

REVITALISATION OF THE ESSENTIAL FACILITIES DOCTRINE IN EU COMPETITION LAW

The complementarity with the new Digital Markets Act

Abstract

In recent years, platform economy has been raising competition concerns around the globe. In the European Union, the European Commission and the National Competition Authorities actively enforced Article 102 TFEU, sanctioning companies for abuse of a dominant position. Within the various theories of harm presented and mostly upheld by the Court of Justice, a common point is the ability of dominant undertakings to leverage, due to owning a platform, their market power in adjacent markets. This article therefore explores whether the Essential Facilities Doctrine should be revitalised to preserve a competitive structure and avoid exploitation of users. Moreover, the entry into force of the *Digital Markets Act* led researchers to analyse similarities with the doctrine and their possible complementarity once the Regulation will start applying in 2023. With a view to this possibility, concerns as to respect of the fundamental principle of *ne bis in idem* have been underlined, trying to clarify the future Competition Law landscape.

JEL CLASSIFICATION: K21

SUMMARY

1 Introduction - 2 The Essential Facilities Doctrine development and the *Bronner* test - 3 The doctrine's applicability to digital markets - 4 The new *Digital Markets Act* and the Essential Facilities Doctrine: similarities and complementarity - 4.1 Identification of gatekeepers and their core platform services - 4.2 Gatekeepers' obligations and the Essential Facilities Doctrine - 4.3 Revitalisation of the Essential Facilities Doctrine and implementation of the DMA: *ne bis in idem* principle - 5 Conclusions

1 Introduction

In recent years, the fast-growing platform economy captured the attention of the Antitrust Authorities, which intervened to restore competition several times in the context of abuse of a dominant position.¹ Specifically, the European Commission, under the guidance of Margrethe Vestager, sanctioned the most powerful US companies, notably GAFAM,² for various anticompetitive conducts considered to violate the principle of

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¹ Article 102, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326.

² This acronym refers to Google, Apple, Facebook (Meta), Amazon and Microsoft.

competition *on the merits*.³ These cases have been at the core of a heated debate among antitrust lawyers for several reasons. Firstly, they considered the innovativeness of the market definition in digital markets. Notably, their peculiarity leads Competition authorities to consider, in their investigation, features such as the various market facets, the networks effects, the economies of scale and scope, moving away from a traditional definition of market.⁴ Secondly, the EU Commission presented new theories of harm, for instance the so-called self-preferencing in *Google and Alphabet v. European Commission* (Google Shopping),⁵ in order to re-establish market competition. However, all cases have in common that owning a platform enables dominant undertakings to maintain and increase their market power in upstream and downstream markets. For this reason, a revitalisation of the Essential Facilities Doctrine, developed in the United States in 1912 in *Terminal Railroads*,⁶ under the *refusal to deal* theory of harm, seems relevant. Indeed, it allows us to consider a platform as an Essential asset indispensable in order to compete in the market and, if necessary, to impose a duty to give access on the dominant undertaking. Moreover, a revitalisation of this doctrine reflects the lively debate around EU Competition Law goals: specifically, whether social values such as fairness and equality should be considered, as frequently evoked by the European Competition Authorities.⁷ The new Regulation, which applies without prejudice to Article 102 TFUE, implies future intersection with the Essential Facilities Doctrine and its desirable enforcement. Consequently, an analysis of how the ex-ante regulation and the ex-post application of the Essential Facilities Doctrine might interact, considering recent developments in legal doctrine and case law, is the primary goal of this article.

The paper is structured as follows: the second paragraph presents a recap of the Essential Facilities Doctrine development in European Union competition case law. The third paragraph analyses the doctrine's applicability in digital markets, considering recent

³ The concept of competition on the merits emerged in Court of Justice case law following the AKZO case. Since then, it helps Competition Authorities in investigating dominant undertakings' conducts. Specifically, the behaviour of dominant undertakings is considered part of the competition process when, by improving its efficiency and performance, it increases consumer welfare. Differently, the conduct is considered to infringe competition on the merits when the dominant undertaking's behaviour leads to exclusion of similarly efficient competitors, reducing consumer choice and violating Article 102 TFUE. See Case C-62/86, *Chemie BV v Commission of the European Communities* [1991] ECR I-03359; see also Aldo Frignani and Stefania Bariatti, *Treaty on Commercial Law and Public Economic Law, Competition Law in the EU* (vol 64, Cedam 2016) 275, 276.

⁴ For this reason, the EU Commission presented a draft for a revised Market Definition Notice that fits better with the features of the digital economy, especially giving emphasis to non-price elements and new guidance in relation to market definition in multi-sided markets. See also: Commission Notice on the definition of the relevant market for the purpose of Community competition law [1997] OJ C372/5, 13.

⁵ Case T-612/17, *Google and Alphabet v Commission (Google Shopping)* [2017] OJ C24/25.

⁶ *United States v Terminal Railroads Association* (1912), 224 U.S. 383.

⁷ The European School of Thought has always been moved by social values alongside economic goals. Specifically, even under the more economic approach and the implementation of a consumer welfare standard introduced in the United States after the Chicago revolution, EU Competition Law remained multi-valued, by protecting, as well as competitive process and market structure, also freedom of choice and fair distribution of wealth. See Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' Oxford Legal Studies Research Paper 17/2018 <<https://ssrn.com/abstract=3191766>> accessed 29 March 2023.

case law. The fourth paragraph introduces to the Digital Markets Act and its similarities with the Essential Facilities Doctrine.

2 The Essential Facilities Doctrine development and the *Bronner* Test

Companies are traditionally free to choose with whom, when and under which conditions to deal with competitors. However, in some circumstances, the ownership of certain assets can represent a competitive advantage over competitors going beyond competition on the merits. Specifically, these assets can be essential to compete in the downstream or upstream markets. The refusal to give access, or the unfair conditions to use them, can undermine the competitive process and lead to elimination of the actual and *potential* competitors.⁸ In the great majority of cases where the Essential Facilities Doctrine was applied, during the investigation, the Commission identified two relevant markets. The primary market, or upstream market, is where the undertaking owning the facility in question has a dominant position which grants it the possibility to act unilaterally without losing its market power, excluding competitors and exploiting consumers.⁹ Notably, in the upstream market, the dominant undertaking owns the facility to which the competitors want access; for instance, in *Commercial Solvents v Commission*,¹⁰ the cornerstone of the refusal to deal *theory of harm*, the dominant undertaking refused to provide the raw material (amino butanol) necessary to produce other chemical products. In this way, the dominant undertaking reserved for itself also the production of other products, *leveraging* its market power in the downstream markets.¹¹ Moreover, it is necessary to specify that two different situations can occur during the definition of the primary market. Firstly, the situation when the dominant undertaking supplied the product considered an essential facility for some time, then stops supplying it. In this case, the existence of a primary market is undeniable, as in *Commercial Solvents*.¹² In the second scenario, the dominant undertaking has always supplied the product together with the production outcomes. In this context, the Court of

⁸ EU Competition Law considers abusive not only practices excluding present competitors in the relevant market but also practices which, by rising the barriers to entry, might limit the entry of potential competitors. See 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' [2009] OJ C 45/7.

⁹ In the *United Brands Company* 1978 case, the Court provided the percentages of market share indicating a dominant position. Specifically, between 85% and 95% there's no doubt about the undertaking's dominant position; between 50% and 85% a dominant position is presumed, and this presumption is reversible; between 10% and 50% the Court made reference to other criteria, notably: the existence of a barrier to enter the market; the technological advantage of the undertaking in comparison to its competitors; down to 10% of market share there's a presumption of non-dominant position. See Case 27/76, *United Brands Company and United Brands Continentaal v Commission of the European Communities* [1978] ECR 1978-00207. Case 85/76, *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 1979-00461.

¹⁰ Cases 6-7/73, *Commercial Solvents v Commission* [1974] ECR 1974 -00223.

¹¹ Niamh Dunne, 'Dispensing with Indispensability' (2019) LSE Legal Studies Working Paper 15/2019 <<https://ssrn.com/abstract=3476938>> accessed 29 March 2023.

¹² *Commercial Solvents v Commission* (n 10).

Justice specified in *IMS Health*¹³ that the two markets can be identified in the two stages of production and the upstream market can be a hypothetical one.¹⁴ In defining the secondary market, it is fundamental to differentiate between the product and the one offered by the dominant undertaking in the primary market. However, in cases where the essential assets are not tangible products and protected by IP rights, different criteria have been elaborated by the Court of Justice to consider the refusal as an abuse of dominant position, notably the new product test established in *Magill*.¹⁵

The doctrine has been applied to different economic sectors, showing its versatility and utility to restore competition in both the relevant markets. Specifically, we can think of the cases *Port of Rødby*¹⁶ and *Sea Containers v Stena Sealink*,¹⁷ where the ports were the essential facilities; *Magill*,¹⁸ where the information about television programs was indispensable to provide the weekly guide, or *Telemarketing*¹⁹ in the advertisement market. During its development, the Court of Justice elaborated in *Bronner*²⁰ the conditions for the application of the doctrine, which, however, are not required under certain circumstances. Specifically, when, as held by the Court of Justice in *Slovak Telekom*²¹ and *Lithuanian Railways*,²² an *ex-ante* Regulation already prescribes the obligation of the dominant undertaking to give access to the facility, the remedies are not *structural* but consist in a cease-and-desist order from the conduct, and the facility is funded through public investments. Nevertheless, it is important to analyse the different conditions set by the Court of Justice in *Bronner*, as this enables us to assess their applicability to digital markets. On the other hand, it is necessary to remember that the recent EU Commission's practice and Court of Justice case law seem to treat them as a *lex specialis*.²³

Firstly, it is necessary that the asset is considered indispensable for competitors and its reproduction is not feasible. In this context, the input is indispensable when no actual or potential substitutes are present in the market, as stated in *Magill*;²⁴ differently, when an alternative is present the conduct cannot be considered abusive.²⁵ For instance, in

¹³ Case C-418/01 *IMS Health GmbH & Co KG v NDC Health* [2004] ECR I-05039.

¹⁴ Anastasios A Antoniou, 'The Essential Facilities Doctrine Before the European Community Courts: Ostracized or Expanded?' (2010) 11 *Cyprus and European Law Review* <<https://ssrn.com/abstract=1641125>>.

¹⁵ Joined Cases C-241/91 P & C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)* [1995] ECR I-743.

¹⁶ Decision 94/119/EC, *Port of Rødby* [1994] OJ L 55/52.

¹⁷ Decision 94/19/EC, *Sea Containers v Stena Sealink* [1994] OJ L 15/8.

¹⁸ *Magill*, (n 15).

¹⁹ Case 311/84 *Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)* [1985] ECR 1985-03261.

²⁰ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint GmbH & Co. KG* [1998] ECR I-07791.

²¹ Case C-165/19 P *Slovak Telekom v European Commission* [2021].

²² Case T-814/17, *Lithuanian Railways v European Commission* [2020].

²³ Pablo Ibáñez Colomo, 'Indispensability, and abuse of dominance: from Commercial Solvents to Slovak Telekom and Google Shopping' (2019) 10(9) *Journal of European Competition Law & Practice* 532.

²⁴ *Magill* (n 15).

²⁵ Maurits J Michon, 'The essential facilities doctrine requirement of indispensability and access to vertically integrated gatekeeper online platforms for downstream competitors' [2020] LL.M. thesis, Utrecht University.

Bronner, the Court of Justice argued that the delivery scheme to which the undertaking wanted access was not essential to carry out the economic activity. Indeed, the purpose here is to protect the “as efficient as the dominant undertaking”²⁶ competitors, which, even when operating on the same scale as the dominant undertaking, will not have the possibility to reproduce the facility, being, in that way, eliminated from the market because of the refusal.²⁷ The impossibility of reproducing the facility can principally be the consequence of three barriers to entry, notably the economic barriers, the legal barriers, and the technical barriers. Starting from the economic barriers, we should consider capital costs and economies of scale. Moreover, as the *IMS Health*²⁸ case shows, the possibility that consumers do not want to switch to another default option is considered an economic barrier.²⁹ Also, legal requirements for the reproduction of the facility can represent an insurmountable barrier: alongside the IP rights for which the Court of Justice established the *new product test*, we can also have cases where a government authorization is necessary to reproduce the facility, as in the *ARA*³⁰ case. Nevertheless, the indispensability test assumes relevance in cases where the remedies to restore competition, in line with the EU Commission’s decision in *Slovak Telekom*,³¹ are proactive or structural, for instance prescribing the terms under which the access to the facility should be given.³²

The second condition for the application of the Essential Facilities Doctrine is that the refusal to give access by the dominant undertaking leads to elimination of competition in the downstream market.³³ In *Commercial Solvents*,³⁴ the refusal to supply Zoja with the raw material leads to the elimination of the only producer of ethambutol in the internal market; in the same way, in *Telemarketing*³⁵ the undertaking was not able to provide its services without operating in the TV broadcasting market. The consequences will be exit from the market of the undertaking seeking access to the facility, reducing innovation in the markets and the freedom of choice of consumers, who will be tied to the dominant undertaking’s product or service, with higher prices.³⁶ Furthermore, even prevention of

²⁶ Specifically, the efficient competitor test is used by the EU Commission to demonstrate that the competitor excluded from the market can effectively match the offer of the dominant undertaking. See Raphaël De Coninck, ‘The as-efficient competitor test: some practical considerations following the ECJ Intel judgment’ (2018) 4(2) Competition law & Policy debate.

²⁷ Dunne (n 11).

²⁸ *IMS Health GmbH* (n 13).

²⁹ *ibid.*

³⁰ European Commission Decision C 5586, Case AT.39759, *ARA Foreclosure* [2016] OJ C 432/6 6.

³¹ *Slovak Telekom* (n 21).

³² Ibáñez Colomo (n 23).

³³ Liyang Hou, ‘The Essential Facilities Doctrine - What was Wrong in Microsoft?’ (2012) 43(4) IIC-International Review of Intellectual Property and Competition Law 251.

³⁴ *Telemarketing* (n 19).

³⁵ *Commercial Solvents* (n 10).

³⁶ Hou (n 33).

merely potential competition, not based on the characteristics of the market at the moment of the investigation, can be considered as a violation of Article 102 TFEU.³⁷

Additionally, when the Essential Facility is an intangible product covered by IP rights, the protection of competition shall be balanced with the protection of Intellectual Property Rights.³⁸ The *new product test*, established by the Court of Justice in *Magill*,³⁹ meets this need and should be applied separately from the Indispensability test, as sustained in *Ladbroke*.⁴⁰ However, in later developments, the necessity to set a higher threshold for the application of the doctrine led to consider that only in “*exceptional circumstances*” IP rights can be considered as an essential facility. Those exceptional circumstances correspond to the introduction of a new and innovative product into market concerns.⁴¹ To be innovative, the product should satisfy consumer demand differently from the existing ones, increasing the demand and reaching new consumers.⁴² The burden of proof of the existing demand for the new product is on the undertaking seeking access to the facility covered by the IP rights.⁴³ Indeed, in these cases a balance between the *special responsibility* of the dominant undertaking⁴⁴ and the protection of its *incentive to innovate* is even more important. In fact, on this ground Justice Scalia, member of the Supreme Court of the United States in *Trinko*,⁴⁵ rejected the doctrine maintaining that it reduces business acumen. On the other hand, the European approach towards the incentive to innovate test clearly highlights the Ordo-liberal School of Thought’s influence on EU Competition Law. In fact, for Ordo-liberals IP Rights are an obstacle to the creation of contestable markets and to the European integration process.⁴⁶

On the other side, there is evidence that in the long run, in highly concentrated markets, dominant undertakings continue to innovate leveraging their dominant position in different markets, outside the concept of competition on the merits, and engaging in killer acquisition. The Microsoft case can be placed inside this context, firstly for the acknowledgment that even merely technical developments are recognised as satisfying the new product test. Moreover, the Commission and the Court of Justice, considering the

³⁷ Case T-201/04, *Microsoft Corp. v Commission of the European Communities* [2004] ECR 2007 II-03601.

³⁸ Valentine Korah, ‘The interface between intellectual property and antitrust: the European experience’ (2002) 69(3) *Antitrust Law Journal* 801.

³⁹ *Magill* (n 15).

⁴⁰ Case T-504/93, *Tiercé Landbroke SA v Commission of the European Communities* [1997] ECR 1997 II-00923.

⁴¹ *Magill* (n 15).

⁴² Aristeidis Demiroglou, ‘Essential Facilities Doctrine and Intellectual Property Rights: Approaches under the Competition Law’ [2016] *School of Economic, business administration & Legal Studies*.

⁴³ Christian Ahlborn, David S Evans and A Jorge Padilla, ‘The Logic & Limits of the Exceptional Circumstances Test in *Magill* and *IMS Health*’ (2004) 28(4) *Fordham International Law Journal* 1109.

⁴⁴ The special responsibility of the dominant undertakings does not just entail to refrain from violating Article 102 TFEU, but also a positive duty to supply competitors when the input is necessary to compete in the market. See Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1981] ECR 1983 -03461, para 57. See also Wolf Sauter, ‘A duty to care to prevent online exploitation of consumers? Digital dominance and special responsibility in EU competition law’ (2020) 8(2) *Journal of Antitrust Enforcement* 406.

⁴⁵ Supreme Court of the United States, 305 F.3d 89, *Verizon Commc’ns, Inc. v Law Offices of Curtis V. Trinko* [2004].

⁴⁶ David J Gerber, *Law and Competition in Twentieth-century Europe: protecting Prometheus* (OUP, 1998). See also Korah (n 38).

incentive to innovate in *Microsoft*, recognised that at first competitors could be harmed. However, in the long run, it is possible that competitors innovate in the market and the adjacent ones will stimulate Microsoft itself to innovate. Consequently, it is relevant to underline that, rather than disruptive innovations which lead to the presentation of a completely new product and competition for it on the market, the European approach privileges competition on the market and the improvement of the already present products.⁴⁷

Based on these assumptions, we can move towards the applicability of the Essential Facilities Doctrine to digital markets. Indeed, relevance is given to the cases that involved the dominant platforms, notably Google, Apple, Facebook, Amazon, and Microsoft. Therefore, considering the doctrine efficient means it preserves the structure of competition and creates fairer and contestable digital markets.

3 The doctrine's applicability to digital markets

The application of the Essential Facilities Doctrine in digital markets could be useful because it targets the competitive advantage held by dominant players, making it more difficult for them to abuse of their market power. In digital markets, platforms act as intermediaries between multiple sides, such as online marketplaces connecting sellers and buyers; specifically, we talk about multi-sided market.⁴⁸ Moreover, the presence of strong network effects, both direct and indirect, increases the *lock-in* of the consumers inside the platforms, limiting their freedom of choice. In this way, it will be difficult for consumers to switch to other platforms as the costs are too high to be sustained by users.⁴⁹ Furthermore, dominant undertakings manage, to offer their services, an incredible amount of data, which could constitute an indispensable asset to increase the accuracy and quality of services in the downstream market. Without access to them and unable to reproduce them, competitors in the secondary market will not be able to compete with the platform that owns a competitive advantage due to its position.⁵⁰ In particular, user data can be used by the gatekeeper to predict where to invest, for instance engaging in M&A of innovative start-ups and eliminating potential competitors.⁵¹

⁴⁷ Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' [2019] DP2019-028, TILEC Discussion Paper <<https://ssrn.com/abstract=3371457>> accessed 29 March 2023.

⁴⁸ Jean-Charles Rochet and Jean Tirole, 'Platforms competition in two-sided markets' (2003) 1(4) *Journal of the European Economic Association* 990.

⁴⁹ Notably, with switch costing we refer to the economical or technical limits faced by consumers in changing supplier. The situation when these costs cannot be faced by the consumer, and there is no interoperability between the competitors, will lead to the phenomenon known as lock-in, often seen in the data-driven market. As also underlined by the Italian Competition Authority (AGCM, AGCOM) Survey on 'Big Data' (2017).

⁵⁰ Maria Wasastjerna, *Competition, Data and Privacy in the Digital Economy, Towards a Privacy Dimension in Competition Policy* (Wolters Kluwer 2020).

⁵¹ The acknowledgment of the diversion of dominant platforms from R&D to M&A of start-ups is one of the main reasons behind the adoption of the Digital Markets Act. In fact, as will be highlighted below, the Digital Markets Act seeks to stimulate innovation around the platform and imposes, at Article 14, the obligation to notify the Commission in case of

The case of *Microsoft*⁵² perfectly shows how the doctrine can be applied to open-up digital markets. Specifically, Microsoft's refusal to disclose the interoperability information, considered indispensable for the competitors, had the objective of *leveraging* the market power from the upstream market of the Operating system, where Microsoft had a *super-dominant* position,⁵³ to the downstream market of the workgroup server operating system.⁵⁴ Concerning the reproducibility of the interoperability information, the European Commission specified that the economic costs and the time necessary to reproduce it were not sustainable for the competitors.⁵⁵ The information, as alleged by *Sun Microsystems Inc.*, was necessary to grant efficient works, for instance inside an office.⁵⁶ Consequently, the imposition on Microsoft of a duty to share was necessary to avoid an irreversible situation where consumers and developers found themselves *locked-in* in Microsoft OS.⁵⁷ The interoperability information was protected by IP rights; therefore, it was necessary to establish whether the competitors wanted to introduce a new innovative product. The threshold provided in *Magill*⁵⁸ has been considerably lowered from the requirement of a "*new product for which potential consumer demand exists*" to the introduction of potential technical development in the field, sustaining innovation on an existing product.⁵⁹

The Court of Justice and the Commission, imposing the duty to share, paid attention to the fact that the incentive to innovate of the dominant undertaking will be damaged. In this context, justifying Microsoft's refusal, the market development depends on its ability to innovate. On the other hand, through the duty to share the interoperability information, the whole sector would have the possibility to innovate.⁶⁰ Furthermore, considering that in digital markets innovations occur in the early stages of their development, the imposition of the duty to share would grant the possibility to implement the existing products. In the light of Microsoft's intermediary position between app developers and consumers, the dominant undertaking was also sanctioned for tying.⁶¹

concentration. In this line, see Pierre Larouche and Alexandre DeStreel, 'The European Digital Markets Act: A revolution grounded on tradition' (2021) 12(7) Journal of European Competition Law & Practice 542. See also Autorité de la Concurrence, Bundeskartellamt, 'Competition law and data' (2016).

⁵² Case T-201/04, *Microsoft v Commission of the European Communities* [2007] ECR 2007 II-03601.

⁵³ Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge SA v Commission* [1998] ECR I-3257, Opinion of AG Fennelly, para 137.

⁵⁴ The working server group are those basic infrastructures which allow, for instance workers in an office to disclose files, share printers and access other services in the network. See Graef (n 48).

⁵⁵ Claudia Koch, 'Incentives to Innovate in the Conflicting Area between EU Competition Law and Intellectual Property Protection - Investigation on the Microsoft Case' (Heft 108, 2011).

⁵⁶ Katarzyna Czapracka, 'Where Antitrust ends and IP Begins - on the roots of the transatlantic clashes' (2007) 9 Yale Journal 44.

⁵⁷ Anneleen Straetemans, 'The EU Microsoft Case - Not a soft Case' (2007) 44(4) Jura Falconis 578.

⁵⁸ *Magill* (n 15).

⁵⁹ James Killik, 'IMS and Microsoft Judgement in the Cold Light of IMS' (2004) 1(2) The Competition Law.

⁶⁰ Wolfgang Kerber and Claudia Schmidt, 'Microsoft, Refusal to License Intellectual Property Rights, and the Incentives Balance Test of the EU Commission' [2008] <<https://ssrn.com/abstract=1297939>>. See also: Nikolas Guggenberger, 'Essential Platforms' (2021) 24 Stan Tech L Rev 237.

⁶¹ Specifically, the Commission decisions, alongside the sanction for the refusal, sanctioned Microsoft for tying the Media Player to the Operating System Windows.

Therefore, the application of the essential facility doctrine allowed targeting the competitive advantage given by the intermediary position and restore competition in the market. The same arguments arise for the most recent investigations.

Starting from *Google*, two judgments involved the company under European Competition law. In *Google Shopping*, the Court of Justice upheld the European Commission's decision to sanction the undertaking for abuse of a dominant position, ex Article 102 TFEU. The Commission argued that Google discriminated between the different competitors, in the *comparison-shopping service* market, listing its own service at the top of the results page and in a more attractive format. The anticompetitive practice has been labelled as *self-preferencing*; however, even in the judgment the Court of Justice held that the search engine represents a "*quasi-essential facility*".⁶² Neither the Court nor the Commission applied the doctrine based on the absence of an outright refusal by Google to give access; however, even unfair and inequitable terms of access, amounting to a constructive refusal, can effectively foreclose the downstream market where competitors operate.⁶³ Access to the search engine on equal footing is indispensable for competitors to reach and offer their services to consumers; or, as in the present case, they will deviate to Google's comparison-shopping service. Referring to *Microsoft*,⁶⁴ the Court recognized the indispensability of the general result page of the upstream market, and the unfeasibility to reproduce it, as the network effects and the switching costs were already high. On the other side, the EU Commission's fulfilment of the *Bronner* conditions was not necessary, firstly because the Commission limited itself to indicating that the format of the page should respect the principle of non-discrimination, without engaging in prescribing how the firm should implement it.⁶⁵ Consequently, the remedy can be categorized as reactive, escaping the *Bronner* criteria, as sustained by the Commission referring to the Court's judgment in *Van den Bergh Foods*.⁶⁶ However, it could be easily argued that the respect of the principle requires a positive obligation rather than a cease-and-desist obligation on the firm in modifying the mode in which the results are presented on the results page.⁶⁷ Additionally, Google's *super-dominant* position⁶⁸ increases its special responsibility to treat competitors equally in the downstream market, even if it is

⁶² *Google Shopping* (n 5). See also Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (2019) Report for the European Commission 7.

⁶³ Ibáñez Colomo (n 23).

⁶⁴ *Microsoft* (n 37).

⁶⁵ *Google Shopping* (n 5), paras 697-705.

⁶⁶ Case T-65/98, *Van den Bergh Foods Ltd v Commission* [2003] ECR 2003 II-04653, para 161.

⁶⁷ Ibáñez Colomo (n 23).

⁶⁸ The Concept of super dominant position was presented for the first time by AG Fenelly in *Compagnie Maritime Belge*. It describes the situation of a monopolist or quasi-monopolist that consequently has a stronger special responsibility in ensuring that its behaviours do not harm the competition in the market by eliminating competitors and strengthening its dominant position. For further specifications and the evolution of the concept of super-dominant position in the EU Court of Justice case law, see Alessia Sophia D'Amico and Baskaran Balasingham, 'Super-dominant and super-problematic? The degree of dominance in the Google Shopping judgement' (2022) 18(3) European Competition Journal 614.

in direct competition with them.⁶⁹ Additionally, even if the list and design introduced by Google do not have the intent to exclude competition, the conduct falls outside competition *on the merits*.⁷⁰

Alongside this case, in *Google Android* the dominant undertaking was sanctioned by the European Commission in 2018⁷¹ and this was partially upheld by the Court of Justice in September 2022.⁷² The abusive conduct consisted in a series of *tying* practices of applications on Android Devices through the different licence agreements concluded with the manufacturers. Specifically, the Commission considered that Google tied the Google Search app with Play Store, not giving the possibility to pre-install Play Store, indispensable for consumers, if the manufacturer failed to pre-install Google Search and Google Chrome as well. The facts of this case seem to recall a refusal to give access to an essential facility, rather than tying two distinct products. Play Store is an indispensable application for consumers once they buy an Android device and at the same time for the app developers to reach their audience, monetize their application through advertisements, and ensure the transaction.⁷³ On the other hand, in order to be able to talk about *tying*, as described by the Commission's Guidance Paper,⁷⁴ it is necessary that a substantial number of customers would purchase the tying product without the tied one.⁷⁵ In this regard, the Court of Justice confirmed that the conduct falls outside the competition *on the merits*, highlighting the intention of the undertaking to leverage its market power,⁷⁶ as well as the fine imposed by the EU Commission, the highest competition fine ever imposed in the EU.⁷⁷

The same concerns arise in relation to the App Store in Apple's investigation.⁷⁸ The terms and conditions imposed on app developers to operate in the App Store are unfair and discriminatory. Specifically, the prohibition to provide in-app purchases and the high commission fees increase costs for competitors and prices for users of the application. Furthermore, Apple engages in *self-preferencing* its application over competitors, as claimed by Spotify in the music streaming market. On top of this, the app developers

⁶⁹ Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission of the European Communities* [2003] ECR 2003 II-04071.

⁷⁰ Denis Lyliau, 'New chapter in the Google Shopping saga', n 0032, Competition Forum, 2022 <<https://competition-forum.com/new-chapter-in-the-google-shopping-saga/>>.

⁷¹ *Google Android* (Case AT.40099) Commission Decision [2019] OJ C 402 2019, 19.

⁷² Case T-604/18, *Google and Alphabet v Commission (Google Android)* [2022].

⁷³ Pinar Akman, 'A preliminary assessment of the European Commission's Google Android decision' [2019] CPI Antitrust Chronicle December.

⁷⁴ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.

⁷⁵ Graef (n 48).

⁷⁶ *Google and Alphabet* (n 72).

⁷⁷ Akman (n 73).

⁷⁸ Press release 'Antitrust: Commission opens investigations into Apple's App Store rules' 16 June 2020 IP/20/1073.

which offer *digital goods and services*⁷⁹ are affected by the 30% commission fees and cannot include external links for purchasing goods and services outside the App Store, otherwise they can be excluded from the platform. The App Store is an indispensable asset for app developers: without it they cannot reach the iOS users and thus give up a large part of the market. The consequence of the application of these unfair conditions is highly harmful to the competition structure and innovation in the market.⁸⁰ In this context, the fulfilment of the *Bronner* test will not be necessary as access to the App Store is granted by the dominant undertaking. However, the case of *Epic Games*⁸¹ perfectly shows how unfair terms and conditions, and eventually their violation, can lead to delisting the app developers from the App Store.⁸² In these cases, the assessment of the indispensability of the App Store to reach the various sides of the market implied considering the economic unfeasibility of reproducing the App Store.

Equally, the data acquired by dominant platforms on the various sides of the markets, from business and consumer users, enable them to adjust their investments, offer better services and outcompete their rivals in the downstream markets. Moreover, as under the GDPR⁸³ data can be categorized as *voluntary-given* data and data acquired through *observing* the users' behaviours in surfing the internet, there is a possibility that the data controller engages in exploitative practices outside the competition *on the merits*.⁸⁴ Their exclusive ownership, considering their importance, can lead to the elimination of *potential* competition and increase barriers to entry. Both at the European and National level, principally in the social networks market, Competition Law enforcers launched a series of investigations over *Facebook*, now *Meta*.⁸⁵ The dominant platform, thanks to its intermediary position, can acquire more information about the interest and behaviour of users, considerably increasing its turnover in the advertisement market.⁸⁶ Furthermore, the personalised services offered to the users will increase their dependence on the ecosystem, supplying the dominant platform with more data and creating a *feedback*

⁷⁹ This distinction is not justified by practical considerations and lacks clarity, for instance concerning online medical consultation, online lectures, and fitness classes. As to the former, the medical consultation apps, the problems around the definition of digital services arose in 2019 with relation to certain Chinese apps; in the end, Apple considered that they were not to be understood as digital services.

⁸⁰ B Kotapati and others 'The Antitrust Case Against Apple' [2020] <<https://ssrn.com/abstract=3606073>>.

⁸¹ *Epic Games v Apple Inc*, 493 F Supp 3d 817 (N D Cal 2020).

⁸² Damien Geradin and Dimitrios Katsifis, 'The Antitrust Case against the Apple App Store' (2020) DP2020-035, TILEC Discussion Paper.

⁸³ European Parliament and the Council, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, General Data Protection Regulation (GDPR) [2016] OJ L 119, 1.

⁸⁴ The distinction, based on how they are collected, was presented in the Joint Report of the French and German Competition Authorities. Specifically, on the one hand data are collected after the owner's consent, in line with Article 7 GDPR, on the other hand data can be acquired by dominant undertakings even by simply analysing user behaviours in the platforms.

⁸⁵ Autorité de la Concurrence, Bundeskartellamt, 'Competition law and data' (2016). See also AGCM, AGCOM, 'Survey on "Big Data"' (2020).

⁸⁶ Andres V Lerner, 'The Role of "Big Data" in Online Platform Competition' (2014) SSRN Working Paper 41,44 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780> accessed 29 March 2023.

loop.⁸⁷ Indeed, those data will be indispensable for the competition in downstream markets where most of the time also the dominant platform operates and where the refusal will lead to the elimination of the *actual* and *potential* competition.⁸⁸ The definition of the two markets in these cases can be peculiar: considering that data are not traded, only a hypothetical upstream market might be identified. On the downstream market, the definition will depend on the products or services offered by the undertakings seeking access, for instance, the advertisers.⁸⁹ The indispensability of data could be assessed based on financial conditions, reasonable period and the ability of competitors to reproduce data; in line with Microsoft, their reproduction will be time-consuming, and the *lock-in* effect might have exclusionary effects.⁹⁰ The European Commission's investigation, launched on 4 June 2021, stresses this point, arguing that the combination of data from social networks and business users in the online classified ads market gives Facebook the possibility to outcompete them in the secondary market in favour of Facebook Marketplace.⁹¹ Furthermore, the possibility to use data from the various sides of the market to operate in the downstream market is a competitive advantage. The vertical integration of Facebook increases these effects, as various data from API (Application Programming Interfaces) and the ones obtained by other services as WhatsApp and Instagram can be combined. This practice has been considered in the Bundeskartellamt's decision against *Facebook*⁹² as an abuse of domination position ex Article 102 TFEU. While considering the exclusionary effects, the Competition Authority focuses on the exploitation of users and in particular the prescription that user content shall be freely given, specific, informed, and unambiguous ex Article 7 GDPR.⁹³ Indeed, the informational asymmetries between users and the platform as well as the restrictions on privacy are considered market failures.⁹⁴ However, based on recent case law, and in

⁸⁷ Inge Graef, 'Data as Essential Facility, Competition and Innovation on Online Platforms' (2016) KU Leuven Faculty of Law 248.

⁸⁸ On this point, the United States case for the refusal by Twitter is an example of the possibility to apply the doctrine to data. See *PeopleBrowsr, Inc et al v Twitter, Inc. (PeopleBrowsr)*, C-12-6120 EMC, 2013 WL 843032 (N D Cal 6 March 2013) [1].

⁸⁹ *IMS Health GmbH* (n 13). See Pierre Larouche, *Competition Law and Regulation in European Telecommunications* (Hart Publishing 2000) 207, 212.

⁹⁰ Even if concerning contact details of customers, the decisions of the Belgian and French Competition Authorities underlined the indispensability of data to offer quality services which can compete with the dominant undertaking in the downstream market. See Autorité de la concurrence, *Décision 14-MC-02 du 9 septembre 2014 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans les secteurs du gaz et de l'électricité*. Belgian Competition Authority, *Beslissing BMA-2015-P/K-27-AUD van 22 september 2015, Zaken MEDE-P/K-13/0012 en CONC-P/K-13/0013, Stanleybet Belgium NV/Stanley International Betting Ltd en Sagevas S.A. /World Football Association S P R L /Samenwerkende Nevenmaatschappij Belgische PMU S C R L t Nationale Loterij NV* 69-70.

⁹¹ Press release, 4 June 2021, Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook.

⁹² Bundeskartellamt's decision 6th Division, Case B6-22/16, *Facebook*, 6 February 2019.

⁹³ Article 7, General Data Protection Regulation (GDPR). See also Maria Wasastjerna (n 50) 148.

⁹⁴ Nicholas Economides and Ioannis Lianos, 'Restriction on privacy and exploitation in the Digital Economy: A competition law perspective' 5 CLES Research Paper Series 4 (2019). See also, Marco Botta and Klaus Wiedemann, 'EU Competition Law vis-à-vis exploitative conducts in the data economy - exploring the Terra incognita' Max Planck Institute for Innovation and competition Research Paper 4 (2018).

particular the Opinion of AG Øe in *Slovak Telekom*, if we consider platforms indispensable it will not be necessary to refer to the *Bronner* test when the request comes from a user who is already in the business. On the contrary, if a third party requires access to the platform data, the anticompetitive effect of a refusal might refer to *Bronner*.⁹⁵

Focusing on *Amazon* and its online marketplace, several investigations have considered the gatekeeper role of the dominant undertaking, both at National and European level. Firstly, the Amazon ecosystem is composed of the online marketplace, a two-sided market where buyers and sellers meet, and e-commerce, where the dominant undertaking offers its products.⁹⁶ The indispensability of the online marketplace is given by the impossibility in the modern economy for sellers to not use Amazon, otherwise they lose a large part of the demand for a product, especially where Amazon offers its *Amazon choice*.⁹⁷ Moreover, once sellers operate inside the online marketplace, several instruments to increase sales are essential to compete in it, among them Buy Box. In 2019 the EU Commission launched an investigation on the terms and conditions to access Buy Box and the competitive advantage owned by Amazon thanks to the data acquired in the upstream market of the online marketplace. Indeed, the competitive advantage can ensure the possibility to leverage the dominant position in the downstream market. Moreover, at Member States level, the Italian Competition Authority well identified that the conditioned access to the Buy Box, and other facilities, to the use of the Prime services enable Amazon to leverage its dominant position also in the logistic services market.⁹⁸ Therefore, the ownership of an indispensable asset, as the marketplace, enables the dominant undertaking to acquire market power, limiting the freedom of choice for users and excluding competitors in the downstream markets. Even in the case of Amazon, where the costs to start operating in the online marketplace are very low,⁹⁹ the unfair treatment and practices by dominant undertakings have the same exclusionary effects of a refusal to supply. As already highlighted above, even in this context the fulfilment of the *Bronner* conditions will not be necessary, as the access to the essential asset, the online marketplace, is granted under unfair terms which potentially will require a cease-and-desist obligation from the anticompetitive conduct.

In conclusion, this doctrine might be a potential tool in *ex-post* competition law enforcement, in order both to sanction and prevent abusive conducts. At the same time, in December 2020 the European Commission presented the Digital Markets Act,¹⁰⁰ to

⁹⁵ Daniel Mandrescu, 'Why you (often) don't need the essential facilities doctrine in the digital economy? - Interpreting Lithuanian Railways and Slovak Telekom' (Lexxion, 2020) <<https://www.lexxion.eu/en/coreblogpost/why-you-often-dont-need-the-essential-facility-doctrine-in-the-digital-economy-interpreting-lithuanian-railways-and-slovak-telekom/>> accessed 29 March 2023.

⁹⁶ Lina Khan, 'The Separation of Platforms and Commerce' (2019) 119 Colum L Rev 973.

⁹⁷ Guggenberger (n 60) 258.

⁹⁸ Italian Competition Authority (AGCM) decision A528, *Amazon* [2021].

⁹⁹ *ibid.*

¹⁰⁰ European Parliament and Council Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector, Digital Markets Act [2022] OJ L 265/1.

ensure *fairness* and *contestability*. Starting from the goals and moving to the obligations, the Regulation seems to recall the recent ex-post competition investigations described above. Moreover, considering the gatekeepers' duty to give access, prescribed by the Digital Markets Act obligations, will impact on the future ex-post case law of the Essential Facilities Doctrine.

4 The new *Digital Markets Act* and the Essential Facilities Doctrine: similarities and complementarity

The *Digital Markets Act*'s¹⁰¹ goal is to ensure fairness and contestability through a set of obligations imposed on gatekeepers, under the formula of one size fits all, which tries to overlap the slowness of the ex-post competition enforcement.¹⁰² Moreover, through structural and behavioural remedies it tries to stimulate the gatekeepers' respect of obligations. The huge fines imposed over the years, due to their huge turnovers, started to be considered by dominant platforms as part of the cost of doing business.¹⁰³ The question of whether the aim of ensuring fairness and contestability is encompassed in the European Competition policy, as ordo-liberal thinking would suggest,¹⁰⁴ is reflected on our question about similarities with the Essential Facilities Doctrine. Indeed, the DMA seeks to overcome the imbalance of power and informational asymmetries between platforms and users, especially in cases when the latter are indirect competitors.¹⁰⁵ As in the case of the Essential Facilities Doctrine application, the imposition of certain obligations over gatekeepers, a different concept of market power,¹⁰⁶ tries to redistribute value along the value chain. Redistribution is granted by restoring competition on a "*level playing field*", protecting competition as a process and free consumer choice, differently from what could happen if the intervention in the market was only moved by the consumer welfare standard,¹⁰⁷ by the well-known "*more economic approach*".¹⁰⁸ Under this perspective, the DMA seems to recall the social principles which are behind the Essential Facilities Doctrine

¹⁰¹ Digital Markets Act, Recital 2.

¹⁰² Monti (n 4).

¹⁰³ Nicolas Petit, 'The proposed Digital Markets Act (DMA): A legal and policy review' (2021) 12(7) Journal of European Competition Law & Practice 529.

¹⁰⁴ Manuel Wosdorfer, 'The Digital Markets Act and the E.U. Competition Policy: A critical Ordoliberal Evaluation', (2022), Maine Business School & School of Computing and Information Science.

¹⁰⁵ Petit (n 103).

¹⁰⁶ Damien Gerardin, 'What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?' (2021) <<https://ssrn.com/abstract=3788152>> accessed 29 March 2023.

¹⁰⁷ The consumer welfare standard was introduced by Robert Bork, principal exponent of the Chicago School of Thought. It oriented the Competition Authorities' intervention in high concentrated markets only when the total welfare, in the Wilson trade-off model, is reduced by the conduct under investigation. Historically, the consumer welfare standard in the European Union is interpreted as consumer surplus, confirming the redistribution goals of EU competition law: cf Robert Bork, *The Antitrust Paradox: A Policy at War with itself* (Basic Books 1978). See also Marktabgrenzung, 'Differences in Schools of Thought on protecting competition: Chicago School vs European School' (2016) 2 CCR - Competition Competence Report Autumn.

¹⁰⁸ Heike Schweitzer, 'The art to make gatekeeper positions contestable and the challenge to know what is fair: A discussion of the Digital Market Act Proposal' (2021) 3 Zeitschrift für europäisches Privatrecht 503, 544.

and which were replaced under the Chicago School of Thought revolution, drifting away from the social aspect of Competition Law.¹⁰⁹ The DMA seeks, as the Essential Facilities Doctrine would, to neutralize gatekeeper conducts mainly made possible by owning the essential asset, which increases the dependence of end users and competitors on their platforms.¹¹⁰

4.1 Identification of gatekeepers and their core platform services

Analysing the regulation, it is necessary to specify that its definition of gatekeepers does not correspond to the traditional assessment of a dominant position under EU Competition Law.¹¹¹ This important difference is due to the acknowledgment of the peculiarities of digital markets and their main features: for instance, network effects and economies of scale and scope.¹¹² Furthermore, the regulation applies to those digital services, called Core Platform Services in Article 2 DMA, which are considered an “*important gateway*” for ancillary markets. In this way, the difficulties faced by Competition Authorities as to market definition, related to two-sided market and vertical integration, are outdated.¹¹³ Normally, under the Essential Facilities Doctrine, after defining the market the Competition Authority must give evidence of the refusal to give access and the indispensability of the service concerned. Under the Digital Markets Act, it is already recognized that, even if there is no formal refusal to access the Core Platforms Services, the gatekeeper’s position enables it to impose unfair terms and conditions on its direct and indirect competitors.

The Core Platforms Services list, Article 2 DMA,¹¹⁴ encompasses Online Search engines, Online Social networks, Video-sharing platforms, Operating systems, Online intermediation services between consumers and businesses, Web Browsers, Virtual Assistants, Connected TV, and Cloud computing services. Moreover, the list is not closed to future updates, for which the ordinary legislative procedure must be respected, preserving the right of initiative for the European Commission after a market investigation, as established by Article 17. However, the procedure is criticised by scholars as it will result in a late update, as in the Competition Law *ex-post* enforcement.¹¹⁵ Hence, it is relevant to underline that those services are implicitly recognized as indispensable to competition in the downstream markets. Furthermore, the threshold has been lowered as

¹⁰⁹ *ibid.* Further on the social side of the European Union competition law, See Ariel Ezrachi, ‘EU Competition Law Goals, and the Digital Economy’ (2018) 17 Oxford Legal Studies Research Paper.

¹¹⁰ Pablo Ibáñez Colomo, ‘The Draft Digital Markets Act: a legal and institutional analysis’ (2021) 12(7) Journal of European Competition Law & Practice 561.

¹¹¹ Gerardin (n 106).

¹¹² *ibid.*

¹¹³ Schweitzer (n 108) 503, 544.

¹¹⁴ Digital Markets Act, Article 2. For a resume of the Regulation, cf Natalia Moreno Beloso, ‘The Proposal for a Digital Markets Act (DMA): A Summary’, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3999966> (accessed 28 March 2023).

¹¹⁵ Schweitzer (n 108).

the DMA does not refer to the CPS as indispensable, but as “*important gateways for business and end users to reach other end users*”.¹¹⁶ Therefore, it is assumed that an abuse in supplying those services, when the undertaking matches the definition of gatekeeper, leads to elimination of the *actual* or *potential* competition in the downstream and upstream markets, corresponding to the third condition established in *Bronner*¹¹⁷ by the Court of Justice. However, in the potential ex-post enforcement of the Essential Facilities Doctrine it will be no longer necessary to fulfil the *Bronner* criteria to sanction dominant undertakings in the digital sectors, as they are already encompassed within the *ex-ante* regulation.

As to the definition of gatekeepers, the DMA considers the features of the digital economy. Specifically, it takes into consideration the quantitative and qualitative criteria listed in Article 3(2).¹¹⁸ As well as applying the criteria of turnover and active user, as well as durable or foreseeable entrenched position, the Commission can consider the data-driven advantage of the undertaking, economies of scale and scope, lock-in and switching costs for users, vertical integration and its structural characteristics. Under the Essential Facilities Doctrine, this position refers to the actual or future “*unavoidable trading partner*” which refuses to deal.¹¹⁹ However, the criteria used to identify gatekeepers are lower than the standards required establishing a dominant position, meeting the need of preventing the situation of abuse under Competition Law.

Once an undertaking is defined as gatekeeper, the obligations set out in the DMA apply under the formula of “*one size fits all*”; from certain viewpoints, they recall the Essential Facilities Doctrine, as will be illustrated in the next subparagraph.

4.2 Gatekeepers’ obligations and the Essential Facilities Doctrine

Before comparing the obligations set out in the DMA and the remedies applied in the Essential Facilities Doctrine case law, it is necessary to point out the flexibility of the approach proposed by the DMA. Specifically, two categories of obligations are imposed on gatekeepers: the ones which are directly applicable, provided by Article 5,¹²⁰ and the ones which can require further specification by the European Commission, listed in Article 6.¹²¹ Alongside them, transparency obligations are established in Articles 12 and 13 in light of

¹¹⁶ Ibáñez Colomo (n 110).

¹¹⁷ *Bronner* (n 20).

¹¹⁸ Digital Markets Act, Article 3(2).

¹¹⁹ Case 85/76, *Hoffmann-La Roche v Commission of the European Communities* [1979] ECR 461, para 41]; Case C-95/04, *British Airways plc v Commission of the European Communities* [2007], para 75; Case T-286/09, *Intel Corporation, Inc v European Commission* [2009] OJ C 220/41; T-155/06, *Tomra Systems ASA and Others v European Commission* [2010] ECR 2010 II-04361, para 269. See Alexandre de Streel and others, ‘The European Proposal for a Digital Markets Act: A First Assessment’ (2021) 11 CERRE-Report.

¹²⁰ Digital Markets Act, Article 5.

¹²¹ Digital Markets Act, Recital 2, Article 6.

the killer acquisitions which in recent years strengthened gatekeepers' positions in digital markets.¹²²

In line with the case law illustrated above, the obligations foreseen by the DMA can be categorized according to their objectives. Firstly, the obligations aimed at preventing the expansion of gatekeepers in ancillary markets,¹²³ and secondly the ones aimed at reducing barriers to entry for new potential competitors.¹²⁴ The analysis will highlight how the objectives pursued by the DMA are complementary, or almost identical, to the ones pursued by ex-post Competition Law enforcement.

Notably, we can refer to *Microsoft*,¹²⁵ where the European Commission intervention has the aim to avoid the *leveraging* of the dominant position, from the Operating system market to the working server group market, through the refusal to supply the interoperability information. The obligation to supply the interoperability information is now a DMA obligation, specifically in Article 6(7), and is susceptible to be further specified by the Commission, for which is not necessary to prove the negative effects in case of non-compliance.¹²⁶ On the other hand, considering the most recent case law, when gatekeepers grant the interoperability information but under unfair terms and conditions, in the ex-post competition assessment it will be not necessary to prove the fulfilment of the *Bronner* criteria. Additionally, as the interoperability obligation could be further specified, the Commission would have the possibility to define the level of mandatory interoperability which will be exempted from the indispensability test in the ex-post enforcement.¹²⁷ Moreover, in *Microsoft*, the obligation imposed by the Commission avoided the elimination of *actual* and *potential* competition and the rise of excessive barriers to entry, which might lead to consumer *lock-in* and hamper innovation in the long run. In the same way, the DMA seeks to stimulate competition around the platforms, favouring the emergence of competitors in the downstream markets, which potentially can be direct competitors in the future.¹²⁸ As highlighted in the Commission Impact Assessment,¹²⁸ the DMA aims to stimulate innovation on the business user side of the market, as it has been noticed that most of the undertakings which are to be defined as gatekeepers have diverted from *R&D* to *M&A* of new entrants.¹²⁹

The same can be highlighted concerning data. Firstly, the prohibition of combining data collected from the CPS with other personal data collected from other services, Article

¹²² Belloso (n 114).

¹²³ The expression “ancillary market” is not clearly defined in case law. However, ancillary markets should be interpreted as markets which depend on the platforms, or which operate close to them. For instance, the logistic services market should be considered as ancillary to the online marketplace.

¹²⁴ Filomena Chirico, ‘Digital Markets Act: A regulatory perspective’ (2021) 12(7) *Journal of European Competition Law & Practice* 493.

¹²⁵ *Microsoft* (n 53).

¹²⁶ Schweitzer (n 108).

¹²⁷ Larouche and de Stree (n 51).

¹²⁸ European Commission Impact Assessment of the Digital Markets Act, 16 December 2020, <<https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act>> accessed 29 March 2023 at 279.

¹²⁹ Schweitzer (n 108).

5(2)(b), secondly the re-affirmation of the right to data portability, Article 6(1)(9), and thirdly the right to access to aggregated or non-aggregated data for publisher and advertisers, Article 6(1)(8). Under these obligations, as maintained by the Bundeskartellamt in *Facebook*,¹³⁰ consumer exploitation is avoided. The purpose is to avoid that a dominant undertaking has the possibility to outcompete rivals only thanks to the amount of data processed. Moreover, the obligations also aim at unlocking the consumers' choice over their data and the way they are processed.¹³¹ Hence, it should be noted that one of the main goals of EU Competition Law has always been the protection of the freedom of consumer choice, especially in the context of the EFD, where the obligation to share imposed on dominant undertakings aims at increasing or improving the quality of the options available to consumers.¹³² In fact, as according to the EFD, an *ex-ante* obligation facilitates the entry of new competitors into downstream or ancillary markets and grants fair competition to the already present market actors, such as the *publisher* and *advertisers*, who through the data can do their verification on the CPS.

Furthermore, the DMA prohibits the gatekeeper to hold business users back from using a different payment system, Article 5(4). The prohibition recalls the EU Commission's investigation into Apple's¹³³ terms and conditions to operate inside the App Store. In fact, alongside the unfair fees imposed on developers wishing to offer their applications in the App Store, the dominant undertaking prohibited app developers from providing users with a different payment system outside the platform. The imposition of such obligation aims at granting developers access to the platform, indispensable for reaching consumer demand under fair and equitable terms.¹³⁴ In the same way, the application of the Essential Facilities Doctrine could impose fair access to the platform, avoiding its *envelopment* and the elimination of actual and potential competition.

Moreover, the prohibitions of *self-preferencing* and *tying*, respectively in Article 6(5) and Article 5(8), reflect the *Google* and *Amazon* cases, both at European and National level. Specifically, the obligations impose on the gatekeeper the duty to grant users the possibility to uninstall the pre-installed application: this is the same result of the *Google Android*¹³⁵ judgment, presented as *tying*. Additionally, for the self-preferencing prohibition, we can refer both to *Google Shopping*¹³⁶ and the case of *Amazon*¹³⁷ before the Italian Competition Authority. In these cases, the ownership of the indispensable CPS

¹³⁰ Bundeskartellamt, *Facebook* decision (n 92).

¹³¹ Rupperecht Podszun, Philippe Bongartz and Sarah Langenstein, 'Proposal on how to improve the Digital Markets Act' (2021) 2 <<https://ssrn.com/abstract=3788571>> accessed 29 March 2023.

¹³² Paul Nihoul, 'Freedom of Choice: The Emergence of a powerful concept in European Competition Law' (2012) 3 *Concurrences Review* 54, 70.

¹³³ Press release: 'Antitrust: Commission opens investigations into Apple's App Store rules', 16 June 2020, IP/20/1073.

¹³⁴ Bapu Kotapati and others, 'The Antitrust Case Against Apple' (2020) <<https://ssrn.com/abstract=3606073>> accessed 29 March 2023.

¹³⁵ *Google Android* (n 71).

¹³⁶ *Google Shopping* (n 5).

¹³⁷ Amazon, Italian Competition Authority (AGCM) decision (n 98). European Commission Press Release IP/19/4291, Antitrust: Commission Opens Investigation into Possible Anti-Competitive Conduct of Amazon [2019].

allows the dominant undertakings to divert consumers to use their ancillary services, such as *Amazon Prime* logistic services, leveraging their dominant position in adjacent markets.

Consequently, several similarities can be found between the doctrine and the DMA; on the other hand, the latter goes further and allows for behavioural and structural remedies to be imposed¹³⁸ in case of non-compliance. Alongside fines, which in case of non-compliance can reach, for three times in 8 years, 20% of the global turnover, structural remedies can be imposed, such as a ban on the acquisition of other businesses. Scholars in this context have advocated for the introduction of more structural remedies, since fines are understood by gatekeepers as a cost of doing business, especially for GAFAM.¹³⁹

However, we should specify that even with the several similarities between the DMA, which applies *ex-ante*, and the Essential Facilities Doctrine, this does not impede the application of the latter in *ex-post* Competition Law enforcement. In fact, the DMA applies without prejudice to the application of Article 102 TFEU, as specified in Article 1 (6). Consequently, the same conduct could be a violation of both EU Competition Law and DMA provisions. Therefore, future intersection between the *ex-ante* regulation and the *ex-post* intervention might raise concern about the respect of the *ne bis in idem* principle, as addressed in the next paragraph.

4.3 Revitalisation of the Essential Facilities Doctrine and implementation of the DMA: *ne bis in idem* principle

The application of the Digital Markets Act does not affect the enforcement of EU and National Competition rules. Starting from this assumption, the same conduct, here the refusal to give access to an essential facility, could be a potential object of three different cumulative proceedings. However, Article 50 of the Charter of Fundamental Rights of the European Union,¹⁴⁰ which encompasses administrative fines, states that an undertaking cannot be sanctioned for the same conduct under different proceedings. The principle has been the object of extensive case law before the Court of Justice, which recently intervened for the purpose of defining how the “idem” condition shall be interpreted under Competition Law. Indeed, as presented by AG Bobek,¹⁴¹ two relevant interpretations of the idem condition exist. On the one side, the so-called “*idem crimen*” approach, which considers the idem condition fulfilled when the proceedings concern the same natural or legal person, the same facts, and protect the same legal interest. Differently, under the “*idem factum*” approach the protected legal interest is not relevant, thus the application of the fundamental principle is broadened. In the field of EU Competition Law, the Court

¹³⁸ Podszun, Bongartz and Langenstein (n 131).

¹³⁹ *ibid.* In this part of the DMA, the ordo-liberal influence is particular evident. In this line see Eucken, ‘El Problema Político de la Ordenación’ in Lucas Beltrán (ed), *La Economía de Mercado. Vol I* (Sociedad de Estudios y Publicaciones 1948).

¹⁴⁰ Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01) [2007], C 303/1.

¹⁴¹ Case C-117/20, *bpost SA v Autorité belge de la concurrence*, Opinion of AG Bobek [2021].

of Justice historically opted for taking the legal interest protected in the two proceedings into consideration as well, as in *Slovak Telekom*¹⁴². However, in *bpost*¹⁴³ and *Nordzucker*,¹⁴⁴ the Court of Justice followed the *idem factum* approach, specifying that the principle is violated when two proceedings sanction the same natural or legal person for the same conduct, the legal interest protected by the proceedings being irrelevant. Nevertheless, the presence of two proceedings could be justified by Article 52 (1) of the Charter¹⁴⁵. In fact, when the duplication is provided by law, under different legislations which pursue different legal interests, there is no violation of the principle if the measures are proportionate and necessary to pursue their objectives.¹⁴⁶ As specified in the DMA, the sector regulation pursues a different but complementary role to Competition Law enforcement.¹⁴⁷ On the other hand, it is undeniable that, thanks to the *ordo-liberal* influence,¹⁴⁸ EU Competition Law does not pursue only economic objectives. Indeed, values such as fairness and the creation of contestable markets are at the centre of Competition Law enforcement, especially in recent years under the guidance of EU Commission Vice-President Margrethe Vestager.¹⁴⁹ Under this assumption, the only choice for a legal basis is Article 114 TFEU,¹⁵⁰ with the goal of harmonising the regulation of digital markets among Member States, which could entail a different legal interest.¹⁵¹

Analysing the risk of violating the *ne bis in idem* principle, two different situations deserve attention. Firstly, when a competition *ex-post* enforcement, hypothetically under the Essential Facilities Doctrine, is opened by the European Commission and at the same time the undertaking, defined as gatekeeper, is sanctioned for non-compliance with DMA obligations.¹⁵² This scenario is unlikely due to the centralised enforcement of the DMA which allows the Commission to avoid the definition of the market, the dominant position, and the effects of the abusive conduct, which makes the enforcement of DMA remedies easier.¹⁵³ On the other hand, if the *ex-post* enforcement is brought by the National Competition Authority against the same undertaking or gatekeeper on the same fact to impose further obligations, it will be necessary to assess whether the exemption provided

¹⁴² *Slovak Telekom* (n 21).

¹⁴³ Case C-117/20, *bpost SA v Autorité belge de la concurrence* [2022].

¹⁴⁴ Case C-151/20, *Bundeswettbewerbsbehörde v Nordzucker AG and Others* [2022].

¹⁴⁵ Charter of Fundamental Rights of the European Union, Article 52, (n 140).

¹⁴⁶ Dimitrios Katsifis, 'Ne bis in idem and the DMA: the CJEU's judgments in *bpost* and *Nordzucker*' [2022] <<https://theplatformlaw.blog/2022/03/28/ne-bis-in-idem-and-the-dma-the-cjeus-judgments-in-bpost-and-nordzucker-part-i/>>.

¹⁴⁷ Digital Markets Act, Recital 10.

¹⁴⁸ Wernhard Möschel, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy' (2001) 157(1) *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift Für Die Gesamte Staatswissenschaft*.

¹⁴⁹ Margrethe Vestager, 'Competition for a fairer society' Speech at 10th Annual Global Antitrust Enforcement Symposium, Georgetown (20 September 2016). On the social goals of the EU Competition Law see also Ariel Ezrachi, 'Sponge' (2016) 5(1) *Journal of Antitrust Enforcement* 49.

¹⁵⁰ Article 114, Consolidated Version of the Treaty on the Functioning of the European Union [2008] *OJ C* 326.

¹⁵¹ Huihsin Kuo, 'Competition in EU Digital Markets' (2022), Faculty of Law Lund University Student Papers.

¹⁵² Katsifis (n 146).

¹⁵³ Monti (n 102).

by Article 52(1) of the Charter can be applied. The analysis, based on *bPost*,¹⁵⁴ will concern the definition of legal interests protected by the two legal tools. Nevertheless, scholars have highlighted that the DMA is an instrument of Competition Law, implementing the shift from a more economic approach to a more regulatory approach,¹⁵⁵ since it pursues the same aims as EU Competition Law.¹⁵⁶ Moreover, as discussed above, DMA obligations merely correspond to the recent antitrust investigations over digital platforms, increasing the difficulties in delineating the difference between DMA and EU Competition Law goals.¹⁵⁷

However, in this heated debate it will be up to the Court of Justice to establish whether the DMA and the possible application of the Essential Facilities Doctrine, or Competition Law in general, pursue the same goals of keeping digital markets fair and contestable.

5 Conclusions

The acknowledgment of the competitive advantage owned by dominant platforms led the European Union Legislator, in particular the European Commission, to take action in order to protect competition on the merits and sanction situations of abuse of a dominant position.¹⁵⁸ In this context, a revitalisation of the historical Essential Facilities Doctrine has been claimed by several scholars who recognised that the ownership of e-commerce platforms, app stores, search engines, data, and interoperability information enable a dominant undertaking to leverage its market power in the downstream markets.¹⁵⁹ However, the application of the doctrine under the refusal to deal theory of harm represents a limit, more than the criteria developed by the Court of Justice, to its effectiveness. In fact, not only a specific refusal to supply competitors with an indispensable asset can lead to elimination of actual and potential competition. Even unfair conditions of treatment in the platform can lead to the same situations where toxic competition, indicated by Stucke and Ezrachi, will always create the same winner.¹⁶⁰ Furthermore, the acknowledgment of the essentiality of platforms is encompassed in the new ex-ante sector regulation, the *Digital Markets Act*, which will start applying in 2023. Similarities between the Essential Facilities Doctrine and the DMA, adopted under the Article 114 TFEU as a tool to avoid fragmentation in the internal market, are several, but there is doubt about their complementarity. Firstly, the definition of gatekeepers and their core platform services fulfils the first three conditions of the doctrine, notably, the

¹⁵⁴ *bpost SA* (n 143).

¹⁵⁵ Marco Cappai and Giuseppe Colangelo, 'Taming digital gatekeepers: the more regulatory approach to antitrust law' (2021) 41 *Computer Law & Security Review* 105559 (online).

¹⁵⁶ Schweitzer (n 108).

¹⁵⁷ Giuseppe Colangelo and Marco Cappai, 'A Unified Test for the European Ne Bis in Idem Principle: The Case Study of Digital Markets Regulation' (2021) <<https://ssrn.com/abstract=3951088>> accessed 29 March 2023.

¹⁵⁸ Article 102, *Consolidated Version of the Treaty on the Functioning of the European Union 2008 OJ C 326*.

¹⁵⁹ Guggenberger and Nikolas (n 60).

¹⁶⁰ Maurice E Stucke and Ariel Ezrachi, *Competition Overdose* (Harper Business 2020).

indispensability of core platform services, the elimination of competition in the downstream market, and the need to stimulate innovation around the platform. Moreover, the DMA aims at preventing all exploitation of consumers, manifesting the typical *ordo-liberal* influence in European Union Law. The obligations set out in the sector regulation reflect the obligations that can be imposed under the EFD ex-post enforcement, nowadays without necessity to prove the indispensability. Furthermore, they recall the most recent case law and investigations on Google, Amazon, Facebook, Apple, and Microsoft, both at National and European level. The problems with the *ne bis in idem* principle are not easy to overcome; in fact, a possible reversion to an “*idem crime*” approach in the Competition Law field cannot be set aside, since the DMA might be interpreted as no more than an implementation of Article 102 TFEU. Anyway, further research into the lively debate on the goals of EU Competition Law and its interrelation with the DMA is necessary, while waiting for the Court of Justice to take a position on these matters.