Business School, MBA in 2017*
- *uses a mobile device (25 months or longer)*
- *interested in crime fiction*
- *returned from a travel one week ago*
- *....*



2. The Facebook case

Content of the German cease and desist order

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Decision of the Bundeskartellamt 6th February 2019

- Facebook can
 - continue to collect and process „on Facebook“ data
 - continue to collect „off Facebook“ data on Facebook services like WhatsApp or Instagram, but may no longer assign these data to a Facebook user account without a voluntary user consent
 - no longer collect or assign „off Facebook“ data from third party websites („like-buttons“) to a facebook user account without a voluntary user consent

- ▶ Voluntary user consent implies that there has to be an option to use Facebook without consenting to the current dimension of data collection, assignment and processing

- ▶ Implementation period 12 months with an obligation to set up a compliance plan within 4 months

2. The Facebook case

Market definition and theories of harm

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Facebook is dominant on the German market for social networks

- In Germany about 32 million monthly active users (market share > 80%)
- About 23 million daily active user (market share >95%)
- no serious alternatives left:
 - Google+ has exited the market
 - LinkedIn, Xing, Youtube, Snapchat focus on different customer needs
- market power due to
 - direct 'identity-based' network effects
 - Lock-In-effects and limited multi-homing
 - access to competition-related data

2. The Facebook case

Market definition: Rich social experience

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XING

LinkedIn



Instagram



Snapchat



Google+



YouTube



WhatsApp

„rich social experience“

2. The Facebook case

Market dominance: network effects

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- 2 users = 1 connection
- 4 users = 6 possible connections
- 8 users = 28 possible connections
- 16 users =

Calculate: facebook has 1,5 billion users: How many connections are possible?

2. The Facebook case

Theories of harm

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- § 19 Abs. 1 GCA:
“The abuse of a dominant position by a dominant undertaking is prohibited.”
- Art. 102 TEC:
*“ ... such abuse may, in particular, consist in
(a) directly or indirectly imposing unfair prices or other unfair trading conditions”*
- What is appropriate, what are unfair trading conditions?
 - Examples in German competition case law for looking at the law outside the realm of competition law
 - FCJ on dominant firms and their General terms and Conditions (‘VBL’-cases 2013, 2017)
 - FCJ on dominant firms and fundamental rights (‘Pechstein’ case 2016)
 - Facebook-Case: Measuring the appropriateness of data processing terms by using the principles of data protection law underlying the GDPR

2. The Facebook case

Theories of harm

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Art. 6 GDPR Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

2. The Facebook case

Theories of harm

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Conclusion:

- Business terms as “manifestation of market power”
 - Restriction of private users’ right to self-determination is clearly linked to Facebook’s dominant position in the market
 - And: The conduct has actual and potential impediment effects to the detriment of competitors
 - Facebook attains competitive advantage
 - Data processing leads to increase in barriers to market entry

2. The facebook case

Proceedings in detail

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- **Proceedings conducted by the Bundeskartellamt (March 2016 – February 2019)**
 - Parties to the proceedings: Facebook Inc, Facebook Ireland, Facebook Germany GmbH, VZBV (German consumer association)
 - Requests for information, consumer survey
 - Cooperation with data protection authorities
 - Decision on 6 February 2019
- **Proceedings at Higher Regional Court Düsseldorf**
 - Facebook appealed the Prohibition Decision and asked for suspension of the operation of that decision for the duration of the appeal.
 - With its interim decision the Court on 26 August 2019 states that it has serious doubts as to the legality of the Bundeskartellamt decision
- **Proceedings at the Federal Court of Justice**
 - The Bundeskartellamt appealed the interim decision by the first instance court.

3. Public Debate on digital challenges to competition law

Final Report of the Commission 'Competition Law 4.0'

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Report by the published Commission Competition Law 4.0 in Sept 2019 with 7 issues (22 recommendations):

1. Work on the definition of digital markets
2. Access to data – users should be able to make their digital user account accessible to third parties, establishing data trustees, better access to public data
3. Code of conduct on dominant online platforms (self-preferencing; data portability)
4. More legal certainty for cooperation of firms in the digital area
5. Merger Control: No changes in merger thresholds; no system of ex-post merger control; guidelines on data-related theories of harm
6. Make more use of interim measures; no amendments necessary
7. Temporary establishment of a Digital Markets Transformation Agency

3. Public Debate on digital challenges to competition law

Draft amendment of German Competition Law

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Draft 10th amendment of the German ARC was published in Jan 2020

Focus on abuse control on digital markets:

- ARC already contains specific rules
 - on digital markets (zero-price markets, dominance criteria on digital markets)
 - on abuse of relative market power
- New proposals in the draft:
 - particular role of intermediaries
 - rules an access to data
 - essential facility rule in ARC until now limited to physical infrastructure – this will be broadened
 - access to data can play role in the context of relative market power

3. Public Debate on digital challenges to competition law

Draft amendment of German Competition Law

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- Introduction of a concept of ‘undertakings of paramount significance for competition beyond the scope of one market’
 - have to be active as platforms or networks
 - in a first step, the BKartA will identify such firms and issue an order declaring them as being such an undertaking;
 - the focus will not be the position on an individual market
 - have to take into account the position on several markets, their linkages, access to resources, esp. data
 - in a second step, the BKartA can order the firm to abstain from a certain conduct:
 - self preferencing
 - platform envelopment (leveraging)
 - Use of data to set up barriers to market entry
 - impeding interoperability and data portability
 - lack of transparency

Thank you for your attention!

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