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# THE INTERPLAY BETWEEN THE ESSENTIAL FACILITY DOCTRINE AND THE DIGITAL MARKETS ACT: IMPLICATIONS TO BIG DATA<sup>1</sup>

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## Abstract:

Today many companies are collecting and extracting data from different sources to help them with their strategic decision-making. Big data is the basis of data-driven economy, bringing significant competitive advantage and market power to companies who are able to harness and exploit its potential. Digital transformation of markets and economy challenges the existing structures of consumer protection, data protection and competition law. Data is a commodity as well as a strategic asset. The term Big data refers to the amount of data that cannot be processed in a short time by traditional informatics devices. Undertakings possessing a large scale of different data have a competitive advantage.

Possible application of the essential facility doctrine to Big data issues has not attracted much attention in competition assessment. This paper will try to fill the gap by providing some insights into competition and data issues. Also, the question whether data can be considered under the essential facility doctrine will be analysed. Furthermore, it will be shown that essential facility criteria are applicable, although there is room for some adjustments to data markets. The last part of the paper will scrutinize the Digital Markets Act that tries to shed some light and clear some possible problematic behaviour of the so-called gatekeepers. The regulation leaves the conventional approach and shortens the process of tackling possible anti-competition concerns. It regulates only those undertakings that have significant impact on market and the possibility to become an important gateway in the future. When the status of a gatekeeper is established in accordance with all prescribed criteria, there will be no need to show that the elements of the essential facility doctrine are fulfilled. The essential facility doctrine will still be relevant to undertakings that are not designated as gatekeepers.

**Keywords:** Big data; EU competition law; essential facility doctrine; Digital Markets Act; gatekeeper

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## INTRODUCTION

Technical revolution, digitalization, improvement of Internet technologies, and advances in Artificial Intelligence convey numerous benefits together with risks and concerns to the usual ways of conducting business. The role of innovation in competition cases has been challenged over the years. The dilemma is whether competition law is capable of adapting to new developments and innovations. It all centres on the flexibility of the existing rules that are able to take into consideration specificities of digital markets. It will be shown that some traditional concepts need to be improved and tailored to economic developments. Today we are witnessing some improvements in mutual understanding of competition and innovation concepts. Their interchangeability and mutual influence has been described by two different approaches. The first one is more or less the approach of the European Commission and does not analyse innovation arguments in competition assessment. A market screen and an undertaking's behaviour are scrutinized, while non-price considerations, such as quality and innovation, are left aside. The opposite view sees innovation as essential part of the competition evaluation in order to justify or condemn certain competition infringement. Although innovation has numerous benefits to the whole society, undertakings invest in the development of innovative products which attract new users.<sup>4</sup> Competition enforcers are confronted with challenges as on the one side they have to protect the traditional concepts of the market and on the other side open the market for new technologies and innovations. There is always the need to find the balance between the market development, flourishing of new products and services, and the protection of existing rules without suppressing innovation. With the emergence of innovative products that enhance consumer welfare, existing practices and norms are being deteriorated, especially with flow of Big data and data analytics. During the years there have been attempts to pay more attention to various data accumulation and to try to find new tools in its assessment.<sup>5</sup>

The paper will try to fill the gap by providing some insights into competition and data issues, particularly the question whether access to data can be considered under the essential facility doctrine. The open queries will be analysed in comparison to the newly Digital Markets Act<sup>6</sup> that tries to shed some light and clear some possible problematic behaviour of the so-called gatekeepers. Before going into deeper scrutiny, it is necessary to define the term Big data.

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<sup>4</sup> See: POŠČIĆ, A. – MARTINOVIĆ, A. Rethinking Effects of Innovation in Competition in the Era of New Digital Technologies. *InterEuLawEast*. 2020, Vol. VII, No. 2, pp. 245–261.

<sup>5</sup> ROBERTSON, V. Antitrust Law and Digital Markets: a Guide to the European Competition Law Experience in the Digital Economy. In: KURZ, H. D. – SCHÜTZ, M. – STROHMAIER, R. – ZILIAN, S. S. (eds.). *The Routledge Handbook of Smart Technologies: an Economic and Social Perspective* [online]. New York: Routledge, 2022, Chapter 21, p. 3 [cit. 2022-02-24]. Available at: <https://ssrn.com/abstract=3631002>.

<sup>6</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). *Official Journal of the European Union*. L 265, 12.10.2022.

## DEFINITION OF BIG DATA

Data is seen as a valuable asset that can bring a lot of benefits in terms of new products and services with increasing number of efficient companies.<sup>7</sup> Nowadays everything is just one click away. The digital platforms have been part of our everyday life. They are an instrument for our social interactions as well as shopping and working. A vast amount of data is collected and processed. This phenomenon is called Big data. There has not been a uniform definition accepted, however, various definitions have been proposed.

The main elements of Big data are summarised under the so called 4 V's: volume, variety, velocity, and value. Volume refers to the vast amounts of data that companies have collected, as facilitated by the decreased costs of data collection, storage and analyses.<sup>8</sup> Duhigg stresses that data trail begins before one's birth and lasts and increases until one's death.<sup>9</sup> Variety refers to different types of data collected. Velocity means the speed at which Big data is generated and is closely associated with time frame, as with time the value decreases. Volume, variety and velocity increase the value of data. Some authors add two more features: veracity and valence.<sup>10</sup> Veracity means truthfulness of data. Valence shows the level of connections between different data.<sup>11</sup> Definitions are focused on "large dimension of datasets and the need to use large scale computing power and non standard methods to extract value therefrom".<sup>12</sup> Put in simple words Big data refers to the amount of data that cannot be processed in a short time by traditional informatics devices. Here, algorithms come to scene. They have to process, storage, and analyse it in order to have certain value. Small undertakings do not have sufficient tolls to process huge amounts of data in a short time. Undertakings possessing a large scale of different data may have a competitive advantage. The mass of stocked, anonymous data has certain economic value.<sup>13</sup> The issue is: can we force those companies to open their data sets to new entrants?

## APPLICATION OF THE ESSENTIAL FACILITY DOCTRINE

The essential facility doctrine refers to the obligation of an undertaking in dominant position owning an indispensable facility to grant access to that facility to its

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<sup>7</sup> Report from the Commission to the Council and the European Parliament: Final report on the E-commerce Sector Inquiry, Brussels, 10.5.2017, COM(2017) 229 final.

<sup>8</sup> STUCKE, M. E. – GRUNES, A. P. *Big Data and Competition Policy*. Oxford: Oxford University Press, 2016, p. 17.

<sup>9</sup> *Ibid.*, reference 25, p. 19.

<sup>10</sup> GALLO CURCIO, M. *Big data, abuse of dominance and the enforcement of article 102 TFEU in digital markets: the Google Cases* [Bachelor's Degree Thesis]. Roma: Luiss Guido Carli, 2020. In: *Luiss Biblioteca: LuissThesis* [online]. [cit. 2022-02-24]. Available at: <http://tesi.luiss.it/27445/>.

<sup>11</sup> *Ibid.*

<sup>12</sup> GAMBARO, M. Big Data Competition and Market Power. *Market and Competition Law Review*. 2018, Vol. 2, No. 2, pp. 99–122.

<sup>13</sup> INGLESSE, M. *Regulating the Collaborative Economy in the European Union Digital Single Market*. Cham: Springer, 2019, p. 138.

competitors. Other undertakings need access to such a facility owned by a dominant undertaking in order to produce their products or perform services. It puts pressure on exclusionary conduct of some dominant undertaking that denies access to certain infrastructure or other form of assets. The doctrine has been developed in the context of infrastructure but also in the sphere of intellectual property rights.<sup>14</sup>

The first decision in this area was *Sea Containers v. Stena Sealink*,<sup>15</sup> where an essential facility has been defined as “a facility or infrastructure without access to which competitors cannot provide services to their customers”.<sup>16</sup>

Digital market with various collected data opens vast opportunities. Data can be considered a valuable asset that permits an undertaking to compete on the relevant market or to develop its own products or services. The dilemma is: can we apply the essential facility doctrine to situations regarding data access? Can a refusal of access to data be qualified as an abuse of a dominant position? Do we have to modify the existing criteria or maybe abandon the doctrine?

Possible application of the essential facility doctrine to Big data issues has not attracted much attention in competition assessment. We believe that its basics are still relevant for possible data access cases. Although we are referring to the “essential facility doctrine”, this phrase itself has not been mentioned in the CJEU’s case law. The CJEU simply speaks of “refusal to supply” or “refusals to deal”.<sup>17</sup> In our situation, the essential facility doctrine would entail granting access to data to other competitors in order to offer equal opportunities to every undertaking. It is called “portability of data”. Competition regulators pay increasing attention to it. We can easily imagine a situation where a small undertaking cannot access data owned by a dominant undertaking.<sup>18</sup> The data portability has not been subject to CJEU scrutiny yet.

Although data access situations have some peculiarities, the usual elements of the essential facility doctrine may still be appropriate. The conditions should be interpreted strictly. Some elements are applicable, although there is room for some adjustments to data markets. The situations may be diverse but we shall focus on the one where data as an input is really difficult to obtain or to develop on its own. In such cases, the refusal to give access to data is liable to trigger the conditions for the application of the classical essential facility doctrine. It is therefore necessary to recall the conditions for the essential facility doctrine developed in the case law.

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<sup>14</sup> GRAEF, I. Rethinking the Essential Facilities Doctrine for the EU Digital Economy. *TILEC Discussion Paper* [online]. 2019, No. DP2019-028, p. 1 [cit. 2022-02-24]. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3371457](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3371457).

<sup>15</sup> Commission Decision of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689 – Sea Containers v. Stena Sealink – Interim measures). *Official Journal of the European Union*. L 015, 18.1.1994, pp. 0008–0019.

<sup>16</sup> See DACAR, R. Is the Essential Facilities Doctrine Fit for Access to Data Cases? *CYELP*. 2022, Vol. 18, No. 1, pp. 61–81.

<sup>17</sup> GRAEF, *c. d.*, p. 2.

<sup>18</sup> CHIRITA, A. D. The Rise of Big Data and the Loss of Privacy. In: BAKHOUM, M. et al. (eds.). *Personal Data in Competition, Consumer Protection and Intellectual Property Law*. MPI Studies on Intellectual and Competition Law, Vol. 28. Cham: Springer, 2018, p. 159.

The essential facility doctrine is part of Article 102 TFEU<sup>19</sup> assessment. According to the well-established case law of the CJEU, there are five elements for determining whether a refusal to supply amounts to an abuse: is there a refusal to supply, does the accused undertaking have a dominant position in an upstream market, is the product indispensable to someone wishing to compete in the downstream market, would a refusal to grant access lead to elimination of effective competition in the downstream market, and can the refusal to supply be objectively justified?<sup>20</sup>

Although all the elements have to be determined in order to apply the essential facility doctrine, we find the indispensability test interesting. It was developed in the Bronner<sup>21</sup> case. The case confirmed that a refusal to supply may amount to an abuse of dominant position where the input is incapable of being duplicated or it is extremely difficult to duplicate, especially where it is physically and legally impossible and economically not feasible.<sup>22</sup> The case concerned denial of access to a newspaper home delivery scheme. Mediaprint had developed a home-delivery scheme for newspapers and it refused access to the newspaper published by Oscar Bronner. The Court found that the indispensability element has not been satisfied as other alternatives have been available for the delivery.<sup>23</sup> According to Graef, it is a rather restrictive approach but it can be justified. As argued by the Advocate General in this case, “*retaining facilities which the company developed for its own use is generally pro-competitive and in the interest of consumers, whereas granting access to the same facilities too easily to other competitors might disincentivise companies to develop new products or invest in new facilities in the long term*”.<sup>24</sup> The duty to grant access may accelerate competition in the short term but in the long term may put pressure on innovation process.

The famous Microsoft case<sup>25</sup> is also worth mentioning. Several elements attracted much attention but one that is relevant for us is the element of interoperability. The usual standards have been applied but the threshold for the fulfilment of some criteria has been lowered. The facts of the case are complicated but we shall stress only one element that can be of particular concern to us. The Sun, the undertaking that has been active in the downstream market for work group server, needed access to the interoperability information in order to allow its services to communicate to Microsoft’s dominant PC operating system Windows. The General Court followed the Commission in applying lower standards for the fulfilment of essential facility conditions. With regard to the indispensability requirement, the General Court explained that in order to compete viably on the market it is necessary for competitors to be able to interoperate with Windows

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<sup>19</sup> Treaty on the Functioning of the European Union (consolidated version 2016). *Official Journal of the European Union*. C 202, 7.6.2020.

<sup>20</sup> WHISH, R. – BAILEY, D. *Competition Law*. Oxford: Oxford University Press, 2018, p. 716.

<sup>21</sup> CJEU, C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.*, ECLI: EU:C:1998:569.

<sup>22</sup> WHISH – BAILEY, *c. d.*, p. 719.

<sup>23</sup> Oscar Bronner, para. 43.

<sup>24</sup> See GRAEF, *c. d.*, p. 4; and Opinion of Advocate General Jacobs on Case C-7/97 Oscar Bronner, para. 57.

<sup>25</sup> Case T-201/04, *Microsoft Corp. v. Commission of the European Communities*, ECLI:EU:T:2007:289.

“on an equal footing”.<sup>26</sup> The court later stated that it is not required that all competition on the market is eliminated as a result of a refusal to license. It is enough to show that the refusal is liable, or is likely to, eliminate all effective competition on the market.<sup>27</sup> The Bronner test requires that access is not indispensable if there are alternatives available and the General Court added that it is not necessary to show that all competition on the market is eliminated. The latter interpretation could suggest that we are witnessing a more flexible approach to refusals to deal/supply.

Further development can be found in the recent *Slovak Telekom and Deutsche Telekom*<sup>28</sup> case, where the Court and the General court among other things discussed the indispensability test. They concluded that it is not a necessary condition. The facts of the case are as follows. The case started in 2014 when the European Commission fined Deutsche Telekom and its Slovak subsidiary Slovak Telekom for abuse of dominant position.<sup>29</sup> Slovak Telekom, the incumbent telecom operator in Slovakia, refused to provide alternative operators with fair access to its local loop network and engaged in margin squeeze that prevented the entry of new competitors. The Commission’s decision was challenged before the General Court. The General Court dismissed the argument that the Commission erred in failing to demonstrate that Slovak Telekom’s local loop network was indispensable for competitors. Later the Court<sup>30</sup> dismissed the appeals against the General Court’s rulings. The Court confirmed that the General Court had rightly rejected the argument that the Commission was required to establish that access to local loop network was indispensable before concluding on the potential abuse. The Court distinguished two possible situations of abusive behaviour regarding the infrastructure: no access and unfair access. Regarding the first, it reaffirmed the previous established conditions that need to be fulfilled: the refusal is likely to eliminate all competition on the part of the rival requesting access, the refusal cannot be objectively justified, and the access to infrastructure is indispensable for the rival to carry on its business, in that there is no actual or potential substitute for the infrastructure.<sup>31</sup> The last condition sets extremely high standard. It is probably because the duty to grant access can have implications on companies’ property rights and may have negative impact in the long term in terms of affecting future investments and developing competing facilities.

The Court concluded that the Slovak Telekom was required to give access to rival companies under the existing telecommunications framework so the General court did not err in law when finding that the Commission was not required to demonstrate indispensability for the qualification of the practice as abuse.

There are two possible filters for the application of the Bronner criteria. One relates to the situation where the access to the facility is mandated by law, and the other where practice concerns a total refusal to make a facility available. The first one is covered

<sup>26</sup> Microsoft, para. 421.

<sup>27</sup> Microsoft, para. 563. See also GRAEF, *c. d.*, p. 5.

<sup>28</sup> T-851/14, *Slovak Telekom, a.s. v. European Commission*, ECLI:EU:T:2018:929.

<sup>29</sup> Commission decision of 22 June 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (COMP/39.525 – Telekomunikacja Polska).

<sup>30</sup> C-165/19 P, *Slovak Telekom, a.s. v. European Commission*.

<sup>31</sup> *Ibid.*, para. 55.



by the relevant legal framework. There is no need to apply the Bronner criteria as the law mandates access to certain infrastructure. The latter situation is the one that was analysed above and includes actual refusal. Circumstances where access is not totally refused are left out. The competitor can gain access to data but with some difficulties or restrictions. The Bronner criteria will be relevant only to cases including refusals to make infrastructure accessible to competitors excluding those covered by legal mandate and those where the access is allowed but with some difficulties.<sup>32</sup>

It is worth making a distinction between the competition *in* the market and competition *for* the market. The essential facility doctrine can encourage competition in the market. On the other side, without the duty to deal the competition for the market will be intensified. There is not enough literature explaining possible consequences concerning competition for the market. Presently, reference is given to the competition in the market. In this situation we are faced with a dominant position that will last as long as there are no new competitors wishing to enter the market. It will be especially relevant for the digital markets that are highly concentrated with strong network effects and possible leveraging effects.<sup>33</sup>

Exclusion of effective competition and new product requirement have to be reversed in order to fit better to digital markets.<sup>34</sup> The first situation is the one where the facility holder wants to reserve the downstream market for itself and denies competitors access to the input. But what if the holder of essential facility does not have the motivation to enter the downstream market or it will only potentially develop such aspirations in the future? This could be particularly interesting for the digital markets as very often competitors need access to data to enter the market where the dominant firm is not active. Does it mean that the dominant undertaking can refuse to give them access to such products? Usually, it is the new market that is interesting. Strict application of the requirements of the essential facility doctrine would mean that the first element is not satisfied. It will be relevant only in the hypothetical situation if the dominant undertaking holder of the essential facility decides to be engaged in the downstream market in the future. In this scenario we can think of a possibility of denying access. The main question is whether the essential facility holder reserves the downstream market to itself by denying a competitor access to the input. It all depends on the future plans of the essential facility holder, i.e. whether it has an incentive to be active in the new market. We believe that the essential facility should be applied also to previous situations. The new product requirement could also be problematic. Graef holds that the requirement of the new product should remain applicable in order to keep up with new developments in new markets. It means that the competitor seeking access should not be obliged to show that it will introduce a new product with the data received. The digital markets are characterised with high tipping effects. It is proposed to apply more flexible approach

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<sup>32</sup> MANDRESCU, D. Online platforms and the essential facility doctrine – a status update following Slovak Telekom and the DMA. In: *lexxion: The Legal Publisher* [online]. 6.4.2021 [cit. 2022-02-24]. Available at: <https://www.lexxion.eu/en/coreblogpost/online-platforms-and-the-essential-facility-doctrine-a-status-update-following-slovak-telekom-and-the-dma/>.

<sup>33</sup> GRAEF, *c. d.*, p. 9.

<sup>34</sup> *Ibid.*, p. 20 and on.



to digital markets with external market failures. The new product requirement can be interpreted to include any asset involved.<sup>35</sup>

We have to have in mind that the essential facility doctrine has been developed before emergence of tech giants that could restrict third party access to their platforms or data. Today we are witnessing an ever-expanding need of competitors to access the platform or the data generated by the platform in order to compete on the market.

## ADOPTION OF THE DIGITAL MARKETS ACT

Over the last years the European Commission is willing to promote competitive digital economy. A lot of initiatives are underway with different acts enacted. In March 2022 the Commission introduced the Digital Markets Act in order to tackle specific practices of the so-called gatekeepers.<sup>36</sup> It is supposed to be one of the crucial documents of the digital markets. The idea is to regulate large tech companies that have strong economic power.

Digitalization has enhanced the position of some undertakings that control whole ecosystems where it is extremely difficult or almost impossible to penetrate. The digital market is characterised by high investment costs with high entry barriers. It is the principle “winner takes it all”. Besides controlling access to their platforms, tech giants become inevitable partners for numerous small undertakings and consumers. The data plays an important role, as despite having and developing new ideas, access to data for small undertakings is sometimes precluded or made difficult. Usually, the service offered by the platform is intermediation in matching the platform users in marketplace. Besides intermediation, it usually provides some services that allow it to build its own ecosystem that forecloses alternative undertakings. As some authors rightly point out, the platform sets the rule of the scene and plays the role of the player and the referee at the same time.<sup>37</sup>

In order to promote proper functioning of the internal market, the EU enacted a regulation in order to ensure contestability and fairness for the markets in the digital sector, especially for business users and end users of core platform services provided by gatekeepers.<sup>38</sup> The regulation leaves the conventional approach and shortens the process in tackling possible anti-competition concerns.<sup>39</sup> As it will be later explained, as soon as gatekeepers are identified they have to satisfy a set of defined obligations.

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<sup>35</sup> Ibid., pp. 21 and 22.

<sup>36</sup> The Regulation entered in force on 1 November 2022. However, it will be applicable from 2 May 2023. Potential gatekeepers will have time until 3 July 2023 to register their core platform services with the European Commission. The European Commission will have 45 days to assess whether the thresholds are met in order to designate a gatekeeper. After that, the gatekeeper will have to comply with the obligations until 6 March 2024.

<sup>37</sup> PODSZUN, R. – BONGARTZ, P. – LANGENSTEIN, S. The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers. *EuCML*. 2021, Vol. 7, No. 2, p. 61.

<sup>38</sup> Preamble of the Regulation, para. 7.

<sup>39</sup> PODSZUN – BONGARTZ – LANGENSTEIN, *c. d.*, p. 61.

The Regulation regulates only those undertakings having significant impact on market and having the possibility to become an important gateway in the future.

It has special rules for platforms that are considered to be gatekeepers. The *rationale* is to complement the existing competition rules and to cover situations which until now have been left out. The Regulation does not oppose traditional competition mechanisms. It takes inspiration from the competition cases and posed problems.<sup>40</sup> The Regulation explicitly states that it is without prejudice to Articles 101 and 102 TFEU (Article 1 (6)). It means, when the undertaking does not satisfy conditions to be classified as gatekeeper, the Treaty articles will still be relevant. During the years and especially with the emergence of digital markets, some short-comings have emerged. One is the definition of the relevant market and process of a market screen with difficulties of defining market shares. Digital transformation suggests new situations and possible difficulties not always connected to dominant undertaking or susceptible agreements or concentrated practices.

The main difference between the mechanisms envisaged by the Regulation is the timing. The Regulation is an *ex-ante* tool, while the “old” competition rules are *ex-post*. The Treaty articles are based on an effects-based analysis with a flexible clause, while the Regulation lists strict prohibition. The Regulation aims to tackle potential competition problems, some of which remain unresolved.<sup>41</sup> Despite the difference in approach, the two instruments complement each other.

The Regulation covers eight platform services. It is targeted to four tech giants called GAFAs<sup>42</sup> but also to other subjects. Some of them can have a bottleneck position. To be qualified as a gatekeeper, both qualitative and quantitative condition must be fulfilled.

The gatekeeper means an undertaking providing core platform services. The core platform services cover ten services (Article 2 (2)).<sup>43</sup> Those are basically services covered primarily by big tech companies. Some electronic communications network and streaming services as well as business to business industrial platforms are not included.<sup>44</sup>

Three conditions need to be satisfied in order for an undertaking to be designated as a gatekeeper: the undertaking has a significant impact on the internal market; it provides a core platform service which is an important gateway for business users to reach end users; and it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future (Article 3 (1)). Those are qualitative criteria that have to be supported by quantitative criteria. The first condition will be satisfied if the undertaking achieves an annual Union turnover equal to

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<sup>40</sup> KOMNINOS, A. The digital Markets Act and Private Enforcement: Proposals for an Optimal System of Enforcement. In: CHARBIT, N. – GACHOT, S. (eds.). *Eleanor M. Fox: Antitrust Ambassador to the World: Liber Amicorum* [online]. New York: Institute of Competition Law, 2021, p. 426 [cit. 2022-02-24]. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3914932](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914932).

<sup>41</sup> Ibid.

<sup>42</sup> RENDA, A. *Can the EU Digital Markets Act Achieve its Goals?* [online]. The Digital Revolution and the New Social Contract series. Centre for the Governance of Change, IE University, 2022, p. 4 [cit. 2023-02-24]. Available at: <https://www.ie.edu/cgc/news-and-events/news/new-policy-paper-eu-digital-markets-act-achieve-goals/>.

<sup>43</sup> Those are: online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services.

<sup>44</sup> PODSZUN – BONGARTZ – LANGENSTEIN, *c. d.*, p. 63.

or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States. Further, the quantitative criteria specify that such an undertaking provides a core platform service which in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10,000 yearly active business users established in the Union (Article 33 (2)). These thresholds are not that high. There is the so-called anxiety of overinclusion.<sup>45</sup>

The undertaking providing core platform services has a possibility to present sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds listed before, due to some special circumstances in which the relevant core platform service operates, it does not satisfy necessary requirements (Article 3 (5)). The Commission is empowered to investigate and designate as a gatekeeper, any undertaking providing core platform services even where the thresholds are not met. There is a possibility for the Commission to open its own market investigation for the purpose of examining whether an undertaking providing core platform services should be designated as a gatekeeper or in order to identify the core platform services of the gatekeeper.

A gatekeeper can have a dual role. It can provide core platform service to some business users and also be a competitor to the same users on similar or same services to the end user. The gatekeeper can exploit its dual role and gather data from its business users or end users based on own searches or searches undertaken on other downstream platforms. The Regulation intends to prevent gatekeepers from using their aggregated and non-aggregated data including personal data. The value of platform increases with the number of users. The idea is to allow other undertakings to have access on fair, reasonable, and non-discriminatory terms. It should apply to every practice that is generated by an undertaking designated as a gatekeeper. The gatekeepers should ensure free and effective interoperability to an operative system that is used for its services to others under equal conditions.

The main and only regulator is the Commission that decides whether an undertaking providing core platform services should be designated as a gatekeeper. It investigates and decides if the undertaking fulfils all qualitative criteria for being identified as a gatekeeper. After being designated as a gatekeeper, it has to comply with the obligations listed in Articles 5 and 6.

The gatekeeper shall comply with the obligations within six months after a core platform service has been listed in the designation decision. The Commission is entitled to reconsider, amend or repeal a decision especially, if there is a change in the facts on which the decision was based or it was based on incomplete or incorrect information. Every three years the Commission will reassess whether the gatekeeper satisfies those requirements as well as publish and update the list of core platform services that need to comply with obligations listed in the Regulation (Article 4).

Everything is in line with an *ex ante* assessment based on market investigations. The regulation has strict obligations for gatekeepers. It is interesting to note how the

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<sup>45</sup> Ibid., p. 64.

Commissioner Vestager compared the introduction of the regulation with the introduction of traffic lights in some American cities in order to bring order to a previously chaotic traffic system. It is supposed to tame the tech-giants.<sup>46</sup>

The Regulation is seen as a means in fulfilling some gaps and a way to abandon the traditional outdated system that did not take into consideration the special power of some big techs. The system differentiates from the previous approach in several ways. The broad definition of possible abuses is replaced by very specific rules. The work of the Commission will become easier as it does not need to apply economic assessment every time. It only has to prove that quantitative and qualitative criteria are fulfilled. The Regulation is based on two blacklists. Due to the size restraints, it is not possible to list and elaborate on every obligation but basically the list reminds familiar practices of which some are still disputed.<sup>47</sup> It is really difficult to manage the long list provided by the Regulation. The list is influenced by some unresolved cases and is more or less case by case structured. It includes so many different practices. Some of them oblige gatekeepers not to process personal data of end users using services of third parties that make use of core platform services of gatekeepers for the purpose of online advertising or combine personal data from any further core platform service. While the list in Article 5 is self-executable,<sup>48</sup> Article 6 provides a black list with the possibility to be further specified.

The list includes random practices, some still dubious and unresolved. For example, one practice refers to the combination of data from different sources, which is reminiscent of an unresolved Facebook case, or anti-steering rules that are under investigation. If a list is too closely built on specific existing cases, it may not be general and abstract enough to fit other cases that might arise in the future. In any case, a long and too complex list could lead to many misinterpretations and misunderstandings in practice, thus failing to achieve its purpose. A viable alternative would be to refer to the more general business practices, instead of enumerating possible factual situations with too much details.

Despite possible difficulties in reading and understanding the Regulation, it is welcomed as from now on, the defining of a relevant market, determining market shares and other elements showing dominance for the gatekeeper will be unnecessary. If we have a gatekeeper that fulfils all the criteria, there will be no need to show that the elements of the essential facility doctrine are fulfilled. The essential facility doctrine will be relevant to undertakings that are not designated as gatekeepers.

## CONCLUSION

With the emergence of Big data, competition regulators might be confronted with possible new abuses. Big data is the basis of data-driven economy, bringing significant competitive advantage and market power to companies who are able to harness

<sup>46</sup> Ibid., p. 60 and on.

<sup>47</sup> RENDA, *c. d.*, p. 5

<sup>48</sup> PODSZUN – BONGARTZ – LANGENSTEIN, *c. d.*, p. 61.

and exploit its potential. Given their possible effect on the competitive structure of the market, the use of Big data and its underlying technology requires the involvement of competition regulators as well. There are some reasons why competition authorities should be concerned about abuse of personal data in digital markets. One relates to the economic value of personal data to undertakings. Data becomes a new currency and a strategic asset. Despite forming part of data protection law, an undertaking can be condemned for abusing its dominant position by exploiting data about consumer preferences and their private life.<sup>49</sup>

Big data can create information asymmetry with negative implications on specific sectors and society as a whole. We have intellectual, consumer, and protection of privacy regulations that are fit for a particular purpose. Data alone is not the problem. What is important is the way undertakings use it. A large amount of data boosts companies' position but it is not enough just to possess a huge amount of data, it all depends on the undertaking's capability in analysing and using it.

Another problem might result from the access to data. We are confident that current competition tools are adequate and ready to deal with possible denial of data. With the classic essential facility doctrine and the introduction of the new Regulation those situations should be diminished. If we have designated gatekeepers there is no need to go into an economic benefit analysis.

There is a difference in the application of the essential facility doctrine and the Regulation, but we believe that those mechanisms can co-exist perfectly. We are facing a shift of focus from *ex post* to *ex-ante* assessment. The Regulation is seen as a regulatory tool that tackles new practices that may be too complex for a traditional competition investigation. The idea to tailor rules to specific practices is welcome but with the caveat that there always has to be place for general principles. We must not forget that the criteria set by the courts under the essential facility doctrine will still be applicable in situations where we do not have designated gatekeepers.

We believe that we need all the instruments to ensure consumer welfare, economic freedom, fairness of the market, and privacy. It is important to insist on mutual collaboration and coordination of competition and data protection regulators. The Regulation is part of the Commission's endeavour to equip Europe for digital age and to be an active actor centring on data, technology, and innovation.

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<sup>49</sup> CHIRITA, *c. d.*, pp. 157 and 158.