

Implications of the German Facebook Decision

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GCLC – Lunch Talk



Bundeskartellamt

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1. Results of the proceeding

2

With its decision of 6 February 2019, the Bundeskartellamt restricts Facebook's processing of user data

Facebook's previous practice:

- Facebook collects data
 - on the Facebook website
 - from Facebook-owned services (e.g. WhatsApp, Instagram)
 - on third party websites or third party apps (e.g. with "Like" buttons)
- **and** combines all these data (under a common, user-specific ID – the Facebook ID)
- Until now users have no choice. They automatically agree to this form of data collection by using Facebook.

1. Results of the proceeding

3

Decision of the Bundeskartellamt:

- Facebook is still allowed to
 - collect and process data on the Facebook website itself.
 - collect data from Facebook-owned services like WhatsApp or Instagram. However, assigning these data to a Facebook user account will only be possible subject to the user's voluntary consent.
 - collect data from third party websites (e.g. with "Like" buttons) and assign them to a Facebook user account. However, both will only be possible subject to the user's voluntary consent.
- Important: **Genuine voluntariness**: Also a user refusing the previous form of Facebook's data processing must be allowed to continue using Facebook.

2. Procedure

4

Objective of the proceeding: changing Facebook's behaviour

- Bundeskartellamt can initiate proceedings if a dominant undertaking is suspected of abusing its market power to impose unfair prices or conditions on its customers.
- no fine proceeding
- objective of the proceeding: to prohibit the abuse of market power
- i.e., to change Facebook's behaviour towards its users
- previous contract terms concerning the combination of data are abusive

3. Market dominance

5

Facebook is the dominant undertaking on the German market for social networks

- around **32 million private users** per month (market share > 80%)
- around **23 million** of them use Facebook on a daily basis (market share > 95%)
- almost no options:
 - withdrawal of Google+
 - LinkedIn, Xing, Youtube, Snapchat focus on different demands
- market power is in particular based on
 - network effects
 - lock-in effects
 - data access

4. Data collection

6

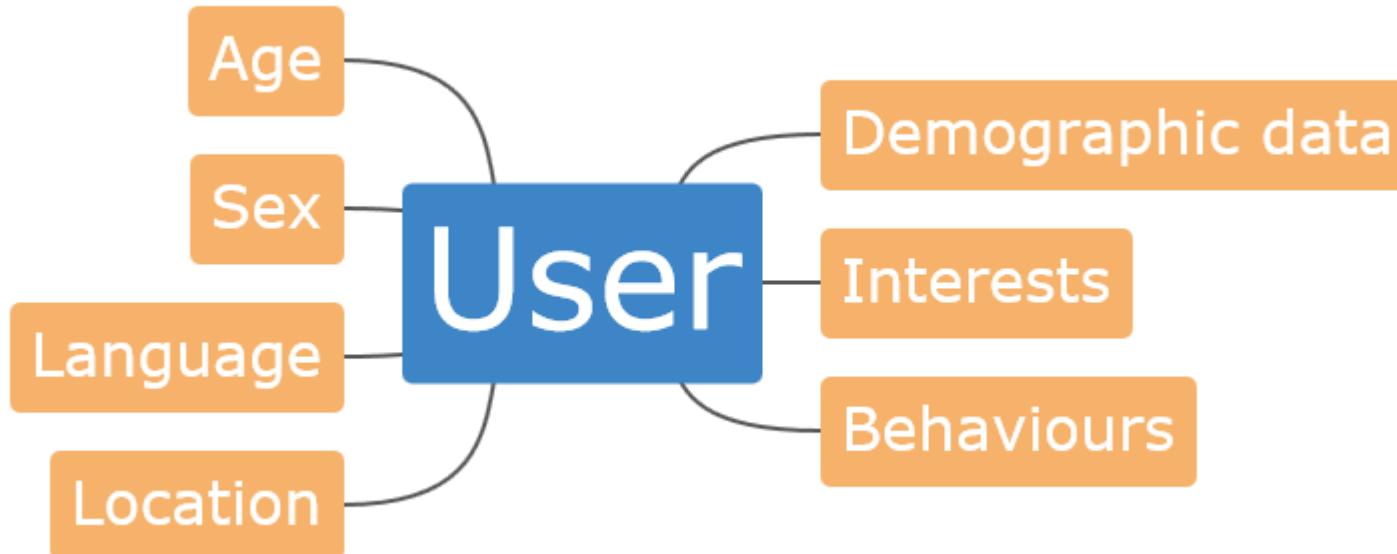
Facebook collects data from various internet sources as well as from the use of apps

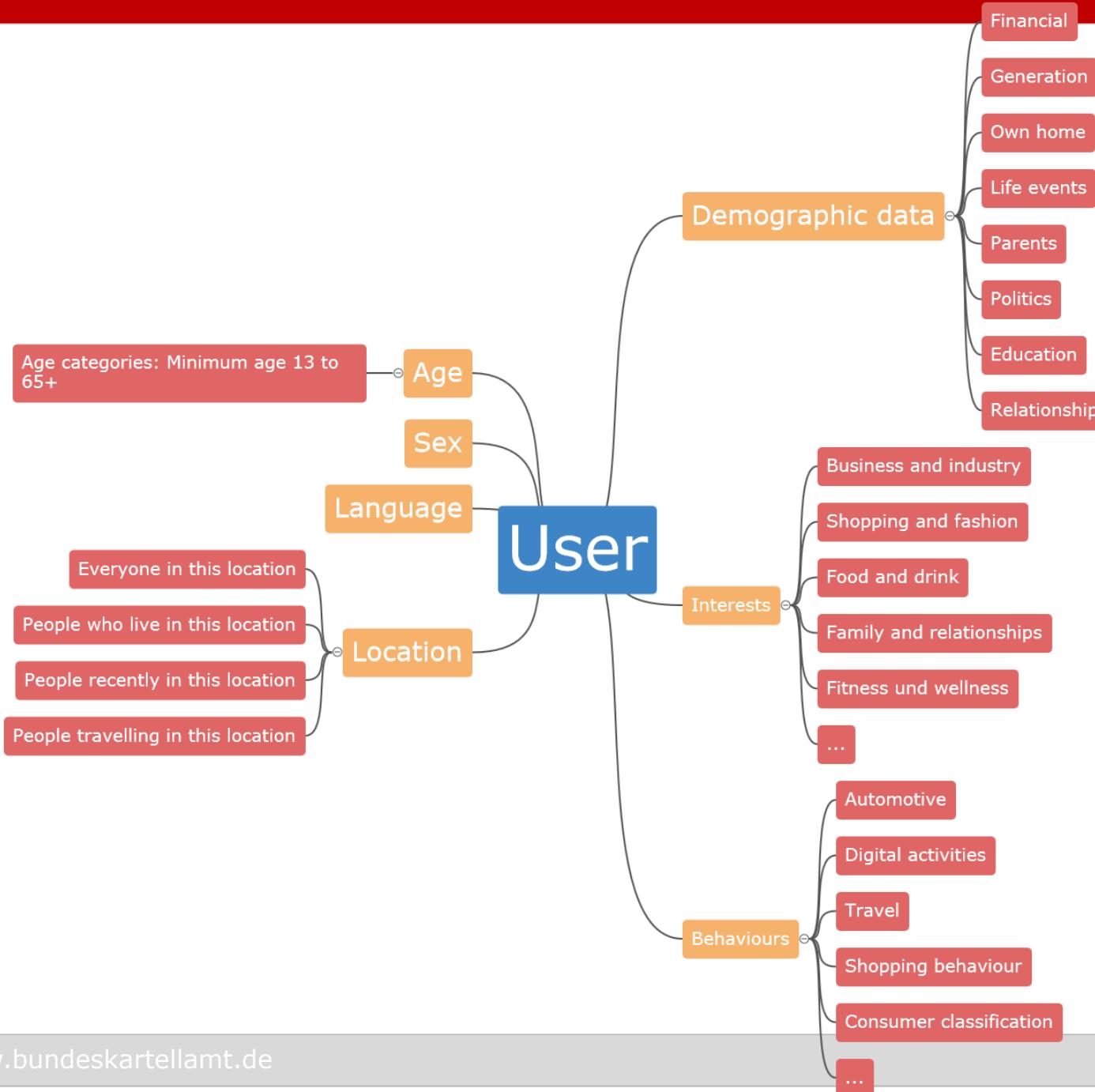
- on the Facebook website itself > this is what most users are aware of
- many users do not know:
- also data from Facebook-owned services like WhatsApp and Instagram is combined with Facebook user accounts
- Facebook also collects data from millions of other websites and apps via interfaces and combines these data with the corresponding Facebook user account
 - “Like” or “Share” button > even without clicking the button!
 - Facebook Analytics > invisible!

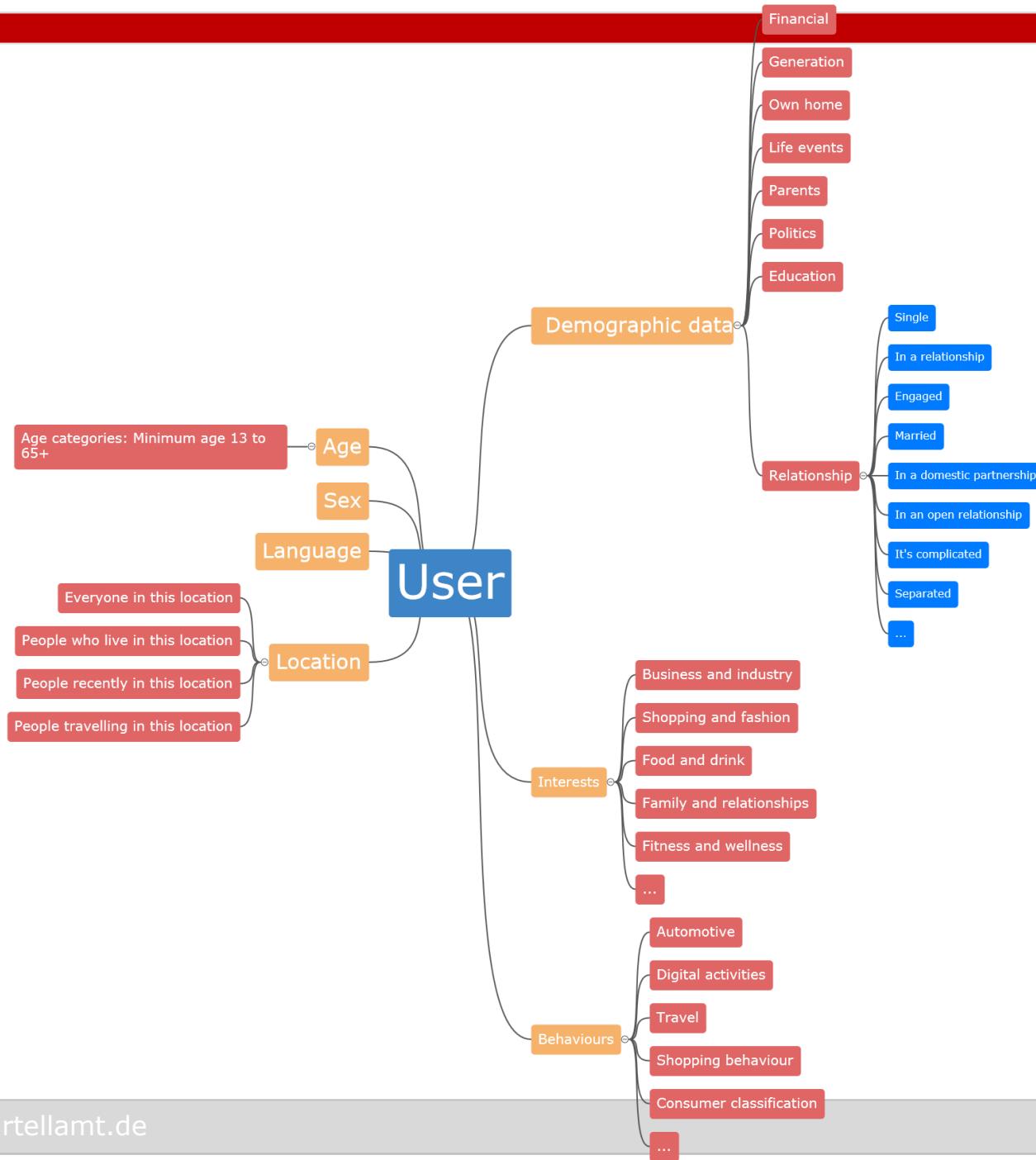
5. Creating a user profile

7

Facebook “measures” its users in detail:







6. Abuse of market power

10

Facebook abuses its strong position to the detriment of its users and competitors

- Facebook is the dominant undertaking on the German market for social networks
- Facebook is not allowed to abuse its market power
- not only excessive prices, but also inappropriate conditions can be classified as abusive
- two theories of harm in the decision:
 - vertical theory of harm: unfair business terms for users
loss of control: users cannot decide freely on how their personal data are used
 - horizontal theory of harm: competitors who are not able to amass such a treasure-trove of data are impeded
- previous data processing terms are prohibited

7. Vertical theory of harm

11

- **Application of German Competition Law:** Section 19 (1) ARC: "The abuse of a dominant position by one or several undertakings is prohibited."
- Case law by Federal Court of Justice, "VBL" (2013, 2017) and "Pechstein" (2016):
 - exploitative vertical abuse by demanding **unfair business terms**
 - i.e. "unfair" by virtue of law: **normative assessment** in the light of law outside the realm of competition law (Concept of **Consistency of the Legal Order**)
 - Federal Court of Justice applied civil law principles aiming to protect a contracting party in an imbalanced negotiation position
- **Data protection law** aims at protecting individuals from having their personal data exploited by the opposite market side.

7. Vertical theory of harm

12

- **Data protection law as benchmark for assessment of unfair business terms**
- Data processing terms violate GDPR and constitutionally protected right to informational self-determination:
 - amount of data collection and processing not required to fulfil contractual obligations of Facebook
 - no voluntary consent into data processing
 - balancing of interests of Facebook and users
- On-Facebook:
data-driven business model needs data processing
- Off-Facebook:
no reasonable expectation of users concerning unlimited data processing
- close cooperation with German data protection authorities

8. Applicability of Art. 102 TFEU

13

- The decision of the Bundeskartellamt left the examination of an abuse under Art. 102 (a) TFEU explicitly open.
- Member States shall not be precluded from applying on their territory stricter national laws, Art. 3 (2) Regulation (EC) No. 1/2003.
- According to Art. 102 (a) TFEU an abuse of a dominant position may, in particular, consist in imposing unfair trading conditions.
- Assessment of “fairness” of trading conditions under EU competition law
 - by **principles of necessity, proportionality and transparency**
 - these are **core principles of data protection law**.
- Not every infringement of data protection rules automatically constitutes a breach of competition law.
- On the other hand, infringements of these rules by a dominant undertaking in a data-driven business have to be examined as exploitative practices from a competition law perspective.

9. Horizontal theory of harm

14

- **Competitors who are not able to amass such a treasure-trove of data are impeded.**
- Section 18 (3a) no. 4 ARC: “In particular in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of: [...] 4. the undertaking’s **access to data relevant for competition.**”
- As social networks are data-driven products, Facebook’s access to the personal data of its users is an essential factor for competition in the market.
 - Data are relevant for both product design and possibility to monetize the service.
 - If other companies lack access to comparable data resources, this can be an additional barrier to market entry.

10. (Inter)national significance

15

Facebook proceeding has a signal effect

- Proceeding sends out the important message that competition authorities keep an eye on the use of data in the internet economy.
- Even on a market where goods or services are offered free of charge users can be exploited; this has to be prohibited by competition authorities.
- The Facebook proceeding is one of a series of many proceedings of competition authorities (incl. Google proceeding of the EU Commission; proceedings of the Bundeskartellamt concerning Booking/HRS, Amazon, Asics etc.).
- It provides guidance on antitrust compliance for the internet economy.

11. What are the next steps?

16

According to the decision of the Bundeskartellamt:

- Facebook has to terminate the conduct objected to within a period of fourteen months.
- In a very limited way Facebook is still allowed to collect data from different sources and combine these data with Facebook user accounts without the consent of these users.
- Facebook has been given a deadline of six months to develop possible solutions and present them to the Bundeskartellamt.
- The Bundeskartellamt will examine whether Facebook's proposals meet the requirements.
- Facebook appealed the Bundeskartellamt's decision to the Düsseldorf Higher Regional Court
 - suspension of deadlines during 1st instance preliminary appeal proceeding

End of the Facebook Proceeding

17

Thank you for your attention!



Bundeskartellamt