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Review article

WHEN COMPETITION MEETS PERSONAL DATA PROTECTION*

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ABSTRACT

In the submitted contribution the authors follow up on the case of Facebook, which was assessed by the German competition authority – Bundeskartellamt. Proceedings moved from administrative to judicial phase, as this case was assessed by Düsseldorf Higher Regional Court (Oberlandesgericht Düsseldorf) and also by Federal Court of Justice (Bundesgerichtshof). However, German national courts had adopted differing views in this regard. National German court (Higher Regional Court, Düsseldorf, Germany) rendered a prejudicial question to Court of Justice of the European union (hereinafter referred to as "CJEU"), concerning mainly (1) interpretation of GDPR regulation and (2) question of whether competition authority is entitled to apply this regulation in its investigations. In the corresponding case No. C-252/21, the Opinion of Advocate General (delivered on 20 September 2022) was recently published. The aim of this paper is to assess the interaction between personal data protection in correlation with the competition rules, more precisely, whether the competition authority is entitled to apply GDPR.

***Keywords**: CJEU competition law, dominant position, Facebook, GDPR*

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1. INTRODUCTION

The interconnection of competition rules with personal data protection regulation continues to provide new challenges to the competent authorities interpreting these rules and applying them in practice towards subjects that fall under the scope of both of these areas of regulation. Specifically, and more prevalently, this issue arises in connection with the operation of digital platforms, the main business strategies of which are oriented on the use and commercialization of user data, whether personal or other. In this regard it is necessary to consider the different scope of competences of the relevant authorities entitled, firstly, to stipulate whether the infringement of data protection obligations took place, and secondly, to consider the impact of these infringements (or in the absence of such infringements consider, in general, the impact of the data policies enacted) on competition and the possible (un)lawfulness of its restriction. Where the former usually falls under the competences of national data protection offices, the latter is included in the exclusive competences of the European Union (Article 3 (1) (b) TFEU[1]) and is implemented in practice by the Commission as its representative or, alternatively, when it comes to issues with exclusively national scope, by the competent national competition authorities (e. g. Antimonopoly office of the Slovak republic).

Following these considerations, the main objective of this paper is to analyse the following question: to what extent competition authorities (whether on national or European level) are allowed to consider personal data protection regulation materialized in the General Data Protection Regulation (hereinafter referred to as 'GDPR') in their investigations with the objective to identify possible infringements of competition rules. To answer this question, the authors consider the recent case No. C-252/21 Meta Platforms and Others brought before the Court of Justice of the European Union (hereinafter referred to as 'CJEU') and the decisions of the German courts that preceded it.

2. THE FACEBOOK CASE – FROM BUNDESKARTELLAMT TO THE CJEU

2.1. National administrative proceeding

Since we have dealt with the German administrative and judicial proceedings regarding Facebook in more detail in our previous paper[2], we will provide only a

[1] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390.

[2] Rudohradská, S.; Hučková, R.; Dobrovičová, G., *Present and Future-A Preview Study of Facebook in the Context of the Submitted Proposal for Digital Markets Act*, EU and comparative law issues and challenges series (ECLIC), Vol. 6, 2022, pp. 489-508.

brief summary of the most relevant facts required for answering the research questions defined in this paper. The case of Facebook began to be considered by the German competition authority - Bunderkartellamt on 2nd March of 2016. One of the main determinants for initiating the proceedings concerned user data collected by Facebook from user devices when users used other services or websites or third-party applications, which were later combined with user data from the social network Facebook.[3] After the extensive investigation of the decisive circumstances, the German competition authority issued a decision on 6th February of 2019. It can be marked as a decision of considerable scope, and its shorter summary was also published.[4] The Bundeskartellamt has prohibited and ordered the termination of Facebook's data processing policy and its corresponding implementation in accordance with Sections 19(1) and 32 GWB.[5]

The aforementioned case of the social network Facebook was the subject of extensive discussions, primarily focusing on the significant connection of competition law with the area of personal data protection. In literature, we are also encountering opinions that regulatory tendencies in relation to the gatekeepers are currently found in consumer protection law, personal data protection law and competition law.[6]

Disputed aspect in the proceedings was whether the competition authority, which exercises its powers within the framework of the protection of competition, has the competence to decide on a violation of the GDPR. The Bundeskartellamt argued in favor of its jurisdiction by saying that in the given case there was an abuse of a dominant position, which was abused to force user consent with the platform terms of use, which are questionable from the point of view of the GDPR.

2.2. National judicial proceeding

On 11th February of 2019 a complaint was filed to the Oberlandesgericht Düsseldorf against the administrative decision of the Bundeskartellamt regarding

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3 Bundeskartellamt, Decision, Facebook case, B6-22/16, [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf%3F__blob%3DpublicationFile%26v%3D5], Accessed 5 April 2023.

4 Case summary, Facebook, *Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing*, *B6-22/16,* [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf;jsessionid=1C5BC37B9C63E0D79C3E41545FCBC694.1_cid362?__blob=publicationFile&v=4], Accessed 5 April 2023.

5 German national Competition protection Act.

6 Mazúr, J.; Patakyová, M. T. *Regulatory approaches to Facebook and other social media platforms: towards platforms design accountability*, Masaryk University Journal of Law and Technology, 2019, pp. 219-242.

Facebook, transferring the legal case from the administrative level to the judicial proceedings. Considering the fact that the German judicial authority has quite clearly declared that it is very likely that the administrative decision issued by the Bundeskartellamt will be overturned, as the court did not agree with its conclusions, we agree with the finding that the court's interim decision was issued in favor of Facebook.[7] As the court first emphasized: "...*there are serious doubts about the legality of this decision of the Bundeskartellamt*."[8] Currently, the aspect of doubts about the legality of the administrative decision entitles the acting court to comply with the petitioner's proposal to grant a suspensive effect. Second, the court also commented on data processing issues when it stated that "…*the data processing by Facebook does not cause any relevant competitive harm or any adverse development of competition. This applies both to exploitative abuse at the expense of consumers participating in the social network Facebook, and with regard to exclusionary abuse at the expense of an actual or potential competitor of Facebook*."[9] However, the competent German judicial authorities have not yet issued a final decision on the merits of the case, and the decisions issued so far have been of a preliminary nature. After the hearing, which took place on 24th of March 2021, the court decided to stop the proceedings and submit preliminary questions to the CJEU pursuant to Art. 267 of the TFEU. The Oberlandesgericht Düsseldorf submitted a total of 7 questions to the CJEU, some of which consist of several partial sub-questions.

3. QUESTIONS SUBMITTED TO THE CJEU WITHIN THE PRELIMINARY RULING

The analysis of the opinion of the advocate general should be directed primarily to the first and seventh preliminary questions, which are, from our point of view, the most relevant for the purposes of this paper. The first and seventh questions are derived in the following sub-questions.

The wording of the first preliminary question is:

"(a) Is it compatible with Article 51 et seq. of the GDPR if a national competition authority – such as the Federal Cartel Office – which is not a supervisory authority within the meaning of Article 51 et seq. of the GDPR, of a Member State in which an undertaking established outside the European Union has an establish-

7 Botta, M.; Wiedemann, K., *Exploitative conducts in digital markets: Time for a discussion after the Facebook Decision*, Journal of European Competition Law & Practice, 2019, pp. 465-478, p. 470.

8 Unofficial translation of the decision - Facebook. /. Bundeskartellamt The Decision of the Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf) in interim proceedings, 26 August 2019, Case VI-Kart 1/19 (V), p. 6-7.

9 *Ibid.*

ment that provides the main establishment of that undertaking – which is located in another Member State and has sole responsibility for processing personal data for the entire territory of the European Union – with advertising, communication and public relations support, finds, for the purposes of monitoring abuses of competition law, that the main establishment's contractual terms relating to data processing and their implementation breach the GDPR and issues an order to end that breach?

(b) If so: is that compatible with Article 4(3) TEU if, at the same time, the lead supervisory authority in the Member State in which the main establishment, within the meaning of Article 56(1) of the GDPR, is located is investigating the undertaking's contractual terms relating to data processing?"

With the first question, the German national court basically asks whether the competition authority can find that the platform's terms and conditions are in violation of the GDPR and issue a decision that prohibits their further use. Advocate General deals with the first preliminary question relatively briefly, stating that, in his opinion, the competition authority did not penalised a violation of the GDPR, but assessed actions showing signs of abuse of a dominant position, among other things, also in the context of the GDPR, specifically stating the following: "Subject to verification by the referring court, it seems to me that the Federal Cartel Office, in the decision at issue, did not penalise a breach of the GDPR by Meta Platforms, but proceeded, for the sole purpose of applying competition rules, to review an alleged abuse of its dominant position while taking account, inter alia, of that undertaking's non-compliance with the provisions of the GDPR."[10] We basically agree with the cited statement, because the competition authority in this case did not really limit itself to assessing the general conditions of use in light of the GDPR, but instead considered them primarily in the context of competition rules, specifically the abuse of a dominant position. However, in our opinion it would be an overstepping of the competencies of the competition authority if it would limit itself exclusively to assessing aspects related to the GDPR and did not deal with such proceedings of the platform in connection with the violation of competition rules.

The wording of the seventh preliminary question is:

"(a) Can the national competition authority of a Member State, such as the Federal Cartel Office, which is not a supervisory authority within the meaning of Article 51 et seq. of the GDPR and which examines a breach by a dominant

[10] Opinion of the Advocate General Rantos from 20th of September 2022, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2022:704, point 18.

undertaking of the competition-law prohibition on abuse that is not a breach of the GDPR by that undertaking's data processing terms and their implementation, determine, when assessing the balance of interests, whether those data processing terms and their implementation comply with the GDPR?

(b) If so: in the light of Article 4(3) TEU, does that also apply if the competent lead supervisory authority in accordance with Article 56(1) of the GDPR is investigating the undertaking's data processing terms at the same time?"

With the seventh preliminary question (and the second in the order addressed by the opinion in question), the national court is practically asking whether the competition authority can incidentally assess whether the platform's terms of use are in conflict with the GDPR and, if so, whether they can be subject to an investigation by this competition authority, whereas those terms are, at the same time, under investigation by the competent lead supervisory authority (taking into account Art. 4 par. 3 of the EU Treaty, which regulates the so-called principle of sincere cooperation).

We agree with the statement that even if the competences of the competition authority will probably not, as a rule, include the possibility to decide on a violation of the GDPR, the regulation does not, in principle, prevent authorities other than supervisory authorities from occasionally taking into account the compatibility of certain practices with provisions of the GDPR. When investigating anti-competitive proceedings, the anti-monopoly authorities basically assess the entire complex of legal and economic aspects of the concerned actions (of platforms or other undertakings). As it is emphasized "….the compliance or non-compliance of that conduct with the provisions of the GDPR, not taken in isolation but considering all the circumstances of the case, may be a vital clue as to whether that conduct entails resorting to methods prevailing under merit-based competition, it being stated that the lawful or unlawful nature of conduct under Article 102 TFEU is not apparent from its compliance or lack of compliance with the GDPR or other legal rules…."[11] In our opinion, therefore, the competition authority can impose a ban on the use of platform terms and conditions containing questionable clauses from the point of view of the GDPR, but only if conditioning access to the platform through these platform terms leads to an abuse of a dominant position.

For completeness, we must refer to other papers in which the question we set out to investigate has already been examined by other authors.[12] To illustrate, Witt in

[11] Opinion of the Advocate General Rantos from 20th of September 2022, Meta Platforms a i. (Conditions générales d'utilisation d'un réseau social), C-252/21, ECLI:EU:C:2022:704, point 23.

[12] WITT, Anne. Facebook v. Bundeskartellamt–May European Competition Agencies Apply the GDPR?. *Bundeskartellamt–May European Competition Agencies Apply the GDPR*, 2022.

this regard states that "competition and data protection agencies working in institutional silos, without regard to the impact of their decisions on the other agency's objectives, risks yielding politically inco-herent and hence undesirable results…"[13]

4. GDPR ASSESSMENT BY COMPETITION AUTHORITIES

4.1. Competition authorities identifying personal data protection infringements?

As the first aspect of the analysed issue, we must consider a question, whether competition authorities are entitled to determine (in the scope of their investigative process) that the investigated subject infringed the provisions of personal data protection regulation.

A simple answer to this question would be no. According to Article 51 GDPR, Member States are obligated to establish one or more independent public authorities responsible for monitoring the application of GDPR with the objective to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the European Union (hereinafter referred to as 'supervisory authorities' or 'data protection authorities). The independence of these supervisory authorities is guaranteed in Article 52 GDPR, which specifies that they are entitled to act with complete independence in performing tasks and exercising their powers in accordance with GDPR and are to remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody. In our opinion, this exemption of data protection authorities from the influence of any third parties (including state or non-state actors) precludes the possibility of competition authorities to "usurp" one of their obligations specified in Article 57 (1) (a) GDPR – the obligation to monitor and enforce the application of GDPR. This is further evidenced by the wording of Article 87 (1) (h) GDPR, that defines the obligation to conduct investigations on GDPR application as one of the tasks of supervisory authorities. These investigations may, however, be based on information provided by different supervisory or other public authorities, which could possibly include the corresponding competition authorities. It is, however, clear from the wording of these provisions that even if another public authority identifies a possibility of personal data protection regulation infringement, only the data protection authority is entitled to carry out the investigation in this regard and decide whether such an infringement took place.

[13] *Ibid.,* p. 9.

This conclusion is supported by the Advocate General Rantos, who in his recently adopted Opinion delivered on 20th September 2022 to the case C-252/21 Meta Platforms and Others (hereinafter referred to as 'Opinion') states the following: "given that the GDPR provides for the full harmonisation of data protection laws, the central element of which is a harmonised enforcement mechanism based on the 'one-stop shop' principle set out in Articles 51 to 67 of that regulation, it seems obvious to me that an authority other than a supervisory authority within the meaning of that regulation (such as a competition authority) does not have competence to make a ruling, primarily, on a breach of that regulation or to impose the penalties envisaged."[14] Therefore, in order to answer the question defined above, we must conclude that competition authorities are not entitled to adopt such a decision, the verdict of which would identify an infringement of personal data protection regulation.

However, from the competition authorities' point of view, policies regarding the use and commercialization of personal data or other information by controllers (especially digital platforms) may significantly impact the functioning of the internal market (including Digital Single Market) and may influence the competition taking place on it. Consequently, precluding competition authorities from assessing the impact and the relevance of personal data for the existing market and its operation would significantly limit the ability of competition authorities to monitor and, where appropriate, regulate some of the most powerful actors exploiting personal and other data to compensate for the seemingly free provision of different services on the Internet. With this objective in mind, we are of the opinion that competition authorities (whether national or European) should not principally be excluded from assessing the relevant data policies that may influence their decisions, the objective of which is to monitor the application of the corresponding competition rules in practice.

A supporting argument in this regard may be the fact that national data protection authorities are usually not well equipped to consider the overall impact of personal data protection policies on all of the affected subjects, as these authorities usually focus on infringements of personal data protection regulation impacting individual data subjects, the rights of which may have been violated, but do not consider the position of other relevant subjects such as the rights of controllers' competitors or consumers, the protection of which falls under the purview of the relevant competition authorities.

[14] Opinion of the Advocate General Rantos delivered on 20th September 2022 regarding the case C-252/21 Meta Platforms and Others. ECLI:EU:C:2022:704, note 11.

To corroborate our argument that competition authorities should be entitled to consider, to some extent, the relevant data protection aspects with possible impact on competition, we provide a short case study examining the decision-making practice of the competent Slovak data protection and competition authorities. Specifically, we will shortly compare the number of cases decided by the corresponding authorities annually and the fines adopted for the infringements identified in this regard.

The Office for Personal Data Protection of the Slovak Republic sanctions approximately 50 cases of personal data protection infringements per year, which usually result in the issuance of a fine, the summary amount of which represents on average a little over 107.000,- Eur annually. Table 1 provides detailed data in this regard.

Table 1: Number of cases and fines adopted by the Slovak Office for Personal Data Protection in the time period 1.1.2017-31.12.2021[15]

Time period	**Number of fined cases**	**Amount of fines in total**
1.1.2021 – 31.12.2021	53	110.900,- Eur
1.1.2020 – 31.12.2020	54	103.300,- Eur
25.5.2019 – 31.12.2019	9	75.300,- Eur
25.5.2018 – 24.5.2019	38	132.600,- Eur
1.1.2017 – 24.5.2018	57	117.600,- Eur

In comparison, considering the fact that the Slovak Antimonopoly Office investigates a similar number of cases as the Slovak Personal Data Protection Office, the fines adopted in this regard amount to a higher sum presenting on average 4.8 million Eur annually. The amount of fines imposed in individual cases, therefore,

[15] The data presented in Table 1 have been collected from the annual reports published by the Office for Personal Data Protection of the Slovak republic, specifically from the following documents:
- The report on the personal data protection status in 2021. Available online: https://dataprotection.gov.sk/uoou/sites/default/files/sprava_o_stave_ochrany_osobnych_udajov_za_rok_2021.pdf
- The report on the personal data protection status in 2020. Available online: https://dataprotection.gov.sk/uoou/sites/default/files/sprava_o_stave_ochrany_osobnych_udajov_za_rok_2020.pdf
- The report on the personal data protection status in 2019. Available online: https://dataprotection.gov.sk/uoou/sites/default/files/sprava_o_stave_ochrany_osobnych_udajov_za_obdobie_25.maj_2019_az_31.decembra_2019.pdf
- The report on the personal data protection status in 2018. Available online: https://dataprotection.gov.sk/uoou/sites/default/files/sprava_o_stave_ochrany_osobnych_udajov_za_obdobie_25.maj_2018_az_24_maj_2019.pdf
- The report on the personal data protection status in 2017. Available online: https://dataprotection.gov.sk/uoou/sites/default/files/sprava_o_stave_ochrany_ou_od_1_januara_2017_do_24_maja_2018.pdf.

could substantially affect the position of sanctioned subjects and alter their position on the market. Table 2 provides detailed data in this regard.

Table 2: Number of cases and fines adopted by the Slovak Antimonopoly Office in the time period 1.1.2017-31.12.2021[16]

Time period	**Number of fined cases**[17]	**Amount of fines in total**
1.1.2021 – 31.12.2021	46	1 547 392,86 Eur
1.1.2020 – 31.12.2020	25	8 139 306,80 Eur
1.1.2019 – 31.12.2019	37	7 628 651,- Eur
1.1.2018 – 31.12.2018	38	10 628 934,09 Eur
1.1.2017 – 31.12.2017	36	3 604 665,- Eur

The comparison provided above could indicate that the infringements investigated by the Slovak Antimonopoly Office are more severe than the infringements sanctioned by the Slovak Data Protection Office. This conclusion is solely based on the considerably higher amount of fines adopted by the competition authority in a similar number of cases as are investigated by the national data protection authority.

The discrepancy in the amount of fines adopted could not be explained by the statutory limitations, as GDPR and the corresponding Act No. 18/2018 Coll. on personal data protection as amended provide the national data protection authority with the ability to sanction specified infringements with fines of up to 20 000 000 Eur, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover. To illustrate, this category of fines could be imposed with regard to infringements of basic principles of personal data processing (e. g. lawfulness, fairness and transparency, purpose limitation, data minimisation etc.) and the infringement of data subjects' rights, which present most of the cases investigated

[16] The data presented in Table 2 have been collected from the annual reports published by the Antimonopoly Office of the Slovak Republic, specifically from the following documents:
- 2021 Annual Report. Available online: https://www.antimon.gov.sk/data/att/122/3181.85a901.pdf?csrt=17982650428904534330
- 2020 Annual Report. Available online: https://www.antimon.gov.sk/data/att/8c3/2421.290ac0.pdf?csrt=17982650428904534330
- 2019 Annual Report. Available online: https://www.antimon.gov.sk/data/att/386/2108.51baf7.pdf?csrt=17982650428904534330
- 2018 Annual Report. Available online: https://www.antimon.gov.sk/data/att/8a7/2044.3eeb94.pdf?csrt=17982650428904534330
- 2017 Annual Report. Available online: https://www.antimon.gov.sk/data/att/76d/1982.a78d6c.pdf?csrt=17982650428904534330.

[17] The sanctioned cases include fines adopted in connection with investigations regarding mergers, abuse of dominant position, agreements restricting competition, including restrictions of competition by state and local administration authorities and fines imposed for non-cooperation with the Antimonopoly Office of the Slovak Republic.

by the Slovak data protection authority.[18] However, the amount of fines imposed in practice does not correspond to the extensive scope of fines permissible under applicable legislation.

In contrast, the Slovak Antimonopoly Office seems more than willing to adopt fines with discernible impact on the subjects that violate competition rules. Given the complex nature of competition regulation and the complicated process of identifying possible violations of competition rules, we believe that the competition authorities should be able to consider all of relevant facts in this regard that may help to identify competition regulation violations and sanction subjects responsible for them. As the Advocate General summarized in his Opinion: "although a competition authority is not competent to establish a breach of the GDPR, that regulation does not, in principle, preclude authorities other than the supervisory authorities, when exercising their own powers, from being able to take account, as an incidental question, of the compatibility of conduct with the provisions of GDPR (…) without prejudice to the application of that regulation by the competent supervisory authorities."[19] Analogously to the Advocate General Opinion, we conclude that competition authorities should be able to consider the impact of personal data policies on competition, as they are able to analyse, in a complex manner, the individual controller, whereas data protection offices, particularly in Slovakia, predominantly focus on smaller, national controllers without significant impact on the market[20]. However, this conclusion is conditioned on the fact that only competent national data protection authorities are entitled to determine whether an infringement of personal data protected rules took place.

4.2. The possibility of cooperation between competition and personal data protection authorities – the case of Slovakia

Following the conclusions expressed above, in this chapter we will try to consider possible forms of cooperation between the competition and personal data protec-

[18] This statement is based on the preliminary results of the author's ongoing research focusing on the analysis of the decision adopted by the Office for Personal Data Protection of the Slovak republic. From the 180 decisions analysed in this regard, almost all of them established the infringement of one or more basic principles of personal data processing.

[19] Opinion of the Advocate General Rantos delivered on 20th September 2022 regarding the case C-252/21 Meta Platforms and Others. ECLI:EU:C:2022:704. Points 22 and 24.

[20] This statement is also based on the preliminary results of the author's ongoing research focusing on the analysis of the decision adopted by the Office for Personal Data Protection of the Slovak republic. From the 180 decisions analysed in this regard, only a handful of them sanctioned digital platforms for personal data protection infringements, and the fines imposed in this regard had almost no significant impact on the sanctioned controllers (the average amount of fine imposed was 2077,- Eur).

tion authorities that may be needed in competition authorities' investigations that focus on the analysis of the relevant personal data protection aspects. The objective of such a cooperation should be, primarily, the effective application of the competition regulation, and the avoidance of differing interpretations of GDPR by competition and personal data protection authorities.

Although Article 57 (1) (g) of GDPR defines a cooperation obligation, the scope of which includes the sharing of information and providing mutual assistance, this obligation is only applicable between the relevant supervisory authorities with the objective to ensure consistency of application and enforcement of GDPR.

As the Advocate General rightly pointed in his Opinion, the EU law does not define cooperation rules between competition and supervisory authorities, as such a regulation could in principle undermine the uniform interpretation of GDPR,[21] and "in the absence of clear rules on cooperation mechanisms (…), a competition authority, when interpreting the provisions of the GDPR, is subject, at the very least, to a duty to inform and cooperate with the competent authorities within the meaning of that regulation, in accordance with the national provisions that govern its powers (principle of procedural autonomy of the Member States) and in compliance with the principles of equivalence and effectiveness."[22] Therefore, to identify possible forms of cooperation, we have to look closely at national regulation of competition and personal data protection authorities' competences.

To illustrate a possible legal basis for such a cooperation, Article 16 (1) (a) and (f) of the Slovak Act No. 187/2021 Coll. on the protection of competition authorizes the Antimonopoly Office to conduct investigations in individual sectors of the economy for the purpose of obtaining information on the state of competition in a given sector and to act and adopt decisions in matters of competition protection resulting from the provision of this act or from other applicable legislation. To ensure that the Antimonopoly Office has at its disposal all of the information necessary to conduct such investigations and to adopt decisions as a result of these proceedings, Article 16 (6) of this Act empowers the Antimonopoly Office with the right to require that other public offices provide it with any information or documentation necessary for the office's activities in any form. This provision, therefore, establishes an obligation of state institutions, including the national data protection office, to cooperate with the competition authority in its investigations. Such a cooperation could include, for example, the utilization of certain competences of the Slovak Data Protection Office, which cover inter alia the

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21 See: Opinion of the Advocate General Rantos delivered on 20th September 2022 regarding the case C-252/21 Meta Platforms and Others. ECLI:EU:C:2022:704, Point 26.

22 *Ibid.* Point 29.

provision of consultations in the field of personal data protection as presumed by Article 81 (2) (c) of the Slovak Act No. 18/2018 Coll. on personal data protection.

To conclude, with reference to the above defined legal framework, we believe that in the case of all investigations that include the analysis of the relevant personal data protection aspects that may have decisive influence on the decision, the Antimonopoly Office should request the help of the national data protection office, e. g. in the form of consultations, and in their mutual cooperation with the necessary guidance, a decision in competition matters may be issued.

4.3. Personal data policies resulting in the possible abuse of dominant position?

How the CJEU perceives the possibility of the competition authority to assess the GDPR can only be deduced from the opinion of the Advocate General Athanasios Rantos. The judgment in case C-252/21 has not been issued yet.

In general, the concept of abuse of dominance is built in such a way so as to enable it to capture a wide range of actions. Such a concept can be perceived positively. When we look at the Art. 102 TFEU, we recognize the so-called general clause of abuse of a dominant position contained in Art. 102 TFEU and subsequently letter a), b), c), d), which represent a demonstrative calculation of actions that may constitute abuse of a dominant position. Therefore, if the actions of the specific subject are not capable of being subsumed under the subsections of Art. 102 a), b), c) or d), this action can still represent an abuse of a dominant position, as long as it is capable of fulfilling the cumulative features of the general clause of abuse of a dominant position. It must therefore be an action on the internal market, or on a substantial part of it, by one or more companies and it must be capable of affecting trade between member states.

For instance, the Slovak national Act No.187/2021 Coll. on the protection of competition has a similar concept of abuse of a dominant position. It also regulates the so-called general clause of the abuse of a dominant position and four demonstrative calculations of actions that may constitute an abuse of a dominant position. The four demonstrative calculations of potential action are essentially the same as those contained in the Treaty on the Functioning of the European Union. In addition, the Slovak legislator specifies that the dominant position belongs to the entrepreneur who is not exposed to significant competition and can act independently due to his economic strength.

According to available statistical data, the social network Facebook has a 79.55% share in the European market of social networks. Instagram took the second place with a share of 8.2%.[23] At this point, we would like to add that according to the jurisprudence of the CJEU, a market share of 50% or more is only an indicator of dominance.[24] Without further analytical research including economic analyses, it would be difficult to state whether Facebook really has a dominant position, however, pointing to its market share, it is definitely possible to state that it has strong market position. Conditional use of the platform with conditions that are capable of encroaching on its user's privacy can be perceived as an abuse of a dominant position, as in our opinion it could be subsumed under Art. 102 par. d). The use of data from third parties could be subsumed under the acceptance of additional obligations, which by their nature are not related to the subject of the provision of services by Facebook. On the other hand, the potential user of the platform can still freely decide whether he is willing to use the platform under defined conditions or not. Considering the number of Facebook users representing its user base, as well as its global reach, we are of the opinion that a platform of such scale and reach can be judged all the more strictly in terms of its market power. If it would not be possible to subsume the proceedings under Art. 102 par. d) TFEU, it is still possible to think about fulfilling the general clause on the abuse of a dominant position.

From our point of view, therefore, the competition authority should not assess whether the terms of use of the platform are in accordance with the GDPR, as it is very likely that this authority will not be entrusted to it by the national legislator, but will be entrusted to an institution or office for the protection of personal data. At the same time, however, nothing prevents her from concluding that the abuse of a dominant position consisted, or the specific practice assessed was able to fulfil the definition of abuse of a dominant position and point to a violation of other legal regulations, not only GDPR. Finally, even if the data processing is legal and the user has given consent that has all the requirements required by the law (regulation), this does not rule out that such an action is an abuse of a dominant position. This is primarily related to the fact that the terms of use of the platform could impose various, absolutely unrelated obligations on its users, who often do not even read the long and indistinct terms of use of the platforms or do not understand their content correctly.

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[23] GlobalStats, available Social Media Stats in Europe - March 2023 at: [https://gs.statcounter.com/social-media-stats/all/europe], Accessed 8 April 2023.

[24] Judgement of Court of Justice, AKZO/Commission, C-62/86, ECLI:EU:C:1991:286.

5. INTERACTION OF DATA PROCESSING AND COMPETITION – DIGITAL MARKETS ACT CONTEXT

Digital Markets Act is a legal act in the form of regulation and together with Digital Services Act were in the frame of European Commission priority „Europe fit for digital age" published in the December 2020. Currently, mentioned regulations are the subject of extensive discussions. With the regard to the thematic focus of this paper, relevant will be primarily Digital Markets Act, concretely article 1 paragraph 1, stating that "„The purpose of this Regulation is to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users."

In our opinion, the regulation in question will primarily have a supplementary nature in relation to competition law. Supplementary character is mainly articulated by the fact that, according to the wording of the regulation, it serves to protect a different legal interest than competition law.[25] It is also necessary to emphasize that the regulation sets specific obligations exclusively for the category of gatekeepers and will focus on the area of digital markets. The concept of the Digital Markets Act is based on the so-called "one size fits all approach", which means that regardless of the diversity of business models of the gatekeepers, their structures or characteristics, all obligations under Art. 5 and 6 of the Act imposed on all gatekeepers and are not customized specifically to the nature of the business model or subject of the platform's activity in any way.

The most significant question is how the Digital Markets Act connects the issue of competition law and personal data protection. The European legislator already expresses this in the preamble, stating that "gatekeepers often directly collect personal data of end users for the purpose of providing online advertising services when end users use third-party websites and software applications. Third parties also provide gatekeepers with personal data of their end users in order to make use of certain services provided by the gatekeepers in the context of their core platform services, such as custom audiences. The processing, for the purpose of providing online advertising services, of personal data from third parties using core platform services gives gatekeepers potential advantages in terms of accumulation of data, thereby raising barriers to entry. This is because gatekeepers process personal data from a significantly larger number of third parties than other undertakings."[26]

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[25] Point 11 of the Preamble of the Digital Markets Act.

[26] Point 36 of the Preamble of the Digital Markets Act.

From our point of view, this is also reflected in the conception of individual duties and prohibitions for the gatekeepers, contained in Article 5 and article 6 of Digital Markets Act, for instance mainly in article 5 paragraph 2 relating to linking, processing or use of personal data, stipulating that the user must grant consent to such use of his data according to the GDPR regulation provisions, and unless the user gives or withdraws such consent, the gatekeeper may not address a request for consent to the user more often than once in one year.

As can be seen from the wording of the Digital Markets Act itself, the majority of actions disrupting competitiveness in the environment of digital markets consist in the abuse of a dominant position. In our previous paper we also pointed out, that the Digital Markets Act would be able to "capture" for example actions such as those discussed in the case of Facebook and Bundeskartellamt (specifically referring to Art. 5 (a) of the proposal for regulation the Digital Markets Act).[27]

Currently, the regulation (Digital Markets Act) is already in its final form, and in a selected part also in effect.[28] In this regard, we also refer to Art. 5 para. 2 (a) of Digital Markets Act, which prohibits gatekeepers from processing, for the purpose of providing online advertising services, the personal data of end users using third-party services that use its basic platform services without the users' consent.

Establishing quantitative and qualitative criteria for the creation of an aggregate of gatekeepers is an effective way, in contrast to the often-lengthy assessment of the presence of a dominant position of a certain platform, while as we mentioned above, a higher market share does not automatically mean a disposition with a dominant position. The Commission will therefore no longer have to examine whether the said platform has a dominant position at all and subsequently assess whether it has committed an abuse of a dominant position. It will be enough that the platform is in the position of the gatekeeper, which is quite clearly defined. Gatekeepers are required to fulfil the relevant obligations set out in the regulation, or to refrain from certain actions. Since this regulation is ex ante in nature, the entire investigation process will become much more efficient and rapid.

6. CONCLUSION

The objective of this paper was to assess the interaction between personal data protection regulation and competition rules, more precisely, whether the competition authority is entitled to apply the relevant personal data protection regulation. In

[27] Rudohradská, S.; Hučková, R.; Dobrovičová, G., *op.cit.,* note 3, pp. 489-508.

[28] In this regard, we refer to Art. 54 of Digital Markets Act regulating the effectiveness of the regulation and its application.

line with the arguments presented in this paper, we believe that the competition authority is not entitled to determine, by itself, whether the actions of a certain subject are or are not in accordance with GDPR (in the absence of any competition law context), as it lack the necessary competence in this regard. However, when the competition authority analyses the actions of a subject with dominant position on the market who may have abused it, it should be entitled to comment on the analysed practices that may violate legislation in certain areas (including GDPR). As the majority of digital platforms (although not all) operate without respect to state borders, it may be difficult to harmonize conditions for their operation (e. g. consumer protection rules, notwithstanding competition and personal data protection rules). Moreover, these platforms may also be subject to investigations realised by the competent authorities from different countries and be, concurrently, investigated for the practices that have violated numerous regulations. In this case, the corresponding authorities should be able to cooperate, on a common platform, and communicate with each other. Currently, the basis for such a cooperation could be Article 4 (3) TFEU that established the principle of loyal cooperation. In the field of competition, a European Competition Network is also active.

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