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DATA-OPOLIES CHALLENGING THE COMPETITION LAW – THE GOOGLE VIEWPOINT

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ABSTRACT

The Google case is one of the most prominent cases of the current decade. The Commission has been investigating the three different allegations against Google and they have tried to integrate the current competition law into a new type of market.

The thesis will concentrate on competition law and the new digital market and the data-opolies, like Google. The new economy is challenging the competition law policies that are set through about dominant position and potential abuse of the dominant position.

The thesis speaks of how the current legislation, like the article 102 TFEU, is to be challenged. Challenge in the manner that it would become more adaptive to the new economy and the data sector. The data sector is developing quickly and the legislation needs to move in the same pace for the rules to be adapted in an appropriate manner. The investigation is done upon the view point of Google and how the Commission is to implement the rules in question.

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ABBREVIATIONS

CJEU	Court of Justice of the EU.
EEA	European Economic Area
EU	European Union
SSNDQ	"Small, but Significant, Non-Transitory Decrease in Quality"[1]
SSNIP	"Small but Significant and Non-Transitory Increase in Price"[2]
TEU	Treaty on European Union
TFEU	Treaty of the Functioning of the European Union

[1]Stucke M. E., Grunes A. P. (2016) *Big Data and Competition Policy*. New York: Oxford University Press p xiv
[2]Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and, Materials*. 6th ed. United Kingdom: Oxford University Press p lxxxviii

INTRODUCTION

One of the most prominent competition law cases for the moment is against one of the bigger tech companies in the world. It is the most debated competition case. Google has been a target of several allegations regarding its business practices. The several different allegations are led by the European Union Commission, which is regarded as the highest competition authority in the EU. The EU is seen as a sort of a stepping stone concerning competition law and they are seen as stricter regarding the cases that are on the table. They have been involved in a few different cases during the last couple of years. The Commission is known as a quite critical and strict party what comes to competition law and its implementation. The Google case has taken a lot of time and manpower of the courts and the Commission since they have been in and out of court. The Commission initiated formal proceedings at the end of the year 2010, and it has continued ever since.[3] The proceedings started by three different companies; Ciao, Foundem and, eJustice claiming that Google had put their websites in a disadvantageous position in the search results compared to other websites who had bought Google's advertising services.[4] Ciao, Foundem and, eJustice were all different search engines, which deal with different types of contents like e.g. flights, hotels, legal information, instead of general and broad search requests.[5]

The latest event in the ongoing investigation and court proceedings of the Google case is the 2.42 billion euro fine given by the Commission on June 27th 2017.[6] There have been several proceedings and investigations regarding Google in other countries in the world. The thing all three cases have in common is the fact that they are related to the Article 102 of the TFEU. This article of the TFEU deals with abusive dominant undertakings.

Competition law in itself is quite a broad topic and this is a bachelor thesis that focuses on the dominant position and the potential abuse of it together with the aspect of big data companies,

[3]European Commission Antitrust: Commission probes allegations of antitrust violations by Google Accessible: http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en 15.10.2017
[4] Notkin M., (2014) *Does Google abuse its dominant position in the search engine market?* Munich: Grin Verlag p 1
[5] *Ibid.*
[6] European Commission (2017) *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*. Accessible: http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm, 07.12.2017

such as Google. The thesis briefly speaks of mergers regarding big data, but the main focus is on the dominant position and the analysis of Google.

The first steps taken towards competition law in Europe was in 1998, it has gone through several different stages of development. However, is the competition law updated enough to cope with big data and big tech companies? My research question in this thesis is: **Is the article 102 of the TFEU and abuse of dominant position in the EU outdated for big data companies, such as Google?** The thesis also regards the ways it is outdated together with potential changes that need to be made to the regulation in order to be adaptable to big data companies such as Google.

The amount of bigger and international companies is increasing and control becomes even more difficult. The thought behind the research question is to see how it is currently regulated. The emphasis however is on bigger tech companies with Google in the limelight. Is the regulation efficient and broad enough?

This thesis will first concentrate on competition law and on the European Union Law. Then it will move on to the specific concept of abuse in EU competition law, by looking at the legislation, case law and investigation process. The research will also define topics on e.g. the relevant market analysis that is used by the Commission and it will touch on the concept of abuse. And from there analyse the position of Google and its current market share. In the final part the research will discuss the role of big data and big international tech companies together with competition law.

The focus will be on EU competition law. Competition law is overlapping with several other branches of law, like e.g. intellectual property law, but this thesis will only focus on competition law. This thesis will not touch on legislation from other countries. The sources used in this research were chosen from the books, articles and other sources that have relevant information about the competition law in European Union. The research method in this thesis is based on a quality research method.

1. COMPETITION LAW

Competition law has become an even more critical part of the world. The processes might differ from country to country, but since the world has become more international, the rules and way of thinking have become more unified. The main idea behind competition law is the protection of customer welfare.[7] A central concern of competition law is that firms can harm consumer welfare by using their market power.[8] There are several different ways a firm might abuse their position on the market. Just to mention a few examples, competition law is concerned with, e.g., anti-competitive agreements, abusive behaviour, restrictions on competition and abusive behaviour.[9]

There are quite a few different goals of competition law. The central importance has been pointed especially to be consumer welfare.[10] Consumer welfare can be viewed from various aspects since its complexity, e.g., from a political perspective.[11] The manners how it competition law affects the welfare of the population is essential from a political viewpoint.[12] This goal has also been frequently mentioned in different speeches held by the European Union (herby EU) Commissioners. It has e.g., been said in a speech held by Neelie Kroes, the former European Commissioner for Competition, on 15th September 2005.[13]

The other principal objective of competition law is consumer protection.[14] This can in itself be divided into two categories; competition law is to protect consumers by taking action on undertakings that are not according to legislation and to protect the interests of the consumers.[15] In its final stages, it is believed that competition law will be beneficial for the consumer.[16] The competition process might also deliver different kinds of benefits for consumers.[17]

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[7] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University Press p 1
[8] *Ibid.*
[9] *Ibid.*
[10] *The Goals of Competition Law*. (2012) Ed. Zimmer D. UK and USA: Edward Elgar Publishing Limited p 8
[11] Nazzini R. (2011) *The Foundations of European Union Competition Law: The Objective and Principles of Article 102. S.l.* Oxford University Press p 44-45
[12] *Ibid.*
[13] Kroes N. (2005) *European Competition Policy – Delivering Better Markets and Better Choices: SPEECH/05/512:* London: European Commission p 2
[14] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University Press *p 20.*
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*

There is an objective of competition law that is separate from the ones mentioned above, but they are also connected to population, protection, and welfare. This objective has been directed to the redistribution of economic power and wealth.[18] Structure and process become the focal point while securing the financial freedom, power and wealth.[19] The primary purpose would also be both to keep an equilibrium on the market and in protect competitors or smaller companies from larger corporations.[20]

Competition law may even in some circumstances have a socio-political and public policy aspect. It may be used in situations that provide security or assistance that effects several different policies.[21] Competition law might help others like e.g., employment, environment, social, industrial regional sectors and policies.[22] The primary goal of a society is to function efficiently and competition law can help these sectors and policies by e.g. monitoring abuses or infringements, which would have an impact on the whole society.[23]

Some of the other, and essential benefits and goals of competition law are; efficiency, creations of innovations, it lowers prices and it offers consumers freedom of choices between different products and services.[24] The protection of consumers' rights and interests might even be given in a priority when compared to the protection of the competition process.[25]

Even though competition law is seen as a more global phenomenon during the last couple of decades, the definition of competition still varies depending on the country that you are studying.[26] There are also several similarities between the states, legislation, and decisions. But as there might be some similarities there are a lot of differences and different points of views and positions for concerns. Some are also more optimistic and enthusiastic about the competition law progress than others.[27] The backgrounds both from legal, economic and economic development perspectives are to be taken into account when analyzing the differences, similarities and the

[18] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University Press p 21
[19] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases and Materials.* 6th ed. United Kingdom: Oxford University Press. P 26-28
[20] *Ibid.*
[21] *Ibid*.
[22] *Ibid.*
[23] *Ibid.*
[24] *The Goals of Competition Law*. (2012) Ed. Zimmer D. UK and USA: Edward Elgar Publishing Limited
[25] *Ibid.*
[26] *Ibid. p 29-30*
[27] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University Press p 20

competition process within the countries in the world who have adopted competition law policies.[28]

1.1 Competition law in Europe

A single market principle is a fundamental aim for the EU and Article 3(3) of the Treaty on the European Union (hereby TEU) states that an internal market is to be established. The article itself contains information on how the internal market is to be established and maintained.[29] The internal market is further also described in article 26(2) TFEU.[30] Competition law is an integral part of the European internal market principle since some of the tasks of competition law are e.g. to ensure fair competition and free trade within the union.[31] Another task of the internal market is also to promote trade between the EU Member States, which is also controlled by the competition policy in Europe, to provide fair trade between the Member States.[32] Effective competition is an integral part of EU competition law, due to the benefits for the consumers in Europe.[33] Many state-owned monopolies have become more private during the last couple of years in the EU.[34] The process is called liberalization and it has happened on various fields in the EU, such as in postal services, transports, energy, and telecommunications.[35] However, this might in some fields create private monopolies, which are regarded differently under EU competition law than public ones.[36]

EU law is collected from several different sources; the most important once are the TFEU and the TEU treaties, EU acts, such as secondary legislation and acts by the EU institutions. EU law also contained case law of the courts (CJEU) and the general EU law principles. [37] The EU regulations for competition law can be found in the Articles 101 to 109 of the TFEU. The

[28] *Ibid.*
[29] *Ibid.*
[30] Brisimi V., (2014) The Interface between Competition and Internal Market: Market Separation under Article 102 TFEU. United Kingdom: Hart Publishing Ltd.
[31] Wish R., Bailey D. (2015) Competition law. 8th Ed. United Kingdom: Oxford University
[32] *Ibid*.
[33] Jones A., Sufrin B. (2016) EU Competition Law: Text, Cases, and, Materials. 6th ed. United Kingdom: Oxford University Press p 35
[34] *Ibid.* p 51
[35] *Ibid.*
[36] *Ibid.*
[37] *Ibid.* p 95

primary rules are 101, 102 and 107 of the TFEU. [38] Examples of such regulations and treaties are e.g. the EU Merger Regulation[39], which applies to undertakings with an EU aspect or the Protocol 27 There are also some protocols, like protocol 27, that have the same force as the treaties.[4041] According to article 51 of the TEU protocols and annexes are an integral part of the treaties and have the same force.[42]

Article 3 (1)(g) of the EC treaty establishing an undistorted competition system in the European Community was repealed by the Lisbon Treaty when it was introduced in 2007.[43] The Article 3 (1)(g) states like already mentioned, that an undistorted competition system should be established, while the newer legislation points out the importance of the internal market and the competition rules that suits it is to be established.[44] The Article 3 (1)(b) TFEU states that the EU is competent to establish rules necessary for the internal market to function.[45] Article 119 (1) TFEU states the conduct of the Member States and the EU must be in accordance with the open market economy and free competition principles.[46] The Court of Justice (CJEU) and the General court are able to reference these different rules in their judgments; the referencing that is made to either the TEU or the TFEU and its protocols are of significance.[47] The Commission uses them when taking the vital decisions in account.[48] Both the part of the Commission and the referencing to proper legislation can be seen e.g. in the judgment of the case Konkurrensverket v Telia Sonera Sverige AB, where the court referred to Article 3(3) TEU and the Protocol 27.[49]

The Commission in the EU has a central role in the policy and enforcement of competition policy in the EU.[50] The Commission is capable of questioning when and in which manner EU competition rules are to be enforced and they are also authorized to take action in situations

[38] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 53
[39] Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139
[40] Akman P., *The Concept of Abuse in EU Competition Law*. United Kingdom: Hart Publishing Ltd. P 312
[41] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 53
[42] Article 51 TEU
[43] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 53
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.* and 119 TFEU.
[47] *Ibid.*
[48] *Ibid.*
[49] Court decision, 17.02.2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, EU:C:2011:83, points 20-24.
[50] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 54

where competition rules are infringed.[51] The Commission is considered as one of the most significant assets when looking at the goal of a single market.[52] There is a unique feature in EU competition law; there is an existence of two different types of competition law since it can be divided into conventional and single market competition rules.[53] With further developments in the EU area and the Union, it will become more important to stay ahead on the single market initiative.[54] The importance of the Commission in regards to the internal market became even stronger after the economic crisis in 2008.[55] This was portrayed both in the manner which cases were judged and it is repeated in speeches held by the European Union Commissioners.[56] The goal would be to minimize the possibility of an economic retreat on the national level.[57]

The EU Competition law policy has undergone a modernization during the last couple of decades.[58] The first steps towards the modern thinking were taken during the 1990's when the goals of competition law were updated to more economic thinking and on consumer welfare.[59] The most drastic change was the introduction of Regulation 1/2003, which impacted way Articles 101 and 102 of the TFEU are applied.[60] Another significant part of modernization was the guidance paper on how to apply article 102 TFEU.[61] The aim of the paper is to guide the Commission on enforcing the article 102 on dominant undertakings.[62] The commission also showed its interests and commitments to the consumer welfare in different cases regarding the Article 102 TFEU.[63] It was demonstrated e.g. in the cases; Microsoft v Commission[64], France Télécom SA v Commission[65], and Telefónica v Commission[66]. In several manners it could be

[51] Geraldin D., (2010) Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful? Tilbury University Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569502 14.02.2018
[52] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 53
[53] *Ibid. p* 54
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press p 1
[59] *Ibid.* p 45
[60] *Ibid.*
[61] Wish R., Bailey D. (2015) Competition law. 8th Ed. United Kingdom: Oxford University p 185
[62] *Ibid.*
[63] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press p 46
[64] Court decision, 17.09.2007, *Microsoft Corp. v Commission of the European Communities*, Case T-201/04, EU: T:2007:289
[65] Court decision, 02.04.2009*, France Télécom SA v Commission of the European Communities,* Case C-202/07 P, EU:C:2009:214
[66] Court decision. 10.07.2014, *Telefónica SA and Telefónica de España SAU v European Commission*, Case C-295/12 P, EU:C:2014:2062

concluded, form Commissioners speeches and from the conduct in both investigations and how cases are conducted and judged, that the new aims for competition law in Europe are to create a system where the markets work better for the businesses and consumers.[67]

[67] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press p 46

2. ARTICLE 102 TREATY OF THE FUNCTIONING OF THE EUROPEAN UNION

Article 102 of the TFEU, is previously also known by Article 82 of the EC Treaty.[68] The Article 102 TFEU is considered as one of the steppingstones what comes to the EU competition law.[69] The article itself deals with undertakings and market power, which can also be regarded as dealings with dominant positions on the market.[70] It deals mainly with abusive conduct that is done by dominant undertakings.[71]

The article does however not prohibit dominance on the market; it is not an offense by itself.[72] The abuse of dominance is quite challenging to establish.[73] The dominance on the market cannot be restricted since it usually originates from hard work, inventions, and entrepreneurship.[74] An entity cannot be infringing on the Article at hand if there is no sign of abuse of their dominant position.[75] Both a dominant position and abuse are required for the application of the article.[76] If the commission finds a dominant undertaking after its investigation, it may impose a fine.[77]

There are some conditions that need to be met so that a violation can be established: (i) there needs to be proof of a dominant position on the relevant market by at least one undertaking, (ii) the position is held on the relevant market, (iii) there is a clear sign of violation of the dominant position, and (iv) there is a potential or actual effect on the trade within the Member States.[78][79]

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[68] *Ibid.* p 259
[69] Lorenz M. (2013) *An Introduction to EU Competition Law*. Cambridge: Cambridge University Press p 189
[70] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press p 259
[71] Lorenz M. (2013) *An Introduction to EU Competition Law*. Cambridge: Cambridge University Press p 189
[72] *Ibid.*
[73] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press p 259
[74] Lorenz M. (2013) *An Introduction to EU Competition Law*. Cambridge: Cambridge University Press p 189
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*
[79] Craig p., De Burca G., (2015) *EU LAW: text, Cases and Materials,* 6th ed. Oxford University Press: New York. P 1056

2.1. Market definition

Article 102 requires for two special characters to be analysed thoroughly before implementing the Article. Namely, the relevant market and the existence of a dominant position are the two main questions that must be analysed before proceeding claims of abuse of dominant position.[80] It is crucial to consider both the relevant product market, as well as the geographical market when looking at the relevant market aspect in abuse of dominance case.[81] The assessments and investigations made upon the relevant market inflate the whole outcome of a case.[82] It is very important to also make new definitions and investigations on a new case; you cannot rely on previous cases.[83] The Commission concludes thorough examinations of e.g. both the relevant product market and the relevant geographic market.[84] A relevant part of the market definition requires an assessment which is complex, especially from the economic point of view. [85]The Commission has several times demonstrated how important a proper market definition is, it was shown again in the case Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities.[86] Due to a proper definition of the market definition, the courts discovered that the Continental Can and its subsidiary was dominant on three different product markets. It has been disputed, that the Commission has adopted too narrow market definitions.[87] The courts also insisted that the Commission should define a relevant market and support its definition in reasoned decisions.[88] The market definition is essential for the analysis of dominant undertakings. The Commission has created a notice on the definitions of relevant markets.[89]

[80]Notkin M.,(2014) *Does Google abuse its dominant position in the search engine market?* Munich: Grin Verlag p 4
[81] *Ibid.*
[82] Jones A., Sufrin B. (2016*) EU Competition Law: Text, Cases, and Materials*. 6th ed. United Kingdom: Oxford University Press p 294
[83] *Ibid.*
[84]Notkin M.,(2014) *Does Google abuse its dominant position in the search engine market?* Munich: Grin Verlag p 4
[85] Bishop S., Walker M. (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement.* 3rd. edition. S.l. Sweet and Maxwell. P 109
[86] Court decision, 21.02.1973, Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities. Case 6-72. EU:C: 1973:22
[87] Østerud E. (2010) *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests.* London, Kluwer Law International p 170
[88] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University
[89] Official Journal of the European Communities (1997) COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law 97/C 372/03 Accessible: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29 20.01.2018

2.1.1. Product Market

A relevant market is defined explicitly by the Commission in the notice. It is about the products and/or services that are viewed as substitutes or replaceable by the consumer. Due to the characteristics, prices or by their intended use.[90]

Most competition agencies commonly use the side substitution method to define a relevant product market.[91] This principle can be viewed as hypothetical, but it is based on a having a product that is supplied by a monopolist and then analyses how everything reacts if the price would be increased by "a small, but significant and non-transitory increase in price," also known as SSNIP.[92] The increase is usually about 5-10%, it is added to the current price of a product or a service.[93] There are two examples of how the relevant market theory works. The first one, would be as simple as examining whether consumers would continue to buy bananas if the price of them would rise steadily, or would the consumers start buying pineapples instead of bananas or would they remain to buy bananas? If a significant number of consumers switch over to pineapples in the meantime, these two fruits can be considered as substitutes and replaceable and thus they are a part of the same product market.[94] This concept is known as demand-side substitutability.[95]

The other example is that if bananas become more expensive, would the pineapple producers switch to bananas, and by that make a larger profit. This would not be substitutional or replaceable products for the producers since it would need a bigger switch from pineapples to bananas. This principle is called the supply-side sustainability.

The demand-side substitutability is the essential part of the relevant market assessment. This is since consumers are in the limelight. The relevant cases for the product market share theory are; Michelin v Commission and United Brands v Commission.[96] These are two leading cases in

[90] *Ibid.* paragraph 7
[91] Notkin M.,(2014) *Does Google abuse its dominant position in the search engine market?* Munich: Grin Verlag p 4
[92] *Ibid.*
[93] *Ibid.*
[94] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press p 259
[95] O'Donoghue R., Padilla J. (2013) *The Law and Economics of Article 102 TFEU.* S.l. Hart Publishing p 112
[96] Court decision, 14.02.1978, United Brands Company and United Brands Continentaal BV v Commission, Case 27/76, EU:C:1978:22 and Court decision, 9.11.1983, NV Nederlandsche Banden Industrie Michelin v Commission, Case 322/81, EU:C:1983:313

analyses done for the Article 102 TFEU.[97] The methods and ways of analysing have become more efficient and they are viewed from many different points of views. This banana example is derived from the United Brands v Commission case.[98]

2.1.2. The aspect of SSNIP and SSNDQ in free services

The merger guidelines in the EU competition law acknowledge the importance in non-price points of competition, which are e.g. quality and innovation.[99] It is about how the increase in a market power can be shown in non-price terms and conditions that affect consumers, with both reduced qualities, product variety, service or innovation.[100] The authorities have placed an importance on the quality of competition.[101] The assessment of systematic risk is quite difficult to assess, which can be ignored or discounted.[102]

Competition includes many different areas such as quality, privacy protection, innovation, and advertising.[103] It can be viewed from several different points of view, like from the non-price parameter, from the multi-sided market, etc. The European Commission has found that when a product is free, quality will usually be a significant part of assessing the competition.[104] For some online markets, the quality components can be analysed from either a quantitative or objective side.[105] When the price for the product is zero, the most important part of competition, in regards to quality, is subjective and multi-dimensional, which is difficult to quantify.[106] In these cases, the competition agencies have larger and more extensive tools to assess and define the relevant market and other competition aspects.[107]

The SSNIP test is quite effective in the case where there is a clear indication of a price that is to be paid for using a service or for buying a product. But what happens in the situation where the

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[97] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press p 259
[98] Court decision, 14.02.1978, United Brands Company and United Brands Continentaal BV v Commission, Case 27/76, EU:C:1978:22
[99] Stucke M. E., Grunes A. P. (2016) *Big Data and Competition Policy.* New York: Oxford University Press point 7.04
[100] *ibid.*
[101] *Ibid.*
[102] Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.15
[103] Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.20
[104] *ibid.*
[105] Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.21
[106]Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.22
[107] Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.22

service is free of charge, just like it is when using Google, Skype or Facebook? In a case where the price is zero, an increase will not impact the sum in any manner, if you increase zero with 5% the sum would still be zero. This was examined by the Commission in the Facebook and WhatsApp merger.[108]

Another possibility, rather than using SSNIP, is for the completion authority to use the method of a "small, but significant non-transitory decline in quality" also known as the SSNDQ.[109] The SSNDQ relies on market data, which is difficult to measure. And price provides a benchmark, which is transparent and consistent. The data-driven mergers involving free products, should use the SSNDQ. The privacy protection would be a big part of the assessment, especially the part of protection of privacy regarding personal data.[110] The products offered free to consumers, the personal data can be viewed as a currency paid in return by the consumer for the use of the product or as a dimension of the quality of the product.[111]

A problem with the SSNDQ test is, that the potential decrease in quality, would cause a decision to switch the product to another rivals' product.[112] That is however not always the case which can be seen in the acquisition of Skype by Microsoft, where the Commission did consider the quality and by differentiating the use of different operating systems and the Skype program.[113] The commission found that while Microsoft could change the usage of Skype it would not be impacted by the other operating systems, such as the iOS, Mac, Android etc.[114]

It would be quite difficult for consumers to notice a decrease in privacy protection. Usually since, the terms and conditions are long and extensive, and few spend the time reading the privacy policies.[115]

Another alternative is to study how the consumers would respond post-merger, if there is a sum charged from the formerly free service.[116] Which was tested in the Microsoft – Skype merger,

[108] Commission decision, 3.10.2014, *Facebook/WhatsApp.* Case M.7217 para 87
[109]Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.25
[110] Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.28
[111] *ibid.*
[112] Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.33
[113] Commission decision 7.10.2011, *Microsoft/Skype*, Case Comp/M.6281.
[114] *ibid.*
[115] Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.35
[116] Stucke M. E., Grunes A. P. (2016) *supra nota* point 7.41

where a majority of the consumers would switch to other service providers instead of continuing the use of the original product.[117]

2.1.3. Geographic market

The geographic market is essential for the determination of the Article 102 TFEU.[118] The Court of Justice pointed out the importance of the definition of the geographic market, in the United Brands v Commission case.[119] The United Brands v Commission was the first case that addressed the relevant geographic market and the discrimination of the price on a geographic market.[120] The court laid down different legal tests for defining the relevant geographic market.[121] The notice has also established a relevant geographic market, and it is defined in paragraph 8, the market is defined as an area, where the product is marketed and where the conditions are similar and where it affects the economic power of the undertaking under evaluation.[122] The notice also welcomes the SSNIP analysis on to the geographic market analysis, as well as on the product market analysis.[123] It can be theorized that what if you raise the price of a product like potatoes in e.g. the city, would people travel, by bike, foot, car, etc. to the next district or outside of the area which would sell the same product for less. Other factors like e.g. language barriers, transport, and diverging legal norms have an impact on the relevant geographic market.[124]

2.1.4. Commission practice in defining data in competition law

Big data has become a big part of the new economy. It has even been dubbed as the "new currency of the Internet".[125] Big data together with competition law has been a hot topic during the last

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[117] Commission decision 7.10.2011, *Microsoft/Skype*, Case Comp/M.6281.
[118] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press p 82
[119] Court decision, 14.02.1978, United Brands Company and United Brands Continentaal BV v Commission, Case 27/76, EU:C:1978:22
[120] Brisimi V., (2014) *The Interface between Competition and Internal Market: Market Separation under Article 102 TFEU.* United Kingdom: Hart Publishing Ltd. p 43
[121] *Ibid.*
[122] Official Journal of the European Communities (1997) COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law 97/C 372/03 Accessible: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29 20.01.2018
[123] *Ibid.*
[124] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press
[125]Stucke M. E., Grunes A. P. (2016) *Big Data and Competition Policy.* New York: Oxford University Press point 22.10

years. Big data raises many legal, ethical and moral issues.[126] Big data is an important part of all the bigger companies, in e.g. their decision making. Data-driven mergers are increasing, together with the risks for implications of privacy, competition law and consumer protection.[127] Data-driven companies at times raise both antitrust and privacy concerns.[128] As the data-driven companies evolve on the market, the competition, privacy and consumer protection officials must consider opportunities and potential inefficiencies in the laws that promote competition, privacy and well-being.[129] The first dabbles in big data and competition law can be found in the Microsoft case.[130]

A big part of EU merger regulations and merger controls consist of economic analysis and many of the court judgements have taken the economic analyses in account.[131] The competition authorities in the EU are paying more attention to the concept of big data. The European Commission has studied the role of big data and competition law. The German and French conducted a joint study that examined if the collection and exploitation of data could harm competition in the market and how data could be a source of market power.[132]

The amount of acquisitions and mergers in the data sector has increased from 55 to 164, between the years 2008 to 2012.[133] The growth of the acquisitions of companies related to big data, can be considered as a competitive advantage.[134] The big data principle is however growing even faster today.

The simplest form of anti-competitive agreements, regarding big data is exclusive licensing and exclusive access.[135] Companies compete on things such as price, privacy protection and quality.

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[126] Stucke M. E., Grunes A. P. (2016) *supra nota* point 1.08
[127] *Ibid.*
[128] *Ibid.*
[129] Stucke M. E., Grunes A. P. (2016) *supra nota* poin21.01
[130] Court decision, 17.09.2007, Microsoft Corp. v Commission of the European Communities, Case T-201/04, EU: T:2007:289
[131] Van Den Bergh R. (2017) *Comparative Competition Law and Economics. S.l.* Edward Elgar Publishing point 9.4
[132] Federale A., Bakker L., Van Asbroeck B., Debussche J., (2016) *Big data, small problem. Is the antitrust toolkit compatible for data?* Accessible: https://www.twobirds.com/en/news/articles/2016/global/big-data-small-problem#3 (5.8.2018)
[133] OECD iLibrary: Data Driven Innovation Accessible: https://www.oecd-ilibrary.org/science-and-technology/data-driven-innovation_9789264229358-en (5.8.2018)
[134] Federale A., Bakker L., Van Asbroeck B., Debussche J., (2016) *Big data, small problem. Is the antitrust toolkit compatible for data?* Accessible: https://www.twobirds.com/en/news/articles/2016/global/big-data-small-problem#3 (5.8.2018)
[135] Moorcroft V., Le Strat A., (2018) The rise of Big Data - Intersection between Competition law and customer data Accessible: https://www.lexology.com/library/detail.aspx?g=f8f0d454-1543-4386-97dc-b99dfa2d753f (8.5.2018)

Merger control is a part of the big data practice together with competition law.[136] The European Commission analyses in detail the effect of completion of the merger of companies' data sets. Some recent cases regarding mergers, which have not had a negative impact according to the commission are the Google – DoubleClick and the Facebook - WhatsApp merger.[137] The commission did not see a problem with the mergers, since it would not impact the situation with the competitors.[138] The Facebook – WhatsApp merger decision provides an insight on how the Commission works out the issues regarding a merger application in the digital sector.[139]

The Microsoft – LinkedIn merger has become a stepping stone for a new way of thinking. The Commission acknowledged that privacy is an integral part of competition.[140] The assessment of mergers involving data issues in the digital sector had a big development and it provides further guidance on how the assessment of big data issues are to be regarded in the courts.[141]

The antitrust laws promote competition not only on price, but on non-price things such a credit terms, product safety, choice and convenience together with quality.[142] Quality in itself is a broad concept that contains privacy protection.[143] Big data plays a bigger role in the marketplace, what comes to regard with the data privacy and security policies they will become even more important aspect.[144]

2.2. The privacy aspect in competition law

Privacy is a crucial issue, regarding antitrust or merger rules in the EU. The competition authorities should review privacy concerns and them being in accordance with competition rules.[145] The

[136] *ibid.*
[137] *ibid.*
[138] *ibid.*
[139] Italianer A. (2015) European Commission: *Competition merger brief.* Issue 1/2015 February Accessible: http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf, (8.5.2018)
[140] Moorcroft V., Le Strat A., (2018) The rise of Big Data - Intersection between Competition law and customer data Accessible: https://www.lexology.com/library/detail.aspx?g=f8f0d454-1543-4386-97dc-b99dfa2d753f (8.5.2018)
[141] European Commission: Competition merger brief. Issue 1/2017 May Accessible: http://ec.europa.eu/competition/publications/cmb/2017/kdal17001enn.pdf, (8.5.2018)
[142] Kalyvas J. R., Overly M. R. (2015) *Big Data: A Business and Legal Guide*. *S.l:* CRC Press p 128
[143] Stucke M. E., Grunes A. P. (2016) *Big Data and Competition Policy.* New York: Oxford University Press point 17.05
[144] Kalyvas J. R., Overly M. R. (2015) *Big Data: A Business and Legal Guide*. *S.l:* CRC Press p 128
[145]Stucke M. E., Grunes A. P. (2016) *Big Data and Competition Policy.* New York: Oxford University Press point 17.02

acquisition and use of personal data are nowadays be considered as practices which are to be regarded under competition law. Data-driven business strategies are to be regarded under both privacy and competition laws.[146] The competition officials must also ensure that they do not infringe privacy and data protection concerns.[147]

It is important to keep both privacy and safety in close-knits with competition law. Privacy is established through big data, competition and privacy laws. While safety is more objective and easier to measure.[148] Privacy competition can be measured through consumer behaviour.[149] European competition agencies are open to analyse the loss of privacy as a potential anticompetitive effect in data-driven mergers and other cases.[150] They, however, face some challenges, like the subjectivity of consumer preferences of privacy.[151] Another challenge is the privacy issue behind two-sided platforms supporting advertising.[152]

Enabling few companies to control much data, there are also political and social costs. Companies like Google and Facebook, which are data-driven companies, face threats of great privacy protections.[153] The data-opolies face problems if greater control is achieved over data.[154]

2.3. "Abuse" as a concept in competition law

The abuse concept plays a vital role in the Article 102 TFEU and in the manner that it is applicable.[155] The courts require a link between the alleged abuse and the dominant position so that they are able to apply the Article 102 TFEU.[156]The concept is not quite defined in either the 102 TFEU or in the guidance paper, it can even in several manners be considered as lacking.[157] Both of these contain several examples of abuse, but they are not exhaustive, since some types of

[146] *ibid.*
[147] *Ibid.*
[148] Stucke M. E., Grunes A. P. (2016) *supra nota* point 17.14
[149] Stucke M. E., Grunes A. P. (2016) *supra nota* point 17.15
[150] Stucke M. E., Grunes A. P. (2016) *supra nota* point 17.21
[151] *ibid.*
[152] *Ibid.*
[153] Stucke M. E., Grunes A. P. (2016) *supra nota* point 17.42
[154] *ibid.*
[155]Jones A., Sufrin B. (2016) *EU Competition Law: Text, Cases, and Materials.* 6th ed. United Kingdom: Oxford University Press
[156] Brisimi V., (2014) *The Interface between Competition and Internal Market: Market Separation under Article 102 TFEU.* United Kingdom: Hart Publishing Ltd. p 63
[157] Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Article 81 and 82 of the Treaty. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:HTML

abuse have not been mentioned.[158] The closest definition of abuse is given in the Hoffmann-La Roche case.[159] The concept of abuse is related to the behaviour of a dominant position undertaking, which influences the market, where the result of the undertaking has made an impact or hindrance on the maintenance or on the development of the competition on the market to a certain degree.[160] The definitions made of the concept of abuse are in no way completely exhaustive, there is always room for interpretation.[161] The courts have pointed out the importance of the link between the alleged abuse and the dominant position in more recent cases, like in the Konkursverket v TeliaSonera.[162] The wording in some cases can be seen as vague, since it leaves a lot to be interpreted, but the wordings have changed in more recent case law such as in the Deutsche Telekom v Commission case.[163]

The two main types of abuses are; the exclusionary abuses and the exploitative abuses.[164] Exclusionary abuse refers to abusive dominant conduct, which is aim would be to prevent competition and its development.[165] While exploitative abuse is when the undertakings affect consumers by setting limitations on the products or by increasing the prices of their products, this price would usually be over the competitive level.[166] The Article 102 TFEU applies to both types of abuses, it was made clear in the Continental Can v Commission case.[167] It is also stated in the guidance paper, that each case is to be thoroughly examined and assessed by the Commission before they should apply.[168] Some the referred to artic is not always no as critical, since it for the most part deals with the Article 102 TFEU[169]. .

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[158] *Ibid.*
[159] Court decision, 13.02.1979*, Hoffmann-La Roche & Co. AG v Commission of the European Communities*. Case 85/76. EU:C: 1979:36 points 6-7
[160] *Ibid.*
[161] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 208
[162] Court decision, 17.02.2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, EU:C:2011:83 points 84-88
[163] Court decision, 14.10.2010, *Deutsche Telekom AG v European Commission*. Case 280/08. EU:C: 2010:603 point 173
[164] Brisimi V., (2014) *The Interface between Competition and Internal Market: Market Separation under Article 102 TFEU*. United Kingdom: Hart Publishing Ltd. p 43
[165] Wish R., Bailey D. (2015*) Competition law*. 8th Ed. United Kingdom: Oxford University p 208
[166] *Ibid.*
[167] Court decision, 21.02.1973, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*. Case 6-72. EU:C: 1973:22
[168] European Commission (2009): Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Accessible: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01) 14.02.2018 point 8
[169] *ibid.* Point 7

2.4. Abuse of dominant position

The EU has become like a stepping stone and as a leader, what comes to assessing and bringing enforcement on companies that abuse their dominant positions. They have infused heavy fines on companies such as e.g. *Microsoft, Intell and Qualcomm*.[170] The laws and ways to analyze the cases of abuse have developed over the years. And other countries have taken a separate initiative and motivation from the EU.[171] There is a clear sign that Google has been a pioneer in the field.[172]
It is crucial also to remember that having a dominant position on the market, is not an offence in its self. But the abuse of the dominant position is considered as an offence.[173] There is a special responsibility for a dominant undertaking to ensure that it does not distort competition.[174]

There are different degrees of dominance, based on the market share. An undertaking is considered as dominant in situations where the market share of the relevant market is at 40%.[175] The guidance paper has also mentioned the 40% in the paragraph 14.[176] They state that dominance is not as likely if the market share is under 40% of the market. There are however no safe harbours for undertakings.

The Akzo Chemie case contains the opinion of the courts about market shares that are at about 50%. The market share is then considered to be in a situation of reputable presumption of dominance.[177] The in the case of a market share at 50% the undertaking is responsible of bearing the proof of non-dominance and by that avoid any special responsibilities. If the market share is over 80% of the relevant market, it is considered as a super-dominance and it is approaching

[170] Goeffrey A. M., Joshua D. W., (2011) *Google and the limits of antitrust the case against the case of Go*ogle: Harvard law journal of law & public policy volume 34, number 1 p 171
[171] *Ibid.*
[172] *Ibid.*
[173] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 190-200
[174] European Commission (2009): *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*
[175] Wish R., Bailey D. (2015) Competition law. 8th Ed. United Kingdom: Oxford University p 190-200
[176] European Commission (2009): Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings Accessible: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01) 14.02.2018 point 14
[177] Court decision, 3.7.1991, AKZO Chemie BV v Commission of the European Communities. Case 62/86. EU:C:1991:286

monopoly.[178] They have a special responsibility to not abuse their dominant position on the market. At 90% the undertaking is considered as a quasi-monopoly. It could be defined that the bigger the market share, the more obvious dominance.[179]

The market shares in themselves are not enough to assess the market power and structure accurately[180]. The market shares show the current situation, but it does not regard any changes in the future, such as barriers to entry, others and new competitors, and the volatility of the market.[181] Defining dominance by market shares requires exhaustive analysis that addresses all relevant factors that might affect the situation at hand.

Dominance requires for the assessment that currently has two different steps; the first is to define the relevant and geographic market; afterward the assessment is made upon the market power.[182] This method has been used in the cases, with a different implementation by the courts depending on the case at hand.

2.5. The Member State aspect

What it comes to the implementation of the article 102 TFEU, it is applicable only in situations where there is trade between Member States.[183] Both the Commission and the court of justice have implemented this criterion quite loosely.[184] For the most part an overall assessment of the effects is done of the situation at hand. The criterion for this type of effects are that it needs to be noticeable, it does not need to be an actual effect.[185] This is bound together with the internal market principle in the EU.[186]

[178] Wish R., Bailey D. (2015) Competition law. 8th Ed. United Kingdom: Oxford University p 190-200
[179] *ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid.* p 199-200
[184] *Ibid.* p 199-200
[185] *Ibid.* p 199-200
[186] *Ibid.* p 199-200

3. GOOGLE INC.

3.1. About the company

Google is known as one of the pioneers in the search engine market, with Google becoming even more popular and used every single day.[187] At the same time information has become a sort of a commodity, during the last couple of years.[188] Everyone has access to information, mainly due to the internet and electronics.[189] Making an earning with providing information is actually quite difficult in today's world since it has to be done fast and the search results are to be of good quality.[190] Google has developed its own programs that are designed to provide the user quick and accurate results with so-called "Googlebots."[191] The software Google uses is powerful and it is constantly updated.[192] The "Googlebots" that are maintained by the software uses a 200 criteria system, which allows the user to find the most relevant pages when searching for something in the search engine.[193]

Google became a household name during the year 2000 thanks to their accurate and efficient search engine. Google started with sponsored links in their search results; which is also known as AdWords.[194] The idea was not to place the ads for the companies that paid the most, but to include up to 11 sponsored links in the search results, together with the original search results, what matched the thing the user was searching for on the internet.[195] The advertisers select words or phrases that work as keywords and which are relevant to the company at hand.[196] The advertiser pays Google every time someone clicks one of these sponsored links.[197] Google's advertising system is made successful since it's made more personal and it's contextualized; Google shows the sponsored links in situations where the user has typed the keywords in the

[187]Notkin M.,(2014) Does Google abuse its dominant position in the search engine market? Munich: Grin Verlag p 4
[188] Google and the Law; Empirical Approaches to Legal Aspects of Knowledge – Economy Business Models (2012). /Ed. Lopez-Tarruella A. Spain: Springer Science & Business Media. p 2
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] *Ibid.*
[193] *Ibid.*
[194] *Ibid.* p.3
[195] *Ibid.* p 2-3
[196] *Ibid.*
[197] *Ibid.*

search box.[198] These advertisements are also made more personal on other levels by, e.g., tracking the location of the user since Google is used in most parts of the world.[199] The global aspect is also fortunate for the companies using *AdWords* since they can reach the users in every brink of the world.[200] The prices for sponsored links or *AdWords* are not fixed, there are specific bids made between the companies and Google.[201]

Google keeps updating their technology, and they also keep creating new ways to help the users of its services.[202] The number of searches made during a day was more than 3 billion in February 2010.[203] Together with increased searches and visitors, Google has also expanded the services it provides. Their current annual revenue is $110.9 billion dollars, which gives them plenty of legroom for innovations.[204] Google has developed several new things like web applications like e.g., *Gmail, Google Drive, Google Maps, and YouTube,* etc. together with the web browser *Chrome* and it has developed the *Android* operating system for mobile devices. [205]

Google has also created the *AdSense*, a system which allows Google to insert advertisement onto third-party websites, which are in partnership with Google.[206] The *AdSense* ads are based on the site content and the data gathered by Google on the user.[207] The principle of *AdSense* is the same as *AdWords*, which I have already mentioned.

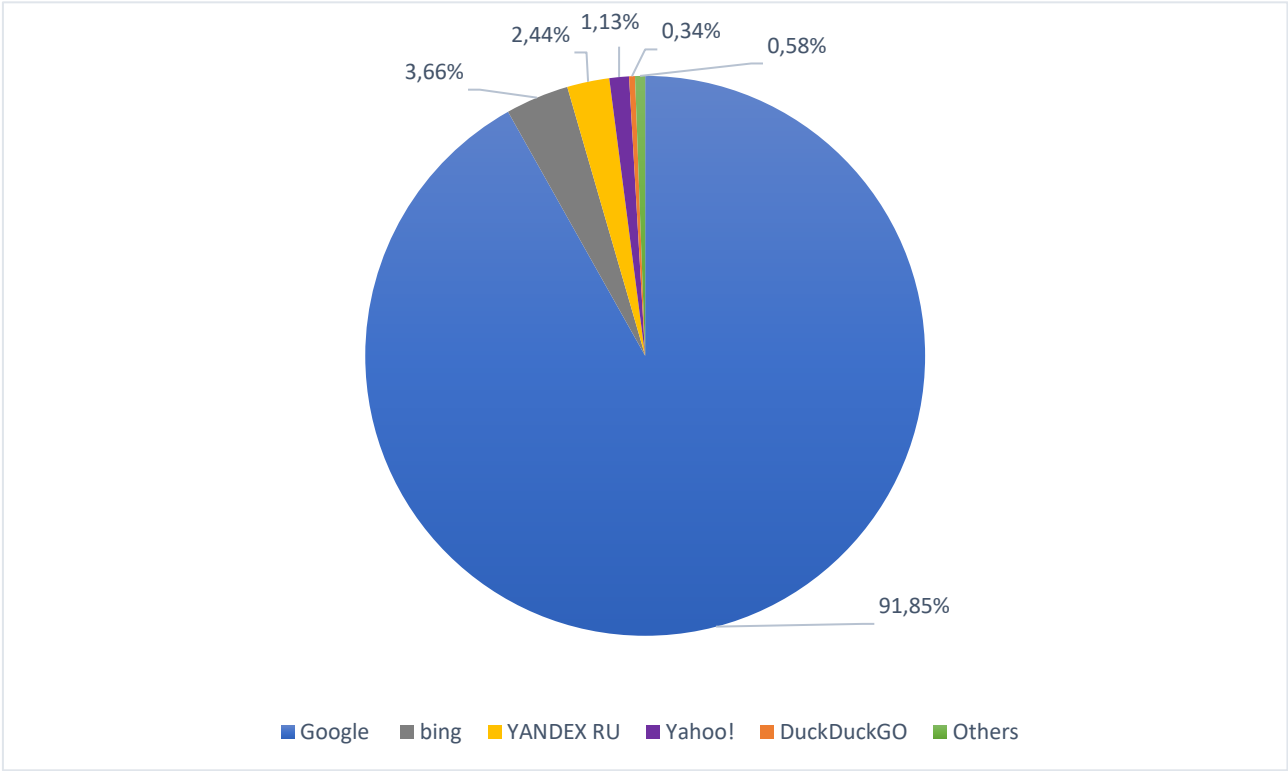
[198] *Ibid.*
[199] *Ibid.*
[200] *Ibid.*
[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid.*
[204]Q4+fiscal year press release concerning Google Accessible: https://abc.xyz/investor/pdf/2017Q4_alphabet_earnings_release.pdf (16.3.2018)
[205] *Google and the Law; Empirical Approaches to Legal Aspects of Knowledge – Economy Business Models* (2012). /Ed. Lopez-Tarruella A. Spain: Springer Science & Business Media. p 4
[206] *Ibid.* p 5
[207] *Ibid.* p 6

3.2. Market share

The market share of Google is demonstrated in the FIGURE 1 which is displayed here below. The figure is the market share in Europe during December 2017. The market share of Google has been at a quite standstill in Europe during the whole year and the newest fines and allegations have not made a big impact on their market share.

FIGURE 1.

The search engine market share in Europe in December 2017



Source: Information on market share in Europe in December 2017 Accessible: http://gs.statcounter.com/search-engine-market-share/all/europe/#monthly-201712-201712-bar (20.02.2018)

There are several search engines that also function in Europe, that function on the same market, but at a totally different calibre. The next biggest market share is held by Bing, with 3,66% of the market. The next is Yandex RU with 2,44% Yahoo! with 1,13% and DuckDuckGO with 0,34%. The others part consists of 10 different search engines, which have very small

percentages of the market share in Europe.[208] Some have stated that search engines such as Bing and Yahoo! are more popular in the United States.[209]

3.3 The Google Case

The Google case itself is quite different from the most competition law cases that have been under the investigation of the Commission in Europe. The investigation against Google was initiated in 2010, and it has continued ever since. The Commission has been pressured quite a lot to either proceed with the case or to conclude it with settlements. There are currently three different cases that the Commission is investigating.

The Commission is investigating different cases regarding the actions of Google, but their actions what comes to web search and web advertising have been in the limelight for a longer period.[210] It is highly debated and often mentioned even in the press.

The first being the comparison shopping that Google provides. It is also called Google Shopping, where the commission sees that Google has used their market dominance in a way that is giving them an advantage on the market.[211] The concern is that Google has given a more prominent placement to its own service, they have placed their own services at the top of the search results or separately at the side of the webpage.[212] Together with placing their own results on top, they are accused of favouring their own and sponsored content.[213] Other highly ranked comparison websites can be found much more down on the list of the search results.[214]

The second investigation the commission has launched against Google is the use of AdSense. Where the commission is concerned about the fact that Google has reduced the users choice by

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[208] Information on market share in Europe in December 2017 http://gs.statcounter.com/search-engine-market-share/all/europe/#monthly-201712-201712-bar Accessible: 20.02.2018
[209]Notkin M.,(2014) *Does Google abuse its dominant position in the search engine market?* Munich: Grin Verlag p7
[210]Themelis, A.T., (2013) Information and Intermediation, Abuse of Dominance and Internet 'Neutrality': 'Updating' Competition Policy under the Digital Single Market and the Google Investigations(?): European Journal of Law and Technology, Vol. 4, No. 3, 2013. P 4
[211] European Commission (2017) *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*. Accessible: http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm, 07.12.2017
[212] *Ibid.*
[213] *Ibid.*
[214] *Ibid.*

preventing third-party websites from presenting search ads from the competitors that Google has.[215] The concern here is that Google has the right to authorize competing ads, meaning that third parties must obtain a separate approval, before making changes to the display of competing search ads.[216] Together with special placement of ads on and with a minimum number of Google ads per page.[217]

The third case is about the Android operating system and the applications. Google is alleged to have breached the antitrust rules, by imposing restrictions on Android devices. There are a couple of key concerns in this investigation. The investigation done by the commission shows that Google has been set as a default search engine, and all Google apps, such as the Play store and Chrome have been pre-installed onto different devices using an Android operating system.[218] Google has made the licensing of the play store conditional to manufacturers of Android phones.[219] This makes it difficult for other search engines to become the default which affects them quite a lot, since the Android phones are a significant majority in the EEA.[220] This also effects consumers and their possibilities to download apps that are competing. Android is supposed to be an operating system, where anyone can make changes and developments, by using so-called "Android Forks".[221] In cases where the manufacturer wants to have Google apps pre-installed on the device, Google requires them to enter into an agreement that that commits it to sell devices that do not have these Android forks.[222] The third concern regarding the Android case, is the exclusivity aspect.[223] Google provides incentives for developers who pre-install Google apps and make it the primary search engine.[224] While it has also reduced the incentives of manufacturers and operators that pre-install competitive apps.[225]

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[215] European Commission (2016) *Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules** Accessible: http://europa.eu/rapid/press-release_IP-16-2532_en.htm 7.12.2017
[216] *Ibid.*
[217] *Ibid.*
[218] European Commission (2016) Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications. Accessible: http://europa.eu/rapid/press-release_IP-16-1492_en.htm 7.12.2017
[219] *Ibid.*
[220] *Ibid.*
[221] *Ibid.*
[222] *Ibid.*
[223] *Ibid.*
[224] *Ibid.*
[225] *Ibid.*

3.4. The allegations against Google

The cases at hand is currently open with regards to the Commission and Google. The latest revelation in the case was the fine the commission set out for Google in July 2017. The Commission imposed a fine to Google which is worth 2.42 billion euros, for its practices regarding its comparison shopping results. The commission ordered Google as well to change the manner it displays search results from its online shopping tool. The Commission ruled that the preferential treatment of the content displayed is illegal and anti-competitive. Google still has the right to appeal the decision.

The Google case is very debated in the media and a lot of people have written an opinion on the matter at hand. It keeps receiving quite a bit of controversy. The process of getting a decision on the case at hand after the investigations, take quite a while. The investigations started in 2010 and the commission just got to the first decision down. The Microsoft case was quite similar, from the initial investigation to the conclusion, it took quite a while to come to a decision.

The problem with the unknown area behind the competition law and big data is that the amount of time the investigation takes, the market at hand might already be adapted to something else. A new market or sector might have already been created, even though the Commission would keep investigating the case through an older perspective.

4. THE POLICY BEHIND COMPETITION LAW

Many have commented that the Article 102 TFEU as it is not suitable for the digital sector in the EU. The market of the digital sector is usually classified as dynamic and fast-moving and the Article itself has shortcomings in both its law and in its practice.[226] There have even been some discussions of an update in the competition law policy in the EU and of possible changes being made to it, including the Article 102 TFEU. Some experts, from e.g. the European Parliament together with several different books, articles and professors, have expressed their opinion that EU's legislative framework needs to be adjusted on several different markets, but as an example they have mentioned the information and the communication technology sector.[227] They have proposed an update of competition law that would comply with the age of digital economy. A digital single market has become one of the priorities in the EU, since 2015.[228] Before the thought of modernization of the competition law policies in the EU, the Commissions approach to the subject matter was criticized as protecting competitors instead of competition.[229]

Another critical look is given to the Article 102 TFEU and the manner its application by different courts. The manner in which the conduct is done now, is quite form based and the manner is not totally at odds with all kinds of economic principles. This is due to the fact that it places a greater emphasis on the form of the conduct of an undertaking, rather than the effect it has on the competition process.[230] Both the courts and the Commission have taken a very strict and formal enforcement of Article 102 TFEU, this being in a position that does not quite coexist with the economic side.[231] It has been commented that the current model of the Commission has not valued the principles of consumer welfare and the economic approach is lacking in its

[226] Karakas C., (2015) Google Antitrust Proceedings: Digital Business and Competition. Accessible: http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS_BRI%282015%29565870_EN.pdf, 13.4.2018.
[227] *Ibid.*
[228] *Ibid.*
[229] Jones A., Sufrin B. (2016) *EU Competition Law: Text, Case, and Materials.* 6th ed. United Kingdom: Oxford University Press.
[230] Geraldin D., (2010) Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful? Tilbury University https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569502 Accessible: 14.02.2018 p 2
[231] *Ibid.*

nature.[232] But the aspect of consumer welfare protection is highly debated and opinions vary a lot, depending on the investigation or the author.[233]
The Article 102 TFEU does not contain any exhaustive list on what is classified as abuse.[234] Therefore, it leaves a lot to interpretation by both the courts, Commission and by the counterpart in abuse cases. This is concerning both exploitative and exclusionary abuses, they are often put together, even though they should be viewed as two separate entities.[235] Together with non-exhaustive lists, there is no need to prove any actual or foreseeable effects of the abusive conduct together with no need to find a causal link between abuse and dominance. The article itself is not as friendly for bigger companies due to this factor and for the fact that there is no de minimis threshold, meaning that there are no explanations or limitations of what is considered abusive.[236] The concept of anti-competitive intent is not a requirement for the implementation of the article 102 TFEU. The manner in which the article is implemented creates room for both "false positives and false negatives", this meaning that a company might get falsely accused of abuse of its dominant position, or then a company is not affected by its abusive conduct. [237]

Since the discussion of bringing competition policies up to date, the Article 101 TFEU has been modernized and the Commission continued with the process of modernizing Article 102 TFEU. The efforts are seen in the guidance paper created.[238] The modernization would according to the Commission lead to more sound economic applications of the Article. But despite the Commission efforts, the Article 102 TFEU is still seen as insufficiently aligned with economics. A way the formalism of the process is shown in a case is through an uncompromising compliance to per se rules for many different economic practices, without regards to the facts at hand. The per se rules have impacted on the way abuse is found, through e.g. an allegation, without looking on the economic effects that the practice may have on the process on competition. This type of conduct was found for example in the Michelin case where the CJEU.[239] The court found in that case that there is an apparent connection with the lines of decisions that are contrary to 102 TFEU. The court also stated that the company in the dominant

[232] Akman P., (2016) The reform of the application of the article 102 TFEU: Mission accomplished? - Antitrust Law Journal, American Bar Association Vol 1-2016
[233] *ibid.*
[234] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 202
[235] *ibid.* p 213
[236] *ibid* p 212
[237] *ibid* p 203-04
[238] *ibid*
[239] Court decision, 9.11.1983, *NV Nederlandsche Banden Industrie Michelin v Commission*, Case 322/81, EU:C:1983:313

position has a special responsibility to keep its conduct so that it does not impair the internal markets undistorted competition.

The Article has also been criticized from other sides, then from its formalistic approaches used in both law and in practice. Some have mentioned that the Article 102 TFEU itself does put bigger and efficient companies in a disadvantageous position and in some cases even discriminates them for their success on the market and in on attaining a dominant position on the market. The actions of smaller corporation might not be viewed in the same light as bigger dominant firms.[240] The Commission and the courts might concentrate more on smaller things done by big enterprises, which are not as harmful, instead of concentrating on smaller anti-competitive actions that would be harming for consumers. An efficient company might however have a positive impact on the welfare of consumers, since it drives the prices down in more effective manners.

Legal commentators have over the years criticized the Commission for its approach towards the undertakings based on Article 102 TFEU. They have argued that it is unnecessary regular interventions by the Commission that impact the market and distort the competition. The commentators have also commented on the courts approach on the cases regarding the Article 102 TFEU. The manner the courts have approached the cases are on a case to case basis, even though they fail to provide any general conclusions that would help with the conclusion of the application or define a clear scope of the Article. The manner of regarding things on a case to case manner is creating further legal uncertainty. The guidance by the Commission usually refers to notions that concern normal competition, situations that are fair, distorted or on merits.[241] A concern has arisen repeatedly is, whether these notions are practical or workable.[242] You could also think that does the vague terms transfer into administrable rules, that would be suitable for direct applications by authorities, legal professionals, undertakings and courts.

The guidance paper was created to modernize and create guidelines to cases regarding undertakings and about what can be expected from the Commission.[243] The common census has

[240] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 200
[241] Wish R., Bailey D. (2015) supra nota p 201-202
[242] *ibid.*
[243] Østerud E. (2010) *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: the Spectrum of Tests*. London, Kluwer Law International p 170

been that the guidance paper is not a guideline on how Article 102 TFEU is implemented. It does not make any rewrites to the Article and it binds neither the EU courts nor the Member State courts.[244] The guidance paper is more to show a process behind the Commission and courts choices and reasons than guide on the application of the Article itself.[245] The guidance paper does not contain any stipulations or exceptions, which together with the lack of safe harbours for undertakings willing to make self-assessments.

The guidance paper does not really cover the aspect of price discrimination and exploitative pricing. [246] It can be considered as downfall, since a big part of the resent cases have covered the aspect of pricing. The concept behind price discrimination is also quite confusing and unsettled as a principle in the EU competition law policy.[247]

The Article 102 TFEU leaves a lot of room for interpretation form both the Commission, courts and the company's side.[248] The wording of the Article leaves a lot of room for various interpretations to be made. This aspect also lowers the threshold of effects which are apparent with both the authority, claim and other parties at hand. [249]

4.1. EU digital sectors and characteristics

Google is a tech giant and one of the biggest in the digital sector in the EU. The company is accused of infringing article 102 TFEU. The most significant lacks of the article are regarding the digital sector. The digital sector is highly dynamic and fast passed if compared with other sectors.[250] The digital sector can be defined as the mixture of telecommunication, internet, software, technology, and information. [251]

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[244] *ibid.* p 186
[245] Geraldin D., (2010) Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful? Tilbury University Accessible: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569502 14.02.2018
[246] *ibid.*
[247] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University
[248] *ibid.*
[249] Karakas C., (2015) Google Antitrust Proceedings: Digital Business and Competition Accessible: http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS_BRI%282015%29565870_EN.pdf 13.4.2018.
[250] Karakas C., (2015) *Google Antitrust Proceedings: Digital Business and Competition.* http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS_BRI%282015%29565870_EN.pdf, Accessible:13.4.2018.
[251] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 757

The digital sector is known for rapid innovation and its continuity. The technological advancements lead to innovations, products, and platforms on a regular basis.[252] The digital sector is quite difficult to regulate effectively. The legislation is falling further back if there is no change in the manner in which it is. Rapid innovation in the sector continually defines the boundaries of the relevant market, and it potentially creates new relevant markets.[253] The changing boundaries are noticeable what comes to the application of competition law in the EU. The scene behind defining a company's abuse dominance, the market share would not be sufficient to determine the market power.[254] The cycles in this market sector are short and it is suggested that the competition law in Europe, regarding the digital sector, should focus on potential forces of innovations, entry, and disputes.[255]

Another characteristic of the sector is network effects.[256] They arise when an increasing number of individuals use a service/product which increases the value.[257] The network effects can be seen, e.g., in a situation where a number of individuals join a service.[258] Direct network effects keep occurring when users interact with each other.[259] And a network becomes more useful the more people use it.[260] They tend to contribute towards a high market concentration. The network effect on the digital sector tends to contribute to a higher market concentration. [261] This is because they have an advantage on the market.

Yet another characteristic of the digital sector is the economies of scale, it is linked with network effects, but it allows for greater returns for companies in the digital sector.[262] It plays a huge role in the economic activities of Google. The digital sector is also known for high fixed cost, but low marginal costs.[263] Fixed cost remains the same regardless of the service or the goods. While marginal costs are, the properties added to the costs.[264] In the digital sector, companies are to

[252] Rato M., Petit N. (2013) Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered? – *European Commission Journal: Volume 9, 2013 p 2*
[253] *ibid.*
[254] *ibid.*
[255] *ibid.*
[256]Rato M., Petit N. (2013) *supra nota* p 4
[257] *ibid.*
[258] *ibid.*
[259] *ibid.*
[260] *ibid.*
[261] *ibid.*
[262] Wish R., Bailey D. (2015) *Competition law*. 8th Ed. United Kingdom: Oxford University p 757-759
[263] *ibid.*
[264] *ibid.*

have significant funds, when starting to develop and introduce their innovation on the market, but once it is done successfully the cost is mostly insignificant.[265] A search engine can be taken as an example, to initiate it, it involves big initial costs, but after initial successful entering the market, the costs are minimal for the search engine.

The digital sector seems to have the characteristic that consumers can easily switch digital platforms and networks.[266] A consumer can easily change e.g. between different search engines, without any kind of payment.[267] The fact that this is possible suggest that any "lock" effects are not possible to have on the sector.[268] Since everyone is just a simple click away from the services they need.[269] With no severance costs for consumers and no locking effects are not playing any major roles in the digital sector.[270] There are non-financial effects when a consumer decides to switch service or product on the market; this can be in the form of lost time, convenience, etc. [271] If lock effects and severance fees are quite absent in the digital sector, it would show that the barriers to entry are quite minimal.[272]

A key aspect of the digital sector is for the ability for compatibility with other products and systems, without any special efforts of the consumer.[273] The digital sector is prone to compatibility with other programs. [274]The commission has stated that there is a need for interoperability, in other words, compatibility, and open standards to ensure fair competition in the digital sector.[275] It has also been separately stated by the courts and the Commission. It attracts innovation, handles costs and it impacts competition together with the aspect of making the market the most versatile and most effective.[276] The dominant undertakings might even be required to supply their rivals to ensure effectivity.[277] And the dominant undertakings refusing to collaborate might even be found guilty of abusing their position on the market.[278]

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[265] *Ibid.*
[266] Rato M., Petit N. (2013) Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered? – *European Commission Journal: Volume 9, 2013 p. 5*
[267] *ibid.*
[268] *ibid.*
[269] *ibid.*
[270] *ibid.*
[271] *ibid.*
[272] *ibid.*
[273] Rato M., Petit N. (2013) *supra nota p. 4*
[274] *ibid.*
[275] Karakas C., (2015) *Google Antitrust Proceedings: Digital Business and Competition.* http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS_BRI%282015%29565870_EN.pdf, Accessible:13.4.2018.
[276] Rato M., Petit N. (2013) *supra nota p. 4*
[277] *ibid.*
[278] *Ibid.*

4.2. The need for a potential review in the policy?

The EU digital sector is very dynamic and fast-passed with its characteristics. The article itself is in need of a refreshment. It is to be expected that the case would continue to be in the courts for the years to come, in the similar manner as the other cases investigated by the commission and before they reached a final decision. The pace of the commission does currently not confirm with the pace of the market. The market pace is effective and quick. The lengthy proceedings reveal weakness and ineffectiveness, what comes to competition law and enforcement in the EU. The EU parliament has also commented on the process of competition law and on the investigations.[279]

There are several ideas of how competition law can be modernized for the digital sector. Several different authors have proposed a solution, which would be beneficiary for the market. The consensus is that a sector-specific regulation would be beneficiary for competition law. The EU parliament has also expressed their opinion on regulations that would be sector-specific.[280] The sector-specific regulation would be an effective manner to regulate the digital sector. It would at the same time bring more openness to the situation of investigation and regulation of companies related to the digital sector.[281]

The efficient proceedings and rules that would be established through the sectors would bring around more transparency. It would also affect the process, which would save on the lengthy proceedings that turn out to be costly both for the Commission and for the investigated party.[282] The European Parliament has debated the renewal of the antitrust rules so that they would be more unanimous, practical and more suitable for the new economy and the digital sector.[283]

[279] Karakas C., (2015) Google Antitrust Proceedings: Digital Business and Competition. Accessible: http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/565870/EPRS_BRI%282015%29565870_EN.pdf, 13.4.2018.
[280] *ibid.*
[281] *Ibid.*
[282] Rato M., Petit N. (2013) *supra nota p. 4*
[283] Themelis, A.T., (2013) Information and Intermediation, Abuse of Dominance and Internet 'Neutrality': 'Updating' Competition Policy under the Digital Single Market and the Google Investigations(?): European Journal of Law and Technology, Vol. 4, No. 3, 2013.

5. CONCLUSION

Data-opolies have become more and more well-known and common on the current market in the EU. The competition authorities are having a hard time to keep up with the amount of changes and ways of legal implementation are starting to be behind if no changes are made to the current policies.

The Google case has been one of the biggest topic on the table during the last couple of years. Many have done immense discussions on how the current case is impacting the way we view competition law in Europe and how big data companies are viewed in today's society. The current proceedings are long and extensive. Which turn out to be expensive for all parties involved. The market behind big data companies develops quickly and current proceedings cannot keep up with the pace, nor the demand.

As earlier mentioned competition law in Europe took its first steps during 1998, where it has evolved further. But the current situation with the digital sector taking up a big part of the current new economy market. The competition law in Europe is regarded in the TFEU and its articles have been through a sort of an update, but the current situation is not adaptive enough for the tech industry. Regarding the law that regulates the antitrust proceedings in Europe, the current situation is not extensive enough for implementing it on the digital sector with anti-competitive dealings.

The cases regarding Google, from the competition law perspective show how the article 102 TFEU have shortcomings, which also impacts the digital sector as a whole. The complex deficiencies in the competition law rules should work as a sort of a wakeup call for both the commission and for the courts. The current way of implementing and viewing the competition rules are not beneficial for the companies, the commission nor for the consumers. The current method is not productive and in accordance with the aims of EU competition law. The aims I am referring to would be both about protecting the principle of competition and the protection of consumer welfare.

A manner where both the courts and the commission work faster and be more in accordance with the new economic principles, would be beneficial on the digital sector, which is drastically

changing and developing manner of thinking and acting. The traditional competition rules are not totally in accordance with the principle, which can be seen in the decade-long proceedings of e.g. the Microsoft case. The focus should be changed to act on innovations, entry to the market and on the debate. The manner of investigating both the market share and price, cannot be reviewed in the similar manner as earlier, since the non-price perspective has become more and more common.

The article 12 TFEU, which is behind the abuse of dominance, is considered as challenging for the implementation on cases on the digital sector. The article 102 TFEU seems to be designed for other common markets, and not for such specific and dynamic sectors like the digital sector. The guidance paper is a welcomed add for the antitrust article. But it is important to remember that it is not considered to be law, but to work as a guideline for the implementation. The digitalisation effects the other sectors as well, since even more companies are using new technologies. The quick changes that originates from the digital sector moves over to the other sectors as well.

The amount of antirust cases increases while the amount and sizes of companies and markets keep increasing and the manner in which the commission is dealing with the investigation of cases. The Commission should review their policies for competition law so that the proceedings would be quicker and more specific. The cost for each investigation and proceedings are quite pricey for all parties involved.

In my opinion the renewal of the competition policies is a good way to help integrate new ways of investigating and helping conclude the cases in a more faster method. The sector-specific regulation seems to be a promising alternative, since it would be easier to maintain and it would make all of the processes quicker. The sector related competition law regulations could be more easily changed or implemented, in the event of e.g. the creation of new subgroups on the market. A more targeted approach would help with the work and make the situation more unified and goal oriented.

It is very important to remember that competition does not only classify on price but on other aspects, such as privacy and quality. Data in itself is not a competition law concern, but it is important to take in account, when thinking of the data sector and competition policies. Even

though data protection is not automatically placed on the competition law, it can be implemented on the digital sector and the competition policies regarding non-price alternatives. Non-price refers to both privacy and to the collection of data.

Both competition law and data principles have to be in accordance and co-ordinate, in order to ensure that consumers are not harmed on the market. Which is one of the main principles of competition law.

If taking a look at older case law, like e.g. the Michelin case, the courts and the commission have not taken the digital sector and its special characteristics in account. The proceedings took a decade which would not be appropriate when looking at the current state at the market. New sub-groups would arise during the time of investigation and implementation by the courts. The Google case seems to be heading in the similar direction, but there is hopes that this would change in the coming investigations.

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