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THE COMPETITIVE ADVANTAGE OF DATA IN THE DIGITAL MARKETS ENVIRONMENT

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I hereby declare that I have compiled the thesis independently

and all works, important standpoints and data by other authors

have been properly referenced and the same paper

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ABSTRACT

Digitalization has leaped forward rapidly in recent years, and data has become an essential way for technology companies to succeed in the digital market. Instead of money, data has become a tool for companies to compete for their market position. Data proves to be essential for the companies on digital platforms.

From a competition law perspective, the market position of technology companies has proved controversial. Large digital service providers, i.e., Facebook, have drawn the attention of competition authorities from the point of view of abuse of a dominant position. Legislation is no longer keeping up with digitalization and is no longer in line with the functioning of today's market.

The thesis examines the status of competition law in the digital market through legislation and case law. The research focuses on two empirical questions regarding the abuse of a dominant market position in the digital market. What are the current legislation's main shortcomings, and how should they be developed? The thesis hypothesis aims to determine that competition law legislation of the digital market should be updated to correspond to today's competition and market principles to maintain the main objectives of competition law. The proposed solutions are analyzed as a common code of conduct for both companies and public authorities. Solutions are also being evaluated under the Digital Markets Act and the Data Act. It is also essential to analyze Facebook v The German Federal Cartel Office -case, which can serve as a possible precedent. The methods used are legal dogmatic as they rely on current case law, legal literature, and existing legislation.

Keywords: competition law, abuse of dominant position, data, digital market

LIST OF ABBREVIATIONS

EU	European Union
TFEU	Treaty on the Functioning of the European Union
FCO	the German Federal Cartel Office
GDPR	General Data Protection Regulation
EC	Treaty Establishing the European Community
CJEU	the Court of the Justice of the European Union
DMA	the Digital Markets Act
EDPS	European Data Protection Supervisor
CMA	the Competition and Markets Authority

INTRODUCTION

Considering digitalization and data in competition law has grown year by year as the evolution of technology and its impact today are massive.[1]. From the point of view of the competition authorities, the regulation of digital service platforms has become one of the main areas of focus for European competition departments, especially when it comes to the abuse of a dominant position under Article 102 TFEU. [2] The data-based business poses challenges to competition law as well as consumer protection and data protection. In terms of competition policy, new innovative products, low consumer prices, and even free services are for consumers' interests. [3] On the other hand, the data economy has led to market concentration. [4] All are linked, inter alia, by the competitive position of these companies and their impact on the market. Competition law enters the picture as new companies seek to enter the market. Still, at the same time, existing large companies buy market shares through, for example, data, acquisitions, and services. Currently, competition law does not tend to control dominant technology- and network platform companies, making the development of legislation necessary. [5] For this reason, there has already been heated debate in competition law about the competitive position of technology companies and the adequacy of legislation in the digital market. [6]

In recent years, the European Commission has been particularly interested in the acquisitions and dominance of data technology companies. [7] Therefore, Big Tech companies such as Facebook, Amazon, Apple, Microsoft, and Google are under a magnifying glass. [8] In recent years, the EU has also stepped up its efforts to address the data economy through legislative changes. The Commission has previously put forward proposals for regulations under the Digital Services Act and the Digital Markets Act. Later, in February 2022, a new proposal, the

[1] Kilpailu-ja kuluttajavirasto (2019). *Kilpailun ja kuluttajansuojan kysymyksiä datataloudessa.Kilpailu- ja kuluttajaviraston selvityksiä. 1/2019* pp.15-16
[2] Kuoppamäki, P (2018), Määrävän markkina-aseman väärinkäyttö digitaalisilla markkinoilla – mikä muuttuu?. Lakimies 7-8/2018. pp.996
[3] Ibid, pp.26,
[4] Ibid, pp. 27
[5] Baker,J.B., Morton, F.S.(2018). Antitrust Enforcement Against Platform MFNs. *The Yale Law Journal*, pp.2176-2177.
[6] Lassere,B.,Mundt, A. (2017). *Competition Law and Big Data: The Enforcers'View.* Italian Antritrust Review. pp.87
[7] European Commission (2021), The EU Digital Markets Act a Report from a Panel of Economic Experts. pp.15-16
[8] Congressional Research Services (2021), The Big Tech Antitrust Bills, pp.2-3.

Data Act[9], was promulgated. This is an act in preparation, as it has a significant impact on data subjects and imposes both rights and obligations on the parties. This data act complements the regulatory initiatives implementing the EU data strategy covering digital platforms, internet services, and data transmission services. [10] The data economy and digital markets need common rules of the game, and the current changes in legislation are a sign that the issue is topical.

The aim of the thesis is to study the digital market and companies operating in the that sector mainly from a competition law perspective. The thesis aims to get acquainted and analyze the competition law position of companies operating in the digital market. The analysis mainly addresses the problem areas of competition law in the digital market sector. The aim is to find solutions in the relevant current case law and legislation and deal with Commission legislative proposals. The thesis is also supported by legal literature and scientific articles related to the topic. The sources also include some columns and news dealing with the digital market and companies in the sector. The research method is legal dogmatic, as the purpose is to interpret and systematize the current legal provisions and to weigh up legal principles.

The structure of the thesis proceeds in a way that the research is divided into five chapters. The first part deals with existing legislation on competition law and data protection. The purpose is to highlight the most relevant legislation. In section two, the author indicates the importance of data in the digital marketplace. It is important for the thesis to go through why data is so important in the market. Also, how do companies in the digital market take advantage of this data? Section three analyzes and highlights the main issues for competition policy in the digital market. What are the specific problems with the current legislation? In section four, the thesis deals with the Federal Cartel Office v Facebook case, as it may serve as a possible precedent in the future. Section five presents solution proposals. These proposals deal with the development of legislation, the FCO v Facebook -case, and the development of cooperation between authorities.

[9] European Commission, COM (2022) 68 Final, Proposal for a Regulation of the European Parliament and the Council on harmonized rules on fair access and use of data (Data Act), Brussels, 23.2.2022
COM(2022) 68 final
[10] Ibid, pp.1-2

1. CURRENT LEGAL FRAMEWORK

The primary purpose of competition law is to protect competition in the market and ensure the efficient use of resources, thereby promoting consumer welfare. [11] Competition works best when companies can enter the market without barriers, strive to offer a better option than their competitors, streamline their operations and develop products that meet customer needs. For consumers, this well-being can be reflected, for example, in lower prices, better products and better quality of goods, and better overall consumer protection. [12]

The current EU competition law and policy are based on four main areas: merger control, antitrust control, state aid, and abuse of a dominant position. [13] The law generally requires more than 50% market share, but the threshold is always case-by-case. The starting point is that this will have a detrimental effect on the market. In other words, if the measures do not distort or subtract competition, there is no abuse of market position. [14] The definition of a dominant position has primarily lagged the case law of the European Court of Justice. In EU case law, a dominant position means "*the financial position of an undertaking a dominant position enabling it to prevent effective competition in the relevant market, because it can operate with considerable independence with its competitors, customers and ultimately consumers.*" [15] It should be noted that a dominant position is not in itself prohibited, but only its abuse, as defined in Article 102 of the Treaty on the Functioning of the European Union. This Article 102 deals with harmful conduct to trade between the Member States. The conditions for the application of the Article 102 are set out in the first paragraph: "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between the*

[11] Communication from the Commission (2004/C101/08), Guidelines on the application of Article 81 (3) of the Treaty

[12] European Comission, Why is competition policy important for consumers?, Retrieved from https://ec.europa.eu/competition-policy/consumers/why-competition-policy-important-consumers_en 10.12.2021

[13] Kuoppamäki,P.(2018). Uusi Kilpailuoikeus. *Alma Talent,* pp.28-30

[14] Bergkvist, P (2019) Collective Dominance and EU Competition Law, Örebro Universitet, pp.20

[15] 27/76 United Brands v Comission of the European Communities, 14.2.1978, point 65

Member States"[16] The general premise is, therefore, the undertaking has a dominant position, without which this article cannot apply.

According to the case law, an undertaking has a special obligation not to restrict effective and undistorted competition in the common market by its activities, whatever its position.[17] Concerning the digital market, it is also possible to include cases in the United States where one of the parties involved is Facebook. Investigations have examined market position and its abuse. In the world of digitalization, the market is global, so it is much more challenging to determine the relevant market when it comes to the starting point for assessing dominance.[18]

1.1. Definition of the relevant market

Although defining the digital market is difficult, it is essential to decide how the relevant market is limited. The relevant market is defined by combining the product and geographic markets. The three critical issues are demand-side substitutability, supply-side substitutability, and potential competition. [19]The European Union's digital single market is defined as certain online activities that are freely available to people and businesses.

Market definition is crucial because it identifies and defines the significant competitors of a company. Its purpose is to determine, by that definition, the restrictions of competition that it faces. In addition, the goal is to identify those competitors who may restrict the conduct of undertakings and prevent free competition. The relevant market is formed by combining the product and geographic markets. Product markets include all substitutable or interchangeable commodities based on their characteristics. These include price and purpose. [20] Once the

[16] TFEU Article 102 paragraph 1
[17] Nederlandsche Banden Industrie Michelin v Comission of the European Communities, no 322/81, European Court 1983
[18] Federal Trade Commission (2020), FTC Sues Facebook for Illegal Monopolization. Retrieved from https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization . 9 October 2021
[19] Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)
[20] Official Journal of the European Communities, C:1997:372:TOC, Section 2, 7

relevant market or geographic market has been defined, it must be determined whether the undertaking has a dominant position within Article 102 TFEU.

Defining the market correctly is essential, as if the market is defined incorrectly, this can lead to misinterpretations. This can lead to an overly broad or narrow definition that allows companies to abuse a dominant position. Article 102 shall not be available to the authorities and the company shall avoid sanctions.[21]

1.2 Abuse of dominant market position

In interpreting whether there has been an abuse of a dominant position, account must be taken of the four main elements of Article 102 TFEU. Article 102 (a) to (d) deals with examples of what constitutes abuse[22]. However, the article is not entirely comprehensive and other forms of abuse may also fall within the scope of Article 102.[23]

Under Article 102 (2) (a) TFEU, the imposition of unfair purchase or selling prices or trading conditions is one of how a dominant undertaking abuses its market position. The application of unfair terms is particularly relevant in the Facebook case. Although the Facebook case does not involve unfair pricing, Facebook has imposed unfair terms in the digital marketplace. Facebook's case is the first competition authorities have assessed the consequences of unfair pricing in the data market. [24] According to the case law, trading conditions may be unfair under Article 102 (2) TFEU if they are not indispensable to the object of the agreement. Conditions are also unreasonable if they unnecessarily restrict the freedom of the parties. In addition, assessing the unfairness is relevant whether the conditions were unilaterally dictated by the dominant undertaking.[25]

[21] European Commission (2021), Competition: Commission publishes findings of evaluation of Market Definition Notice, Press release. Accessible: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3585. 11.5.2022

[22] TFEU Article 102, paragraph a-d

[23] Kuoppamäki, P (2018), *Supra nota*. pp. 998

[24] Botta, M., Wiedemann, K. (2019). The interaction of EU Competition Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey. Max Planck Institute for Innovation and Competition. pp.465-467

[25] Case T-203/01, Manufacture francaise des psenaumatiques Michelin v Commission of the European Communities, ECLI:EU: T:2003:250, point 140-145

1.3 EU´s data protection law

Data protection was reformed when it was noted that regulations on personal data protection needed to be reformed and modernized. Due to technological developments and globalization, significantly more material is being collected than previously. As stated earlier, personal data has become a commercial asset exploited through data in the technology sector. However, this imposes obligations on companies to comply with data protection regulations, as do others. Article 8 of the Charter of Fundamental Rights of the European Union states that "everyone has the right to the protection of personal data concerning him or her."[26] The starting point is that the processing of personal data must be appropriate and carried out for a specific purpose and, most importantly, with the consent of the person concerned or based on another legal basis. [27]In addition, the party concerned has the right to access the data collected about him and the right to request rectification of the data. The right to this protection of personal data is also enshrined in Article 16 TFEU, which states that "*everyone has the right to the protection of personal data concerning him or her*."[28]

The requirements of data protection legislation are well known among companies, but there are shortcomings in their implementation. When developments are ongoing, companies must try to keep up to date with regulatory requirements regarding data protection legislation. As the volume of data grows and consumer expectations about data protection are changing, the importance of comprehensive data protection management is growing. Since the entry into force of the EU Data Protection Regulation, legislation and enforcement practices have become more precise. Another significant change that the business world has faced is the ruling of the European Court of Justice in July 2020, when the Scherms II decision overturned the EU-US Privacy Shield. [29] As the thesis later discusses the Facebook case v German the Federal Cartel Office, it is worth mentioning that US data protection regulations differ from EU regulations. At the turn of the millennium, there was a need for a mechanism that allowed companies to transfer personal data from the EU to the US without compromising confidential data protection. This need gave rise to the so-called Safe Harbor in 2000, which the EU Commission considered ensuring adequate safety of personal data transferred from the EU in the United States. The Safe Harbor system was deficient, leading to the development of the Privacy Shield

[26] Charter of Fundamental Rights, Article 8, paragraph 1
[27] ICO, Lawful basis for proceccisng, Retrieved from https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/. 13.10.2021
[28] TFEU, Article 16, paragraph 1
[29] CJEU Case C-311/18

mechanism in 2016. [30]However, in its decision of 16 July 2020, the EU Commission now annulled the inadequacy of Privacy Shield. The European Court of Justice ruled that the processing of personal data in the United States is not sufficient in light of EU regulations. [31] The companies affected found themselves in a surprising situation, where they had to quickly understand the transfer of personal data outside the EU and at the same time to be able to assess the lawfulness of the transfer.

The EU's general data protection regulation came into force on 25th May 2018. This new regulation replaced the previous Directive 95/46 / EC of the European Parliament and the Council on protecting individuals regarding the processing of personal data and the free movement of such data. [32] Regulations are acts that apply directly and uniformly as soon as they enter into force. However, the EU General Data Protection Regulation is an exceptional regulation that leaves the objectives of the GDPR are modern, coherent, and comprehensive data protection framework for the EU. The aim was to strengthen data subjects´ sovereignty and the European internal market dimension by enhancing trust in digital service platforms. It is also essential to consider the global dimension of data protection and enforcement. [33]

Article 1 (1) of the GDPR lays down rules for protecting natural persons about the processing of personal data and rules for the free movement of personal data. Article 2 (1) of the GDPR The Regulation shall apply, in whole or in part, to automatic processing and manual processing where personal data form part of a register or are intended for. [34] The concept of personal data is also comprehensively defined in the GDPR. According to Article 4 (1), *personal data are all data relating to an identified or identifiable natural person*. [35] In addition, Article 4 (2) of the GDPR covers the processing of personal data.

The GDPR is primarily based on risk-based thinking, which requires risk-based data protection design and the ability to prove action. The controller has been required to provide proof, which means the proper and lawful processing of personal data. [36] The controller may

[30] Resource Center. A brief History of Safe Harbor. Retrieved from https://iapp.org/resources/article/a-brief-history-of-safe-harbor/ . 09 October 2021
[31] CJEU Case 3-11/18
[32] European Data Protection Supervisor, *The History of the General Data Protection Regulation.* Retrieved from https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en. 11 October 2021
[33] Andreasson,A.,Riikonen, J.,Ylipartanen, A.(2019). Osaava tietosuojavastaava ja EU:n yleinen tietosuoja-asetus. Tietosanoma Oy, Helsinki. pp.35–38
[34] Article 2 (2) to (4) and Article 85 of the General Data Protection Regulation
[35] GDPR, Article 4 paragraph 1
[36] Andreasson, A. Riikonen, J., Ylipartanen, A. (2019). supra nota, pp.26–30

be defined as a natural or legal person, public authority, or other body that alone or jointly determines the purpose and means of processing personal data.[37]

2. THE IMPORTANCE OF DATA IN THE DIGITAL MARKET

As stated earlier in this thesis, the problems faced by competition policy and law are topical and essential. Today, every EU citizen has access to a telephone, computer, or another device whose use is centered on Big Tech -companies.[38] Technology spans almost every industry, and therefore its importance in today´s market is enormous. The importance of data is emphasized, as it enables the world's largest companies to collect, use and store data to develop their services. The value of data increases when it is successfully processed to produce better services and, for example, targeted advertising.

[39] While we consumers use the services provided by the platforms, digital platforms collect data about their users. Platforms, therefore, benefit all their users and users get access to the services and opportunities offered by the platforms. With the collected data, the platforms develop their programs and their services. [40]This use of data is now a significant part of the digital platforms' business, enabling efficient data collection and analysis to give a competitive advantage in the digital market, which means that large platforms have a significant advantage.[41] Evidence of this is that Facebook has bought WhatsApp and Instagram in recent years, which are now the most popular ones. [42] Smaller platforms do not have the potential

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[37] Article 4 General Data Protection Regulation, point 7
[38] Statista, Global social network ranked by number of users 2021. Retrieved from https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/, 13 December 2021.
[39] Kilpailu-ja kuluttajavirasto (2019).*Supra nota,* pp.9-10.
[40] Oxera (2015), Benefits of online platforms, pp.4-8
[41] Viitanen, J.,Paajanen, R. Loikkanen, V. Koivistoinen, A. (2020). *Digitaalisen alustatalouden tiekartasto.* Business Finland. pp.14-17
[42] Auxier,B. , Anderson, M. (2021). *Social Media Use In 2021.* Retrieved from https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ , 7 October 2021

compared to large companies, as smaller platforms do not have the same capabilities and resources to collect or develop efficient algorithms to go through the collected data. [43]

When treating data as a general term, the word “Big Data” is the expression that comes to mind. It refers directly to mass data or metadata and broadly to data used and collected for various purposes[44]. Another important term is “Big Analytics”, which refers to the techniques used to analyze data and convert it into a usable format. [45] The European Commission defines data and its analysis “as analyzing vast amounts of data to reveal patterns and other necessary information. “The primary goal of data analysis is to help technology companies make better business decisions. [46]

In practice, data can be divided into personal and non-personal data. Personal data is any information about an identified or identifiable individual stated in the OECD Data Protection Guidelines. Thus, this can be, for example, user-generated content, activity and behavioral information, social information, location information, and identification information. [47] Non-personal data is anything except personal, so the concept is broad. Ratings can be broken down so that there is information that can be anything unrelated to personal information. The second classification is personal data that has been anonymized. It is not possible to associate this anonymized information with an individual.[48]

In addition to European data protection authorities, competition authorities are following the practices of companies when it comes to handling and storing their data. Big data has become valuable and is expected to become more as the market value of data is increasing.

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[43] American Economic Liberties Project (May 3 2021). *The Truth About Google, Facebook, and Small Businesses.* Retrieved from https://www.economicliberties.us/our-work/the-truth-about-google-facebook-and-small-businesses/ 12.12.2021

[44] Gandomi, A., Murtaza, H. (2014). Beyond the hype: Big data, concepts, methods and analytiscs. Ted Rogers School of Management, Ryerson University, Toronto, Canada. pp.138

[45] Kadar, M. Bodgan, M (2017). *Big Data and EU Merger Control – A Case Review.* Journal of European Competition Law & Practice, pp.479-481

[46] European Commission (COMP/M.7023), pp.119.

[47] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. Retrieved from https://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm 10.12.2021

[48] European Commission (2019), COM(2019) 250 Final, pp.5-6

2.1. Data collected by platforms

The potential of big data is excellent. That is why it is valuable today and has been called the "new oil of today."[49] On the other hand, data is an essential factor for dominance and is also a barrier to entrants in the technology sector. The more data a company has, the more it can use it to a competitive advantage. Merely owning the data does not create a dominant market position, but the situation is different if the data can only be collected by one company.[50]

Consumer data is vital for companies in the digital market, as it enables a company i.e. Facebook, to succeed. The negative factors caused by the data weaken the already limited competition in the technology sector and promote market concentration in the market position of large companies. [51] This also means that competitors become dependent on the company in a dominant position and that consumers see the company as positive, as the company has the best consumption opportunities. Therefore, Big Data has a significant impact on strengthening the dominant position and the distortion of competition. [52]

Facebook can be used as an example. The core idea of Facebook's business model, for example, is to provide free services through user data. Facebook still sells this data to others, such as marketing companies, who benefit from doing this by marketing to individuals. [53] Facebook and other companies state in their privacy policies that they do not resell personal data to third parties, in other words, they only use the information they collect to enable advertisers to target their ads.[54] For large companies, data is precisely one primary reason why a company has gained a dominant market position. [55]

The importance of data in economic activity has grown significantly, primarily due to the rapid development of data transmission and processing capacity. [56] Equally important has been data

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[49] The Economist (2017). The world´s most valuable resource is no longer oil, but data. Retrieved from https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data . 07 October 2021

[50] Rubinfield, D.L., Gal, Michal.(2017). *Access Barriers to Big Data*. Arizona Law Review. pp.28-34

[51] Ibid, pp.30-34

[52] OECD (2016). Big Data: Bringing Competition Policy to The Digital Era. pp.5-14

[53] Graef, I (2016) *Supra nota*, pp. 133-135

[54] Pew Research Center (2019), Facebook Algorithms and Personal Data, Retrieved from https://www.pewresearch.org/internet/2019/01/16/facebook-algorithms-and-personal-data/, 12 December 2021

[55] Di Porto, F. Ghidini (2018), Big Data between privacy and competition : dominanceby exploitation? Which remedies?, pp. 6-7

[56] United Nations (2019), The value and role of data in electronic commerce and the digital economy and its implications for inclusive trade and development, , pp. 5-6.

mining technology that allows a large amount of unstructured information to be found and formed into structured information.[57] A company that exploits data can obtain it directly or through a third party. Directly, it can be received by the customer or the user voluntarily handing over, observing the customer, or inferring his behavior, which the Online Stores especially exploit. [58] The company may also purchase data from a third party. A small start-up company may not be able to collect as large amounts of data as a large one, and a long-established company holds. A company that has been in the market for a long time may have gathered so much information that a minor competitor may not obtain even by purchasing a similar amount of data, or a prominent company may refuse to sell the amount of data to an outsider. This creates significant market power for the leading company and the possibility of foreclosing competitors. [59]The phenomenon can have a self-reinforcing effect, the collection of ever-increasing amounts of data allows for better economies of scale, the development of more accurate services, and more efficient algorithms. [60]

[57] Bundeskartellamt & Autorite de la Concurrence (2016), *Supra nota*,.pp. 4-8
[58] Graef, I (2016), *Supra nota, pp.*252-254
[59] Ibid, pp.252-255
[60] Bundeskartellamt & Autorite de la Concurrence (2016), *Supra nota*. pp.11-13

3. SHORTCOMINGS IN THE COMPETITION POLICY

The different nature of the technology sector in the market plays a significant role in distributing competition law between companies. One of the digital market problems, as stated previously, is the monopolistic market. [61] Digitalization has brought both advantages and disadvantages to the market under competition law, and this tends to highlight regulatory issues. Abuse of a dominant market position proves to be central, primarily when the business is based on a digital service platform. The concept of mass data will play a unique role in this sector.[62] Large companies have an advantage in the market because they already have the resources to collect this business-critical data. The value of data is based on its processing and its proper utilization. This gives the operator at the market advantage over its competitors. The amount of information is one of the core problems under competition law and a company's market behavior. The data itself also brings problems in the technology sector, as the market structure of the technology sector is somewhat monopolistic. [63] However, the fact that a company holds data is not a problem. The problem possibly arises when the information is started to be processed or used.[64] Companies, which have gained a significant position in the technology market, have been interesting as they face competition law problems and data protection problems.

There are third parties in the market to collect data and resell it. Facebook, among others, has taken advantage of this tool.[65] For example, Facebook entered into an agreement in 2015 with Data Shift, a leading social data platform. However, there is a problem with companies partnering with third parties to promote better-targeted advertising. The use of data to abuse a dominant position is a cause for concern for competition and data protection authorities. We are already moving close to Facebook disclosing or sharing information to third parties in this situation. [66] This leads to the same point, i.e., the mere possession of data or a dominant position on the market is not the problem. Smaller competitors find themselves where access to their extensive data mass is blocked. Matter becomes a problem when a company abuses its

[61] United Nations (2020), *Supra nota,* pp.4-5
[62] Kuoppamäki, P (2018), Supra nota, pp.999-1000
[63] United Nations (2020), Economic properties of data and the monopolistic tendencies of data economy: policies to limit an Orwellian possibility. Department of Economic and Social Affairs. pp. 4-5
[64] Rakic, I. Dragic, I. *Big Data – Between the competition policy and privacy and data protection.* pp.18-21
[65] Bundeskartellamt & Autorite de la Concurrence (2016), *Supra nota,* pp.12-13
[66] Graef, I (2016) *Supra nota.* p.133-136

position. As a result, small companies cannot compete in the market well enough against large companies.

3.1. Main problem areas

As the thesis has highlighted, there are gaps in competition law in the digital market sector. Competition law rules were established well before the digital market was born. In the EU, competition policy aims to defend fair and undistorted competition through legislation and sanctions. Above all, stable and impartial competition rules are at the heart of the functioning of the EU internal market and contribute to the integration of the internal market.[67] Competition law also seeks to ensure that everyone follows the same rules and that companies have an equal chance of succeeding and operating in the internal market.[68] That is, competition in the market works and consumers benefit from competition.

Currently, legislation and policy are attracting the attention of companies that dominate the digital market and comply with their rules. It now plays an increasingly important role in maintaining and developing competition. [69] The current technology market is problematic, as competition law is primarily based on a price-oriented market and efficiency principles. [70] In the field of competition law, EU law places significant emphasis on the objectives of competition law, namely, to ensure healthy and effective economic competition from harmful restrictions on competition.[71] Large companies like Facebook have been able to stay ahead of the slow pace of current legislation. This has contributed to the competitive advantage of certain companies in the market. The purpose is to secure a competitive advantage through the product's quality, price, or other characteristics. However, the digital market is not always suitable for these, and it is challenging to classify data in this category. From a competition law perspective, the problem in competition law is the excessive flexibility of the rules and the excessive discretion in taking a decision. [72]

[67] European Parliament (2019). *EU Competition Policy: Key to fair single market.* pp.1
[68] European Commission (COM/20187482). Report on Competition Policy 2017
[69] Kerber,W.(2016) . *Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection*., pp.8-9
[70] Raitio, J (2018). Rule of Law, Legal Certainty and Effiency in EU Competition Law. Rechtstheorie. pp.478-481
[71] Ibid, pp.478-481
[72] Ibid, pp.480, 490-492

In the past, about market definition, there could be the talk of two or multi-sided markets for digital market companies. This means that the company provides services to the consumer free of charge, and on the other hand, costs are levied on the users of the data collected from the consumers.[73] Of these, Facebook, for example, offers these services in return for the right to collect and resell data to a third party. The problem occurs when the customer or user has no choice but to accept the terms offered or to refuse to use the service. This creates significant market power for service providers.[74] These two- and multi-sided markets are a common problem in competition law compared to the one-sided market. At present, competition policy has failed in the market for digital companies that provide these free services while obtaining data for themselves. Two-sided markets can define terms of use and prices, making it more challenging to monitor market power and abuse from a competition law perspective. One of the big problems in competition law that needs to be addressed is that price focus should be changed in the competition rules. Current future legislative changes are likely to address this, limiting the collection and sharing of data by companies operating in the digital market.

[73] Kuoppamäki, P (2018). *Supra nota.* pp.999
[74]Ibid, pp. 1000

4. CASE LAW: THE GERMAN FEDERAL CARTEL OFFICE v FACEBOOK

As the author has stated, the case of Facebook is leading the way at unfair trading conditions, the data protection terms, and practices may be unjust to competition law.[75] There have been some similar cases comparable to the Facebook case. In an example case, a dominant undertaking could oblige customers to purchase services that are not requested or are not closely related to the core object of the agreement[76]. In the Alsatel v SA Novasam case, according to the ECJ, unfair contractual terms were imposed whereby the relationship between a dominant undertaking and another undertaking would automatically continue after its termination, and another company would automatically be required to pay a higher rent to the dominant company. In this case, the terms have been unfair to another company. [77] When comparing to the Facebook case, we pay attention to the findings of the Bundeskartellamt According to the case law of the Court of Justice of the European Union, unfair contract terms may be considered in the framework of current case law. The Facebook case has the same considerations as the Alsatel case, as Facebook has imposed a take-or-leave requirement on its users in terms of use.[78]

Facebook's case selection for the thesis is relevant from the point of view of both competition law and data protection. It plays a crucial role in discussing digital platforms that provide services to consumers for free.[79] In return, these platforms instead have access to the personal data of their users. The case further addresses the relationship between data protection law, particularly the General Data Protection Regulation and the Competition Act, as the German Federal Cartel Office's arguments were firmly based on Facebook's alleged non-compliance with the GDPR Regulation.[80]

[75] Botta, M.,Wiedemann, K(2019). Exploitative Conducts in Digital Markets: Time for a discussion after the Facebook decision. Journal of European Competition Law & Practice. pp.466
[76] *Ibid,* pp.471
[77] *Ibid,* pp.471
[78] *Ibid,* pp.472
[79] Wiedemann, K. (2020).,A matter of Choice: The German Federal Supreme Court´s interim Decision in the Abuse of Dominance Proceeding Bundeskartellamt v Facebook (Case KVR 69/19). pp. 1168-1169
[80] *Ibid*, pp. 1169

4.1 Background and facts of the case

In 2016, the German Federal Cartel Office (Bundeskartellamt) launched an investigation into the abuse of a dominant position in Facebook. The parties to the case were Facebook Inc USA, the company's Irish subsidiary, and Facebook Germany GmbH. The authority began investigating suspicions that Facebook had abused its potential dominant market position in the social networking market through the terms of use of the user data. It is suspected that Facebook's terms of use for consumers violate privacy regulations. Dominant companies needed to have specific obligations, such as appropriate terms of service. It was also important for consumers to be sufficiently aware of the type and extent of data collected. [81]

In February 2019, the FCO issued its decision on the case. In conclusion, they found that Facebook had abused its dominant position in the social networking market in Germany by combining data collected from private users outside the Facebook.com service with data collected in connection with the use of Facebook without the users' valid consent.[82] In its decision, the competition authority essentially demonstrates that Facebook has acted in breach of the general data protection regulation in processing personal data.[83] Facebook and its affiliates develop and maintain a variety of applications.[84] The main idea of the service is a social network aimed primarily at private users, funded by targeted online advertising services offered to advertisers.[85] According to Facebook's privacy policy, Facebook may collect information about your activities outside of Facebook.com from other Facebook Group services and third parties through Facebook's Business Tools, regardless of whether the user has a Facebook account or is logged in to Facebook. [86] Facebook will use the above information to provide, personalize and improve our products and services.[87] By using the Facebook services, the user accepts the terms of use. Concerning your personal information and use of the Service, the Terms of Service refer to separate information and cookie policies. These terms

[81] Bundeskartellamt. (02.03.2016), Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused it market power by infringing data protection rules. Retrieved from https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html . 10 October 2021
[82] Bundeskartellamt (06.02.2019), Case B6-22/16, *Facebook v Bundeskartellamt*
[83] *Ibid,* point 522-523.
[84] *Ibid*, point 3
[85] *Ibid*, point 37
[86] I*bid*, point 100–101
[87] Ibid, 103-106

apply to all products in the Facebook Group and define what information Facebook collects about you and how it processes and discloses them.

Facebook later appealed to the competition authority to appeal to the German state supreme court and requested that enforcement be suspended until the matter was resolved. In the interlocutory proceedings, the Supreme Court suspended the Competition Authority's decision in August 2019. The Supreme Court argued in the decision that Facebook's conduct did not harm competition and did not constitute user abuse, as the terms of use are voluntary and thus free using the service. [88]However, the federal Supreme Court overturned the decision. In the decision of the Federal Supreme Court, data protection was not as important as in the decision of the competition authority. [89] The Federal Supreme Court ruled that Facebook's conduct distorts competition and creates barriers to entry from the competitor´s perspective. In addition, users 'freedom of choice is reduced when they must allow Facebook to process information outside of it, regardless of whether users want it processed.[90] The decision of the Federal Supreme Court has been made in the interlocutory proceedings, and the case is still pending. In April 2021, the State Supreme Court requested a preliminary ruling from the CJEU. No preliminary ruling is yet available. However, when it comes to the last line between the EU Commission and the Court of Justice, the case would be unique because it combines competition law with data protection regulation.[91] In the past, the Commission and the Court of Justice have kept these two areas of legislation separate.

[88] Wiedemann, K. (2020), *supra nota*. pp.1170
[89] *Ibid*, pp.1170
[90] Case B-6-22/16, supra nota, point 92-94
[91] CJEU, Case C-252/21, *Meta Platoforms and Others*

5. SOLUTIONS TO CURRENT REGIME

Combining data protection and competition law is new in competition policy, but it will be necessary, especially once the possible precedent decision for the Facebook solution has been announced. Separating data protection and competition law has been a clear conscious choice among public authorities. Still, as consumer data is now a growing part of the competition in the digital market, the competitive advantages it creates and market entry call for action to address breaches of data protection and competition law.[92] If a company in a dominant position breaches data protection law, it can also constitute a breach of competition law. Therefore the case law should start to take both aspects into account.[93] Based on the case, proposals can be made to solve the challenges of competition law in the digital market. It can be said that there are several solutions, depending on what is the biggest problem. The most common issues considered problematic for competition law are the rapid development of the technology sector, the abuse of market power, the freedom of services, and the bilateral market. Several research groups and government authorities have researched the current state of the digital market and how competition law should adapt to today's world. [94] The competition problems in the technology sector start at its roots. First, the market is highly concentrated, there is little competition and smaller digital platform companies cannot enter the industry.

[95] Acquisition control has been proposed to solve this problem, among other things development. Closer monitoring of acquisitions could help prevent market concentration in the hands of large companies. For example, if Facebook had once been banned from buying Instagram, Instagram could have become a real competitor to Facebook and would not be as distorted. The cornerstone of the conditions for merger control is turnover limits, which determine whether a merger is subject to investigation by the authorities.[96] Criticism has been leveled at the suitability of the current approach for emerging digital users.

[92] Katz, M.,Sallet,J.(2018). Multisided Platforms and Antitrust Enforcement. The Yale Law Journal. pp.2172-2173

[93] Volmar, MN.,Helmdach, KO.(2018).Protecting consumers and their data trough competition law? Rethinking abuse of dominance in light of the Federal Cartel Office´s Facebook investigation. European Competition Journal. pp.212-213

[94] UNCTAD (2021), Competition law, policy and regulation in the digital era. pp.2-3

[95] *Ibid,* pp.14

[96] Case COMP/M.7217 Facebook/WhatsApp v. European commission.

If we compare the GDPR mentioned above with Article 102 of the TFEU, it can be concluded that the processing of personal data can be an economic activity.[97] The controller mentioned in Article 4 (7) of the GDPR Regulation may be an undertaking for competition law purposes and the undertaking may be a controller or processor under data protection rules. [98] Data protection and competition law are linked because they have common goals. As stated earlier in this thesis, these issues include completing the internal market, protecting individuals, and interfering with the balance of power. [99] Of these, consumer welfare is paramount and is the most unifying factor.

Firstly, the well-being of consumers is a key objective in competition law, as the goal of the effective and successful competition is to deliver benefits, and quality products to end consumers. The Commission has therefore pointed out that one of the objectives of competition law is precisely economic efficiency and consumer welfare. This protection of competition is inherent in helping to improve consumer welfare.[100] At the same time, the effects of data protection weakening on the services of dominant companies have been highlighted for consumer welfare in the digital economy. The level of data protection can be seen as part of the quality of service. Ineffective and inefficient competition leads to a reduction in the level of protection of personal data in addition to the quality of services.[101].

Previously, data was classified as personal and non-personal data. It is essential to consider the intersections between data protection and competition law regarding personal data. Data protection law may not be a sufficient means of preventing competition law problems when it comes to the movement of personal data. Big technology companies collect sensitive data about us consumers and users. Of course, at the same time, these companies are striving to comply with privacy rules. However, large companies still have significant ambiguities in this regard. In 2016, the German competition authority began investigating Facebook's activities and whether it is abusing its market power by violating data protection regulations.

Common rules of conduct have also been proposed for companies, as it must be better to address the exploitation of dominance and market power. The Competition and Markets

[97] Acquisti, A. (2010). *The Economics of Personal Data and the Economics of Privacy*. OECD Conference Centre, pp.7
[98] Vanberg, D, A., Unver,MB(2017).*The right of data portability in the GDPR and EU competition law: odd couple or dynamic duo?.* European Journal of Law and Technology.
[99] Costa-Cabral,F., Lysnkey, O. (2017). *Family ties: The intersection between data protection and competition in EU Law*. Common Market Law Review. pp.20-22
[100] Kuoppamäki, P (2018), *supra nota.* pp. 3–7
[101] Costa-Cabral, F., Lysnkey,O. *supra nota*. pp.12-13

Authority (CMA) in its 2020 study, concluded that current regulation is not sufficient to remove market concentration but that ex-ante regulation is also needed. Clear rules governing the conduct of companies would prevent companies with a dominant position from exercising their power in an anti-competitive way. The new regulation could create principles and codes of conduct for network platform companies. Violations would be sanctioned and enforced by the authorities. [102] These principles and rules of conduct would be based on market power, and compliance with them would mainly apply to large online platform companies such as Facebook. The advantage of these codes of conduct is seen as their flexibility, which means that they remain better involved in the ongoing development of the digital market than the legislation. Furthermore, it is essential to intervene in the structure of companies at the start-up stage, which will also make it easier to monitor them. [103]. The rules mentioned above conduct have been the subject of competition law research. Creating common rules for companies could be a viable solution to competition law problems. However, the code of conduct should be international to have the best possible impact on the network platform market. Companies operating in the market are usually international and their needs are global. [104]The code of conduct should consider the competition process more than its objectives, such as economic models. When services are free, it is also one of the challenges of competition law, as they are different from traditional companies whose assistance must be paid for. Companies offering free services use data as payment for services, which is very new to competition law and therefore, changes are needed. Competition authorities should have access to data and analysis collected by companies to identify potential abuses better. Possible restrictions on the collection and use of data have also been considered.[105] In particular, tightening regulations on consumer data would be a viable solution to limit the power of large companies on technology platforms.[106]

[102] The Competition & Markets Authority (2020) Online platforms and digital advertising. Marketing study interim report pp.233-234
[103] Ibid, pp.228-232.
[104] Report of the Digital Competition Expert Panel (2019). Unlocking digital competition. pp.54-55.
[105] Talouselämä (21.10.2019), *Asiantuntija kertoo, miten Googlen ja Facebookin kaltaiset jätit muuttivat kilpailuoikeutta – Kuluttajat ostavat nyt palveluita eurojen sijaan antamalla tietoa.* Retrieved from https://www.talouselama.fi/uutiset/asiantuntija-kertoo-miten-googlen-ja-facebookin-kaltaiset-jatit-muuttivat-kilpailuoikeutta-kuluttajat-ostavat-nyt-palveluita-eurojen-sijaan-antamalla-tietoa/7c926ec0-49cd-45de-acd8-652132a06969. 30.11.2021
[106] The Competition and Markets Authority (2020), supra nota. pp.228

5.1. New regulatory environment

The Commission has considered proposing a regulation that would give national competition authorities better tools to address the use of mass data in breach of competition rules.[107] In December 2020, the European Commission published new legislative proposals aimed at fairer digital practices and services for businesses and consumers. As Laura Halenius states in her article "*the Commission ensures with this new legislation that consumers have access to a wide range of secure products and services online.*" [108] In addition, from the point of view of competition law, the new legislation aims to enable companies operating in Europe to compete freely and fairly on the Internet, just as they do offline, and illegal content, for example, must be removed from services. Through this, the Digital Market Act (DMA), the legislative proposal seeks to prevent digital giants in the internal market from abusing their position.[109] The most well-known of these platform companies are Google, Amazon, Facebook, and Apple, which author already mentions in this thesis, and already have such a dominant position that they can prevent or significantly slow down the provision of services to consumers by their business users and competitors.[110]

In February 2022, a new regulatory initiative related to the EU´s data strategy, *the Data Act,* was introduced. If successful, this data act could significantly impact the EU's efforts to create a fairer data society. [111]The purpose of the data act is to complement comprehensive regulatory initiatives for digital platforms, internet services, and data transmission services. In the Data Act, switching to a service provider is a significant benefit. The legislation allows the transfer of information collected to the service to be facilitated. This can also have a considerable impact on competition law. The third important point is that the rights to share data with third parties must be clearly defined. [112]This has a significant impact on companies operating in the digital market that sell data to third parties. The primary purpose is that data sharing requires reasonable and non-discriminatory contract terms.[113]

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[107] European Commission, COM (2020) 66 Final, pp. 1-2
[108] Halenius, L. (2021), New Legislation brings order to digital markets, Sitra. Retrieved from https://www.sitra.fi/en/blogs/new-legislation-brings-order-to-digital-markets/. 09 October 2021
[109] Ibid
[110] European Commission (2021). The EU Digital Markets Act a Report from a Panel of Economic Experts. pp:10
[111] European Commission, COM (2022) 68 Final, Supra nota. pp. 1
[112] Lehtonen, K. Halenius, L. Rastas, T.(2022) The Data Act promises the same keys to success to everyone participating in the data economy. Sitra. February 16, 2022. Accessible:https://www.sitra.fi/en/blogs/the-data-act-promises-the-same-keys-to-success-to-everyone-participating-in-the-data-economy/
[113] *Ibid*

Also, the important proposal from the Commission is the Digital Services Act (DSA), which transfers significantly more responsive to the content published or traded through large platform companies such as Facebook or Amazon. According to the draft law, all digital services that connect consumers to goods, services or content will be subject to binding EU-wide rules defining the rights and responsibilities of network users, online platforms, and public authorities. According to the legislative proposal, platform companies must also tell how the algorithms select the content to be displayed to users. In the future, researchers will have a better opportunity to assess the responsibility of platforms because they will have more complete access to the data collected. [114]

A model can also be taken from the German Competition Authority. Later in the case of Facebook, a new provision in German Competition Act will allow the competition authorities to intervene better and more effectively in the activities of large companies in the digital market. The competition authority may find an undertaking involved in anti-competitive practices and therefore prohibit it.[115] The decision is valid for five years and, for Facebook, means special supervision under German competition rules.[116]

[114] European Commission (2021), The Digital Services Act Package. Retrieved from https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package

[115] Bundeskartellamt (2022), Bundeskartellamt / Digital economy, Press release, 4th May 2022. pp.2-3

[116] Ibid, pp.2-3

6. CONCLUSION

The thesis aimed to highlight the problems of regulating competition law and policy in the technology sector. As stated, the main objective of competition law is essentially related to consumer welfare and the protection of competition in the market. In the technology sector, the most detrimental are companies in a dominant position that can block competitors or otherwise abuse their position. Therefore, the dominance of dominant companies in the technology sector is problematic for competition law.

The thesis dealt with 102 articles of the TFEU, the definition of abuse of a dominant position, which is prohibited under Article 102 TFEU. This article applies to companies in a dominant position, but it is essential to clarify the scope of this article. For digital platform companies, the definition must consider its multidirectional nature in the global market and the type of network platform. The European Court of Justice and the Commission have not used data protection considerations in competition law. The exception is the case of Facebook v Bundeskartellamt, the German competition authority ruled that Facebook was abusing its dominant position in the social networking market.[117] This is since Facebook has not complied with the GDPR in processing user data. The state supreme court in Germany and the federal supreme court have differed on the case and, as a result, enforcement of the case was suspended. The state supreme court favored a dissenting opinion, but the federal supreme court agreed with the FCO on the abuse of a dominant position. The German Supreme Court has asked the EU for a preliminary ruling, setting a significant precedent for the case throughout the European Union. [118]

The European Data Protection Supervisor already stated in 2014 that cooperation between competition, consumer protection and data protection authorities need to be stepped up[119]. It is well established that data does not allow the company setting up its business to be managed in the same way, as the service is based on a free service. This is not established under same regulations well enough as in a traditional in a price-driven market. The EDPS states that shortcomings in the development of competition law and data protection have reduced the

[117] Graef, I (2016), *Supra nota*, pp. 349
[118] Ibid, pp.304-305
[119] European Data Protection Supervisor (2014), *Supra nota,* pp.7

enforcement of competition rules. This has direct implications for consumer protection, service development and privacy.[120]

The thesis concludes that competition law has not kept pace with developments where the competition takes place with data rather than money, as digital market companies have changed the structure of traditional competition with free services and big data. So far, the competition policy is too price-oriented and does not fit well enough to look at the digital market. One essential solution would be a common code of conduct for both dominant companies and their regulators. Other solutions include considering the links between data protection and competition law in the case law, which have explicitly emerged from the Facebook case, and the possible restriction of the use of data. Another critical issue is the forthcoming Commission´s proposal on the data act, which could significantly impact everything that produces and uses data. If successful, the impact of data regulation can be as significant as the GDPR. Regulation can allow for a more level playing field between companies while also taking excellent account of users.

Competition law is primarily concerned with protecting competition in markets associated with consumer welfare. In the digital market sector, competition is most distorted by dominant companies that can prevent competition from entering the market. The concept of a dominant position includes defining the relevant market, which is divided into product and geographic markets. Product markets comprise all commodities that are interchangeable based on their characteristics. Geographic markets consist of regions where companies operate and are sufficiently similar and distinct from others. As a result, the digital market is almost continental or global. After defining market shares, it is crucial to examine competition and barriers to entry to determine the dominant position. When assessing an abuse of a dominant position, the starting point is the detrimental effects on the market, so if the measures don’t harm or distort the market, they cannot be considered abusive. The digital market sector is commonly abused by barriers to entry, tying, market impediments, usage restrictions, unreasonable and predatory pricing, and consumer engagement.

As stated by the EDPS, it remains whether more common rules will be added to allow better control of the digital market by competition, consumer protection, and data protection

[120] European Data Protection Supervisor (2014), Premilinary Opinion of The European Data Protection Supervisor, pp. 30-35

authorities. The solution of the Facebook case may also serve as a precedent and increase this desirable cooperation between different authorities. A significant leap forward is current Commission regulations the DMA and the Data Act for the digital market. In the future, if successful, the Data Act would enable better data management for businesses and consumers and fairness of competition in the data sector.

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