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Data, Digital Markets and Refusal to Supply

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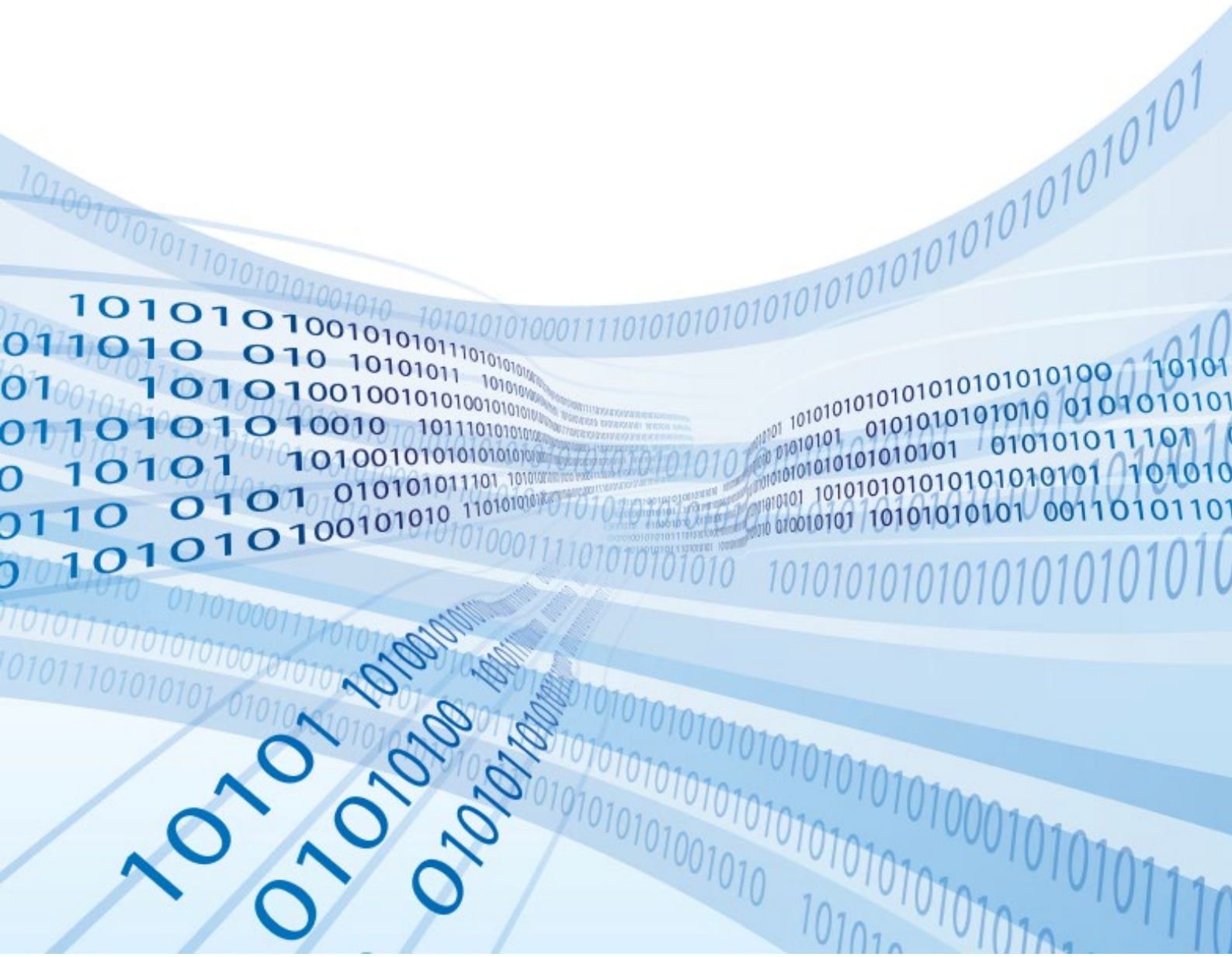

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Contents

Section

What we are discussing – in brief

A competitive advantage may arise because one firm has access to assets or facilities which are not available to rivals. If these rivals were able to use these assets/facilities, then they may be stronger competitors with improved products/services and consumers may benefit from this.

Very occasionally, sectoral regulators or competition authorities may require a dominant firm to contract with rivals to provide access to key facilities controlled by the dominant firm in order to support their ability to compete and serve end customers. However, this is a very rare step as doing so may undermine the incentives of the dominant firm, and its rivals, to invest in developing important assets in the first place. Therefore, it is necessary to balance the likelihood and impact of these outcomes.

Reflecting this, the legal criteria that must be met in order to find that a firm with a dominant position in a market has infringed competition law, through an outright refusal to supply access to an asset, are demanding. We consider how these criteria (the 'essential facilities doctrine') may apply in digital markets where there has been a refusal to supply, particularly when data is the asset to which access is sought.

We consider this to be worth exploring for three reasons. First, it is worth asking whether these essential facilities criteria are still fit for purpose in ensuring that this part of competition law continues to achieve its objectives. The criteria were set long before the development of contemporary digital markets, and so there is a risk that these criteria are not appropriate to the challenges presented by market power in the digital sector. Second, these criteria may also be informative of when regulatory authorities might seek to impose a duty to supply access in digital markets. Third, we use the example of access to data because the importance of data has been emphasised in explaining the strength of companies/platforms in digital markets and mandating access to data has been identified as a potential solution in situations where there is a refusal to supply.

1. Why and when a duty to supply may be imposed

1.1 Companies generally have a right to deal with whomever they choose and a right to do with their property as they wish. Interfering with a company's property rights should be expected to occur only very rarely and where there is seen as little possibility of effective competition arising in the absence of intervention. Moreover, imposing a duty to deal may reduce the incentives for companies in that sector to continue investing and innovating. Companies may not wish to take the risks of investing in producing an asset if they are not free to utilise it how they see fit, including choosing not to supply it to competitors. In addition, there is a risk of innovation weakening more broadly if competitors to the company with a desired input or asset choose not to invest in developing similar assets of their own if they can simply rely on using the asset of the company which was first to develop it. Although mandating access to the asset for competitors may benefit competition in the short-run, the longer term harm to consumers due to the reduced incentives to invest and innovate may outweigh this benefit.[1]

1.2 However, there may also be good economic reasons for requiring a company to provide competitors with access to an important facility which it owns.[2] If an input is truly essential to be able to produce a product or service in a downstream market, denying that input to a downstream firm effectively removes them from being a competitor. If the refusal to supply eliminates all competition in the downstream market, then a competitor with control of that facility would not be competing 'on the merits' – that is, by offering better goods or lower prices on the downstream market. While the owner of the facility may be allowed to extract profits from the market on which the facility is sold, as otherwise there may be no incentive to create the facility, it has no right to use it to monopolise a vertically integrated related market. Such conduct can harm competition and ultimately consumers.

1.3 In relation to digital markets, commentators have pointed to ineffective competition and entrenched market power in relation to certain very large players in digital markets and in relation to specific services they offer.[3] These players have sometimes been characterised as gatekeepers – providing a service which is seen as necessary to use by businesses seeking to reach consumers in some way. It has been argued that a key reason for these gatekeepers to have secured this position is that the service offered is not seen as having good alternatives. Moreover, in some cases the service being offered may rely on a key

[1] *Slovak Telekom v Commission*, C-165/19, EU:C:2021:239, paragraph 47.
[2] The explanation here is taken from pages 511-512, The Law and Economics of Article 102 TFEU, 2013, Robert O'Donoghue and Jorge Padilla.
[3] For example, 'Unlocking Digital competition – Report of the Digital Competition Expert Panel' (commonly referred to as the Furman Report), March 2019; and the European Commission's 2019 'Competition Policy for the Digital Era'.

input to which the gatekeeper has sole access. Without access, rivals and potential rivals to the gatekeeper in downstream and adjacent markets might struggle to compete.[4]

1.4 This can lead to ineffective competition in these downstream markets. Competitors are reliant on something which is possessed by a key player in the digital market. What happens if this player does not want to supply this input to competitors, or would only do so on terms which effectively impede the ability of competitors to compete meaningfully?

Access regulation through ex ante sectoral powers

1.5 As a sectoral regulator, Ofcom has specific statutory powers to deal with the access issue identified above in certain regulated markets. The Communications Act 2003 and Postal Services Act 2011 include specific powers to address competition issues alongside relevant policy objectives where market power has been identified. These powers include the ability to mandate access to assets or facilities and set the terms of access (including prices), which downstream companies face for access.

1.6 This explains many of the ex ante regulatory requirements placed on Openreach, as a very important supplier of 'last mile' fixed line infrastructure. It is similarly the case when Ofcom sets ex ante regulatory conditions on Royal Mail for bulk mail access operators that need Royal Mail to take their mail to local sorting offices for final sorting and delivery to households.[5] These are examples of former state monopolies where competition has been added to the contestable parts of the market.

1.7 As part of the statutory process when assessing whether to impose an access obligation on a regulated firm, e.g. a duty to deal, Ofcom produces detailed assessments of the relevant markets to identify whether there are competition concerns, and undertakes a detailed review of the implications of imposing this duty.[6] Where competition has proved effective, or is expected to grow in the absence of burdensome regulation, then Ofcom has reduced the scale of its intervention over time and indeed removed regulation entirely in some cases.[7] Nonetheless, it is clear that, at times, it has been seen as necessary to impose a

[4] There have been regulatory initiatives to support data portability, whether this relates to consumers or business users being able to access and transfer the data which they create on platforms. Such initiatives might provide a way to enhance competition in markets where data plays a particularly important role. We do not discuss these initiatives any further.
[5] 2022 Review of Postal Regulation, 18 July 2022, page 235 and following.
[6] Ofcom's assessments must meet certain criteria before it can impose conditions on entities considered to have significant market power (SMP). In particular, Ofcom must assess whether the following conditions are met in a relevant market: (a) that high and non-transitory structural, legal or regulatory barriers to entry are present; (b) that there is a market structure which, having regard to the state of infrastructure-based competition and other sources of competition behind the barriers to entry, does not tend towards effective competition; and (c) that competition law alone is insufficient adequately to address the identified market failure. Ofcom may then identify an entity as having significant market power in relation to a defined market if that entity "*enjoys a position which amounts to or is equivalent to dominance of the market*". Sections 78 and 79, Communications Act 2003.
[7] For example, in March 2021, Ofcom indicated that it intends to take different approaches to regulating Openreach's residential broadband products in different parts of the UK depending on the level of current or prospective competition. Where there is established competition, Openreach's broadband products are not regulated; where there is potential for material competition, Openreach must provide wholesale access to its network, but only one of Openreach's broadband services is subject to price regulation; where Openreach is the only operator, there is more extensive price regulation. Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26, Volume 1, March 2021.

duty to provide access to an important input and that this has been a key policy tool in the progressive liberalisation of certain former state monopolies.[8]

1.8 Moving forward from the examples cited above of former state monopolies, the potential for a duty to supply to be imposed through sector-specific regulation is also pertinent to certain digital sectors as they become subject to increasing ex ante regulation. For example, in the UK, the Government has proposed a new pro-competition regime for digital markets. In advance of the statutory regime, a non-statutory Digital Markets Unit (DMU) has been established within the Competition and Markets Authority (CMA) to promote competition in digital markets. It is anticipated that the regime will be targeted at a small number of firms with substantial and entrenched market power, which gives them a strategic position ('Strategic Market Status', SMS) in one or more activities. Under the Government's proposals, once a firm is designated with Strategic Market Status, the DMU will have powers to set out how it is expected to behave through conduct requirements.[9]

1.9 Several influential commentators have highlighted the importance of data in digital markets.[10] For instance, access to data has been raised as an issue in the development of an ex ante regulatory regime for digital markets in the UK. Concerns around access might arise when a firm is an important access point to customers (a gateway) for other businesses.[11] In its consultation document, the UK Government identified how an enforceable code of conduct would allow corrective action against an SMS firm which suddenly restricts a third party's access to key data.[12] Similarly, the Government identified 'access to the data' as a potential conduct requirement for firms with SMS to support a competitive advertising market.[13] The DMU's decision-making will be independent and evidence based. Nonetheless, this suggests that forms of access remedy will be part of the tool kit of the Digital Markets Unit under the new ex ante competition regime.

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[8] Other UK regulators act similarly. For example, wholesale water companies act as monopolists in their respective geographical regions. Nonetheless, there is a separation between the functions of the upstream wholesale regional monopolists (which engages in water abstraction, treatment and delivery and wastewater collection) and the retail of water services to certain customers (which comprise meter reading, billing, and collecting payment from customers). There is competition between numerous retail providers operating in a region, but all are supplied by the same upstream wholesale company which has its wholesale prices limited by Ofwat's licence conditions. An upstream water company could not deny this access in order to favour its own downstream retail arm.

[9] Government response to the consultation on a new pro-competition regime for digital markets, May 2022

[10] Concerns and issues about access to data in digital markets were raised in the reports identified in the previous footnote. For example, chapter 5 of the European Commission report is dedicated to issues arising with data. See also the discussion of 'data openness', at page 74 of the Furman Report. In addition, in its market study into online platforms and digital advertising, the CMA found that digital platforms collect vast quantities of unique user data, which gives them a significant competitive advantage when providing data-driven services such as targeted online advertising and entering new markets.

[11] Paragraph 68, A new pro-competition regime for digital markets, consultation document, July 2021; also, page B13, A new pro-competition regime for digital markets Advice of the Digital Markets Taskforce, December 2020, Appendix B: The SMS regime: designating SMS firms. The Government response to the consultation did not re-articulate the criteria that will be used to identify whether a firm has a strategic position or the importance of access to data. However, it did note broad support for the criteria and set out its intention to implement the criteria in legislation.

[12] Paragraph 106, A new pro-competition regime for digital markets, consultation document, July 2021.

[13] Paragraph 66, Government response to the consultation on a new pro-competition regime for digital markets, May 2022.

Competition law and the essential facilities doctrine

1.10 Competition law, applying to all companies and sectors, may effectively also impose a duty to supply on companies when finding a company to have abused a dominant position when refusing to supply a key input.[14] This requirement may be imposed on a firm or firms which have not previously been identified as holding market power or being natural monopolies and which are not subject to ex ante regulation of market power.

1.11 This duty to supply is imposed extremely rarely. In part, this is due to a recognition of the potentially negative consequences of such intervention, as noted above. In the light of these potential consequences, demanding criteria, often referred to as 'the essential facilities doctrine', have been set by the courts. These criteria are what a competition authority should expect to be able to meet if it has found that a dominant company has infringed competition law by refusing to supply access to an asset (an essential facility) and, flowing from this, wishes to impose a duty to deal on the dominant company. These criteria have been set, in large part, by the '*Oscar Bronner'* judgment, which was ruled on by the Court of Justice of the European Communities back in 1998. (CJEC – now known as the Court of Justice of the European Union or CJEU).[15]

1.12 In Oscar Bronner, a case in which an Austrian newspaper home delivery service was found not to have abused its dominant position by refusing a rival access to its service, the CJEC held that there could be an abuse of a dominant position if (i) the refusal was likely to eliminate all competition in the market on the part of the person requesting the service; (ii) that such refusal was incapable of being objectively justified; and (iii) that the service in itself was indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence to the service.

1.13 In relation to the demands of the criteria set by the *Bronner* case, one commentator has noted that: "*Under Bronner, it does not suffice to demonstrate that the owner of the facility is in [a] dominant position in the upstream market, since a dominant position does not exclude the existence of alternative facilities. Moreover, even if alternatives do not exist yet, it cannot be concluded that the facility is indispensable. Indeed, a forward-looking assessment of the downstream market will have to determine whether viable alternatives can be developed. Thus, Bronner confines the application of the essential facilities doctrine to a particular form of dominant position, a kind of "super-dominance*".[16]

1.14 In what follows, we consider how the criteria in the essential facilities doctrine may apply in the digital sector. In particular, we first consider why data might be considered an

[14] We say that competition law may effectively impose a duty to supply because a competition authority could find a refusal to supply to be an abuse of dominance (and an infringement under Chapter II of the Competition Act 1998). In order to no longer be in an infringing position, the dominant firm would need to provide access, presuming access was still required. Therefore, the infringement finding would effectively be a requirement to provide access.
[15] Case C-7/97, EU:C:1998:569.
[16] Page 23, Sébastien J. Evrard, 'Essential Facilities in the European Union: Bronner and Beyond, 10 Colum. J. Eur. L. 491 (2004), p.23.

essential facility and how the criteria might be applied to data. We consider this to be worth exploring for three reasons.

i. The criteria were set long before the development of contemporary digital markets, and so there is a risk that they are not appropriate to the challenges presented by market power in the digital sector.[17] Therefore, it is worth asking whether these criteria are still fit for purpose in ensuring that competition law continues to achieve its objectives.

ii. These criteria may also be informative when regulatory authorities are considering the imposition of a duty to supply access in digital markets.

iii. We use the example of access to data because the importance of data has been emphasised in explaining the strength of companies/platforms in digital markets and access to data has been identified as a potential solution.

1.15 This discussion paper focuses on the situation when a dominant firm has engaged in an outright refusal to supply, and where the essential facilities criteria would be the relevant criteria against which to assess the conduct. There may be other ways in which dominant firms can effectively limit competitors' access to key assets or services controlled by the dominant firm. This conduct may be characterised differently under competition law and, therefore, may not require the essential facilities criteria to be met. In particular, the CJEU has identified when the essential facility criteria will and will not apply: an "*undertaking may be forced to give a competitor access to an infrastructure that it has developed for the needs of its own business only where such access is indispensable to the business of such a competitor, namely where there is no actual or potential substitute for that infrastructure. By contrast, where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down by the Court of Justice in paragraph 41 of the judgment in Bronner do not apply*".[18]

1.16 In line with this, this discussion paper does not suggest that the essential facilities criteria should apply in any or all instances in which access to assets or services in digital markets, such as data, is impeded by dominant companies, such as setting unfair conditions for access.[19] Rather, the paper is focused on those situations where the essential facilities criteria would apply.

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[17] Much of the case law on essential facilities relates to natural monopolies and often to physical infrastructure. Digital platforms markets may be characterised by particular features, such as strong network effects, single-homing, and a propensity to tip, which mean that the criteria might be applied differently. For example, these features of digital platforms may mean that, while there are other small competitors providing a similar service, they provide no real competitive constraint on the dominant digital platform. One might, then, interpret the requirement for 'an elimination of competition on a second market' (discussed further below) less strictly where a duty to deal was seen as necessary in order to support effective competition.

[18] *Slovak Telekom v Commission*, C-165/19, EU:C:2021:239, paragraphs 49-50.

[19] In this regard see for example the judgment of the General Court in *Google and Alphabet v Commission*, T-612/17, EU:T:2021:763 at paragraphs 212-249. In its appeal, Google argued that it was more appropriate to characterise the conduct as an alleged refusal to supply access and, under this characterisation, it was incumbent on the Commission to show that,

2. Assessing whether data meets the criteria for an essential facility

The importance of data in the digital economy

2.1 The CMA and ICO recently set out why data plays a central role in the business model of many firms operating in digital markets, and in particular of online platforms:[20]

> *"Examples of digital businesses relying on data to optimise their services include: online stores monitoring sales volumes for their products; search engines that collect and analyse search queries to train their algorithms and improve future search results; social media platforms that observe user behaviour to improve the content displayed in feeds; and news media publishers that adapt their content to draw and retain users on their pages".*
>
> *"Enabling greater access to data that can be used to improve a product or service can in principle enhance choice and the user experience. Similarly, ensuring services can communicate freely with one another (ie making them interoperable) can facilitate integration of a wide range of products, services, and applications, for example allowing for cross-posting from one platform to another, or for connecting various devices produced by different firms. This can improve consumer experience overall, and avoid consumers being "locked in" to a particular ecosystem by enabling them to move more freely between services."*
>
> *"Data is also a critical input for digital advertising. While the services described above are typically offered to users for free, the providers of these services, mainly large platforms, seek to make money through the selling of inventory to advertisers. The value of this inventory can be enhanced by data that supports improved targeting, measurement, and attribution of adverts that are displayed. Google and Facebook are by far the largest two platforms that are funded by digital advertising. This advertising-funded business model is also adopted by a range of other online content and service providers including for example many online newspapers and mobile apps."*

among other things, that access to the dominant company's infrastructure is "indispensable" for competition. The General Court did not support Google's view on this. While the General Court acknowledged that the Google Shopping case concerned rival comparison shopping services' equal access to Google's general results pages, it held that not every issue of access necessarily creates an obligation to apply the Bronner criteria and to establish a refusal to supply. In this case it was inappropriate to refer to *Bronner* because Google's conduct was based on discrimination of comparison search services, namely the simultaneous favouring of Google's own comparison shopping results and the demotion of competitors'. The discrimination against rivals' comparison search services was an integral part of the abuse and did not relate to gaining access to Google's general search result. For a detailed and varied consideration of the *Google Shopping* judgment see the special issue of the *Journal of European Competition Law & Practice*, Volume 13, Issue 2, March 2022.

[20] Paragraphs 13 – 15, Competition and data protection in digital markets: a joint statement between the CMA and the ICO, 19 May 2021.

The criteria for being an essential facility

2.2 The term 'essential facility' is typically defined as an asset that is owned or controlled by a vertically integrated dominant firm, where rival companies need access to the facility to compete with the vertically integrated firm in a downstream (or related, or adjacent) market.[21]

2.3 Increasingly in digital markets, firms collect and combine data to enable them to enter vertical and/or adjacent markets. Given the debate around 'gatekeepers' in digital markets it is easy to see how commentators are considering data as being potentially indispensable to compete in a downstream or adjacent digital market. That is, without data access remedies the incumbent may become entrenched in the downstream or adjacent digital market. Some observers have suggested that regulators should have the power to force large digital platforms to make their data available to potential entrants, to boost competition.[22]

2.4 Commentators have also argued that greater third party access to data should occur, owing to its particular economic characteristics. For example, data is 'non-rivalrous', meaning that one firm's use of data does not prevent another firm/institution from using that same data. Put differently, data can be used multiple times by several entities, and it will not be depleted.[23] This feature, combined with the benefits that stem from using data, has been used to argue for regulatory authorities mandating wide access to data, so as to enhance societal welfare. However, while data itself is non-rivalrous, the collection of data is costly and the profits obtained from insights from data are rivalrous. This implies that care would need to be taken when imposing any access duty, so as to preserve incentives to continue investing in the collection, storage, analysis and final use of data by an incumbent.

2.5 Here we consider (i) the particular issues/challenges which may arise in relation to data as an essential facility, when assessing whether the minimum conditions for compulsory dealing under general competition law have been met; and (ii) some issues that may arise when mandating access through ex ante regulation. These minimum conditions have been identified as:[24]

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[21] Essential facilities have traditionally been seen as large infrastructure: an airport, port, or energy transportation pipeline which is deemed essential for a competitor to compete in a downstream, related, or adjacent market.

[22] For example, the final report of the Stigler Committee on Digital Platforms final stated that digital platforms "generate several concerns across different fields, all linked to the power of data. To address these concerns in a holistic way, there needs to be a single regulator able to impose open standards, to mandate portability of and accessibility to data, to monitor the use of dark patterns and the risks of addiction, and to complement the FTC and the DoJ in merger reviews." Page 18. September 2019.

[23] According to the Furman report: "Datasets are non-rivalrous, meaning that opening them up to additional users does not deplete the volume of data available for the original users or owners. Unlike a physical asset, data are easily duplicated so can be accessible and useful to multiple users simultaneously. However, they are excludable by contract, technical barriers, or regulation, meaning those that gather or acquire valuable consumer data do not need, or may not be able, to share it with others". Paragraph 1.41.

[24] See page 538, The Law and Economics of Article 102 TFEU, O'Donoghue and Padilla.

a) there is a refusal to supply;

b) the requested party is dominant on an upstream 'market' for the supply of the input and the anticompetitive effects of the refusal arise on a second, downstream, 'market';

c) the input in question is essential for competition on the second market, in the sense that it cannot be duplicated or can only be duplicated at an uneconomic cost;

d) the refusal to deal would eliminate competition on the second market;

e) at least in the case of IP rights, the refusal to deal prevents the emergence of a new product for which there is consumer demand or otherwise limits 'technical development'; and

f) no objective considerations justify the refusal to deal.

2.6 In discussing these conditions, we utilise a hypothetical example. Consider a situation where a hypothetical digital company/platform (Domco) holds a very strong position of dominance in the provision of a service to users. Through the provision of this service to users, Domco collects data on the preferences of these users. Domco then uses this data to develop and optimise its services to users in the 'downstream' market (downstream because the data acquired in the upstream market is used as an input into the downstream market). A competitor ('Challenger') believes that it can only enter or expand effectively in the downstream market if it has access to the data on customer preferences which the dominant company has; that it has requested this data to be supplied to it on commercial terms; but that the dominant firm has refused to supply the data or engage in discussions on terms.

There is a refusal to supply

2.7 In the hypothetical example, Challenger requested access and Domco refused access or to discuss terms. However, there could be a constructive refusal to supply rather than an outright refusal to supply. Domco could delay in responding to requests and/or set unreasonable requirements for Challenger to meet in seeking the input data. Case law has indicated that such practices can still be considered as a refusal to supply.[25] However, more recently, the CJEU has clarified that in cases of "constructive" or "implicit" refusal to supply an input, the requirement of the *indispensability* of such input, as discussed further below, is not itself decisive for an abuse of dominance to be found.[26]

2.8 Whether considering an outright, or constructive, refusal to supply in relation to data, it may be difficult to establish whether a competition law breach has occurred if there are

[25] For example, see Telekomunikacja Polska, Holyhead, and Microsoft cases.

[26] How Indispensable is the Indispensability Criterion in Cases of Refusal to Supply Competitors by Dominant Companies? (Slovak Telekom, C-165/19 P), Jose Rivas, Kluwer Competition Law Blog, 1 April 2021. See also, Slovak Telekom, paragraph 50.

complexities in identifying exactly what data is required, how it should be provided, and what is a reasonable licence fee for access.

2.9 In particular, a challenge may arise where it is not simply a raw data set to which Challenger requires access. For example, Challenger may request access to data which Domco has processed in some way to make it useable or to provide the necessary insights. Similarly, Domco may combine the data with other sources which are more widely available. It may be that Domco has refused to supply the processed data, or the insights which flow from this, but would supply less processed data which Challenger could not use or find it uneconomic to use.

2.10 Another challenge is the price at which a constructive refusal to supply may arise. Data on customer preferences which Domco collects through the provision of its service in the upstream market may not have any clear direct cost to Domco and which might be used as a point of reference in pricing. Therefore, there may be difficulties in identifying a reasonable access price which balances incentives for Domco to invest and make a return against the exclusionary effects of a high price.[27] The challenges of establishing an appropriate access price also arise when an outright, rather than constructive, refusal to supply is adjudged to have occurred.

Mandating access to upstream 'data' markets

2.11 Mandating access to upstream data markets appears more likely to meet the criteria when it is clear that there is, or could be, a market for the supply of this sort of data to downstream third parties. As discussed further below, indicators that there is or could be such a market may include when the type of data has been supplied previously to third parties by Domco or businesses with similar types of data; or where there is a clearly separate downstream arm to Domco to which this data is supplied for production of some downstream service.

2.12 However, it may not always be the case that such a data market already exists. In these situations, a challenge may be a greater difficulty in identifying the relevant upstream economic market in which the incumbent – Domco in this example – operates. Essential facilities case law has generally focused on physical assets or certain discrete intellectual property rights.[28] Data, unlike these other assets, may be an amorphous entity with constantly changing qualities, dimensions, and quantities. In turn, a firm or firms may seek to use data in different ways, and a firm may use data differently over time. Since it is the data, in this example, to which downstream or adjacent rivals seek access i.e. 'data' in some shape or form is deemed to be the facility, it may be challenging to establish the

[27] Although it has been suggested that "proof of a margin squeeze would presumably, however, be sufficient of a constructive refusal even if not necessary". O'Donoghue & Padilla, page 540. However, some downstream markets, such as two-sided markets, may not have pricing which is easily subject to margin squeeze tests.

[28] Discrete intellectual property rights like the TV listings in *Magill* or the structure of the designated geographic 'brick' structures for segmenting data on regional sales of pharmaceutical products in *IMS Health*.

appropriate aspects and type(s) of data that should be considered as falling within the 'essential facility', and which stands up sufficiently to legal and economic scrutiny.

2.13 There may be further analytical complications where Domco operates in an ecosystem in which data is collected, stored, analysed, and used across multiple sectors and jurisdictions; in such a situation Domco may simply consider this data to be an integral part of its overall service which would not normally be sold to any third party. Can Domco be required to supply data if it has not previously supplied or sold data? Moreover, if there is no obvious downstream market, can Domco be mandated to provide access to data to allow access to the ('upstream') market where it is deemed to be dominant and where it collects this data?

2.14 In this context, it is relevant to note that in the 'IMS Health' case the CJEC indicated that the presence of two separate markets is a necessary condition for the imposition of a compulsory licensing of an IP right, but that it is enough in this regard to identify a 'potential' or 'hypothetical' upstream market.[29] The CJEC expanded on this by adding that "*it is determinative that two different stages of production may be identified and that they are interconnected, the upstream product is indispensable in as much as for supply of the downstream product*".[30] The CJEC therefore suggested that it does not matter that the upstream input was never independently marketed before and is only used as a key component in the production of a final product. It is sufficient that there is "*the possibility of identifying a separate market*" even if none yet exists.[31]

2.15 This appears to indicate that, if a hypothetical upstream market for data could be identified, then Domco could be found to be illegitimately refusing supply to this data even if it had not previously sold/supplied it to a third party; and even if there were no separate Domco downstream arm which used this data as an input when competing with Challenger.

2.16 However, this broad view has been challenged. It has been argued that: "*A 'stage of production' that does not correspond to a market – in the sense that it gives rise to a product or service which is sold or licensed – should not be enough in itself to entitle a competitor to demand it. … A 'stage of production' must mean something more akin to an actual market in the sense that it is something that is inherently capable of being sold or licensed to third parties (and even if the dominant firm has not yet done so). A product at a stage of production that nobody has ever sold or licensed, or that it would never be rational to sell or license, can only be a competitive advantage. It cannot be assumed that the EU Courts had in mind that all competitive advantages, if valuable enough, should be shared*".[32]

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[29] Page 544, O'Donoghue & Padilla, which refers to the Court of Justice decision in IMS – *Case-418/01, IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039, paragraph 44.
[30] *IMS Health*, Paragraph 45.
[31] Page 544, O'Donoghue & Padilla, again referring to *IMS Health* and indicating that the General Court approved the same test in *Microsoft.*
[32] Page 545, O'Donoghue & Padilla.

2.17 The foregoing indicates, unsurprisingly, that the assessment, of whether the refusal to supply data by Domco could be characterised as a competition law breach, would depend on the specific circumstances of the case. It appears that it is possible to find such a breach where the data has not previously been supplied. It also appears possible to find a breach where Domco is not already operating a clear upstream entity which produces the data and supplies it to a downstream arm. However, it appears harder to find a breach when Domco has not previously supplied the data to a third party; and the more notional it is that the data which Domco acquires is really a product which might typically be sold to third parties, particularly if there are no other examples of this type of data being sold.[33]

2.18 The criteria underlying the essential facilities doctrine were largely developed with physical infrastructure in mind, although there have been leading cases in relation to IP rights.[34] It is not clear whether they remain suitable for modern digital markets where different services are closely integrated, rather than being highly discrete, and where data collected by the dominant company is utilised across these services, and markets may be multi-sided.[35] The nature of these digital markets may have become too complex for the relatively simple criteria of the essential facilities doctrine still to be optimal.

The indispensability of the data as an input

2.19 Under the essential facilities doctrine, for a product or service to which access is requested to be considered indispensable, it must be essential for the exercise of the downstream activity in question.[36] In addition, it must be determined whether there are products and

[33] One approach, to assessing whether the supply of data might be characterised as a market, even if it has not previously been supplied, is to consider whether it is something worth monopolising. This would be the application of the hypothetical monopolist test. This could at least show whether there were close demand or supply side substitutes to the data and, if not, whether the data might be considered a separate relevant market. However, this approach may be the minimum that needed to be shown to indicate that there were no good alternatives. It may be that one would need to go beyond this to show that the specified data is something that one might expect to see supplied/sold if not held by a (vertically integrated) monopolist, or because similar (but not substitute) types of data are typically supplied/sold in other sectors/contexts.

[34] Magill, IMS Health, Microsoft. In *Magill*, the Court of Justice found that refusal to license an intellectual property (IP) right was an abuse of dominance when broadcasters in the UK and Ireland would not provide their listings for TV programmes for the week ahead to Magill, who wished to publish a weekly television guide containing these details across the TV channels. In *IMS Health*, the European Commission found that IMS Health had abused a dominant position by not making available, on reasonable terms, access to copyright-protected data analysis structure in Germany which related to the way pharmaceutical sales data were reported. In *Microsoft*, the European Commission found that Microsoft had infringed Article 102 by refusing to supply the protocol specifications contained in its PC operating systems or had done so on discriminatory terms, thereby reducing the interoperability of competitors' products with its dominant Windows PC operating system product. See page 534, O'Donoghue and Padilla.

[35] On the other hand, it has been suggested that some characteristics of data may facilitate antitrust intervention in data-dependent aftermarkets. For example, it has been observed that in most legal orders data is not subject to a property right. Data is subject to lesser forms of a right, such as possession or control. Accordingly, antitrust intervention in data cases will not be as detrimental to the right of property as in other cases and the threshold for intervention may be lower. It has also been suggested that "data lock-ins" may justify intervention because, not only do they lead to foreclosure of secondary markets, but they may significantly reduce the contestability of the primary market: see 'How Indispensable is the Indispensability Criterion in Cases of Refusal to Supply Competitors by Dominant Companies?' (Slovak Telekom, C-165/19 P), Jose Rivas, Kluwer Competition Law Blog, 1 April 2021. It has also been suggested that while there are no general property rights in the UK or the EU regarding data (European Commission Joint Research Centre, *'An economic perspective on data and market power'*, September 2020, p. 5, section 2.4), data controllers might be able to assert intellectual property rights or otherwise establish legal rights to data they have collected through contractual means.

[36] Page 545, O'Donoghue & Padilla, referring to Ladbroke v Commission.

services which constitute alternative solutions, even if they are less advantageous. There must be no actual or potential 'viable alternatives' to the dominant firm's input or it must be the case that the cost of such alternatives is 'prohibitively expensive' and would not make any commercial sense.[37]

2.20 This sets a relatively high bar.[38] It is not enough for Challenger to argue that replicating the asset (i.e. the data) is unaffordable due to the smaller scale of Challenger. The Oscar Bronner judgment indicated that it would be necessary to assess whether replicating the asset would be uneconomic if operating at the scale of Domco. Specifically, the requesting party (Bronner) argued that it could not afford to replicate the home-delivery system of Mediaprint because of its small distribution. However, the Court's view was that Bronner's calculation was incorrect because it relied on an unreasonable assumption regarding its distribution after the introduction of the new home delivery system. In this respect, the Court of Justice clarified that:[39]

> *"For such access to be capable of being regarded as indispensable, it would be necessary at the very least to establish … that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distribution by the existing scheme"*.

2.21 The CJEC appeared to say that, when assessing whether access to the existing newspaper distribution system was indispensable in order to compete, one would need to look at whether investing in building a newspaper distribution system would have been economic when a newspaper has the same level of circulation as the incumbent; or that one cannot just say that it is uneconomic for the challenger because the challenger is operating at a small scale. How might this view, and the indispensability condition more generally, relate to digital platforms and data?

2.22 First, in some situations, one might consider that the difference in scale between some existing digital platforms and those seeking to compete with them through accessing data is very large. It might, then, be unrealistic, or at least quite difficult, to assess whether Challenger could recreate the same data when operating at the scale of Domco.

2.23 Second, it may be that the legal tests should take into account the additional challenges, aside from scale, which Challenger might need to overcome in order to compete effectively with Domco. The greater the barriers are to competing with Domco, then it may be that access to the data held by Domco is more important in supporting effective competition than might be the case if there were fewer additional challenges to compete. Additionally,

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[37] Page 546, O'Donoghue & Padilla.

[38] It may be that the height of this bar is more variable than it appears at first, as indicated by the approach of the General Court in *Microsoft*. "*Although the General Court relied on the same exceptional circumstances as taken into account in earlier cases, it followed the Commission in applying lower standards for the fulfilment of the 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 "on an equal footing". This while the Court of Justice made clear in Bronner that access is not indispensable if alternatives are available, even though they are less advantageous*." Page 45, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy', Inge Graef.

[39] *Oscar Bronner*, paragraph 46 .

if there are other substantial barriers to competing, it means that Domco will likely continue to earn some degree of market power rents even if Challenger were able to compete.[40] Therefore, the dynamic incentives for Domco to invest in developing an important asset exclusively for its own use, are less likely to be undermined by granting access to Challenger. Features of digital markets which may be relevant here are network effects and limitations to switching and multi-homing.[41]

2.24 In addition, it may be that many of the practices of the dominant digital incumbent, aside from the refusal to supply essential data, mean that achieving a comparable scale is not feasible. A dominant incumbent may exploit users' behavioural biases to make the users 'sticky' to its platform. That is, a dominant platform can use techniques ('choice architecture'), such as how its website is presented and structured and the prompts it gives to users, to exploit people's behavioural biases and limit their interest in switching or ability to switch to rival platforms, without providing the users with any benefits (such as improved quality).[42] The competition or regulatory authority may need to tackle these practices, and the lack of competition they may entail, through means other than mandating the provision of access to the data. For example, seeking remedial actions that address the use of defaults and/or choice architecture, rather than imposing a duty to deal.

2.25 Whether or not the incumbent is exploiting behavioural biases of users, it would be important to understand what alternative approaches are available to Challenger other than securing access to Domco's data. For example, Challenger may be able to adopt a different business model to Domco. Assume for a moment that Domco has a business model with advertising as the primary revenue source and, as a result requires significant volumes of data to be viable. However, Challenger may be able to enter using alternative revenue models, such as a subscription-based revenue model requiring less data.[43] An authority would need to consider this as part of its assessment. However, there may be difficulties in gathering sufficient evidence on whether an alternative business model is viable, especially in the absence of such a firm.

2.26 Third, it may be rather unclear how much data is required by Challenger in order to have the same scale as Domco. Many companies in digital markets now are less likely to have

[40] This indicates that an access remedy may not be sufficient to ensure that the market becomes very competitive. Other remedies might be considered too. However, it would seem inappropriate only to intervene where one could be sure that the outcome would be a highly competitive market rather than improving competitive outcomes in the market relative to those arising in the absence of intervention.

[41] See pages 35-36, 'Unlocking Digital competition – Report of the Digital Competition Expert Panel', March 2019.

[42] Examples of the kinds of behavioural biases firms may seek to exploit include default bias and loss aversion. (i) Default bias: people often fail to consider their outside options and instead focus on the options that are presented to them. For example, to prevent people from considering alternatives to its platform, the dominant firm can create an interface with 'infinite' scrolling. This will tend to retain users on the site as they will then tend to stick to the options in front of them. Loss aversion: people often suffer greater psychological harm from a loss than the psychological benefit they obtain from an equivalent gain. Platforms can exploit this bias by for example heightening the time sensitivity of user choices. A common way for e-commerce platforms to do this is to use a countdown timer to put pressure on users to make a purchase. When the timer 'runs out', the user needs to start its selection process again from the beginning. Users will often hastily make purchase decisions to avoid the loss of the product they have arrived at through the selection process. Therefore, they may fail to shop around i.e. consider alternative options.

[43] Such a strategy may not always be an option in cases where users have a low or zero willingness to pay and have a strict preference for paying with their attention by receiving adverts.

access to the same volume of data available to, say, a Domco, when these Domcos started providing their services to users. However, that does not mean that having this volume of data would allow one to compete effectively with these companies now. This leads to the question of how one might define what constitutes 'enough' data to compete effectively with an incumbent.

2.27 Fourth, it may similarly be unclear what type of data is indispensable; whether it is only a single type of data; and how the type and volume of data might interact or substitute in terms of ability to compete. In assessing indispensability, an authority might ask itself whether Domco has exclusive access to a type of data and if so, whether there are substitutable data available that could offer a competitive level of use for a new entrant.

2.28 The existence of substitutable data requires careful analysis. For example, suppose there are economies of scale in the collection of data, due to fixed costs of infrastructure required to collect data. A cursory analysis might presume that a barrier to entry exists because of the existence of economies of scale. However, because data is often multivariate, in that it has multiple characteristics, the extent of economies of scale will be affected by these characteristics. In one scenario, variety of data may make up for smaller volumes of data. The implication of this would be that a new entrant may be able to use substitute data to that used by Domco even if it does not have access to data of the same volume. In another scenario, it may only be possible to create an insight or produce a set of information from a specific combination of data characteristics that are uniquely available to the incumbent. A key insight here is that data substitutability (and linked to this, its indispensability) is partly determined by the combination of data characteristics needed to produce the relevant use or insight.

2.29 Consequently, there is merit in considering: (i) what are the characteristics of data held by Domco, (ii) what combination(s) of these characteristics are required to generate economic value and are these characteristics substitutable, and (iii) whether there are alternative data sources available to new entrants. There is also a question over whether data needs to be accessed on an ongoing basis, for example where the usefulness of data, and its importance to the ability to compete, varies over time.

2.30 The example of how the volume and type of data improves the accuracy of machine-learning models may be illustrative of this.[44] Some have argued that model accuracy increases with data sample sizes but at a decreasing rate, so displaying decreasing returns to scale.[45] Others have argued that the complexity of problems tackled by machine learning mean that new, harder tasks are more valuable than earlier, easier ones and, therefore, they also call for more data, and more complex data.[46] For these problems, the more data, the better it can address these harder tasks, and the more valuable it is. Others have

[44] The following summarises material found at The dynamics of data accumulation, 28 December 2020, Julian Anderson.
[45] Intuitively, in teaching an algorithm what Labradors looks like, the first ten Labradors are more informative than the following ten. Hal Varian, Artificial Intelligence, Economics, and Industrial Organization, NBER Working Paper 24839, 2018; and Patrick Bajari, Victor Chernozhukov, Ali Hortaçsu & Junichi Suzuki, The Impact of Big Data on Firm Performance: An Empirical Investigation, NBER working paper 24334, 2018.
[46] Glen Weyl and Eric Posner, Radical Markets: Uprooting Capitalism and Democracy for a Just Society, Princeton University Press, 2018.

argued that, even if data exhibits decreasing returns, returns can be increasing in an economic sense:[47] a slight lead in data quantity may induce a slight lead in quality that attracts users and this creates a 'data feedback loop' such that a small initial data advantage can translate into a significant share of the user base and of the market.

2.31 In other words, data may not simply exhibit either decreasing or increasing returns to scale; its relationship to scale may be complex and vary according to the level of competition. The underlying point is that apparently small differences in the volume and type of data which Challenger has, relative to Domco, may lead to substantial differences in Challenger's ability to compete with Domco. Identifying the amount and type of data which may be 'indispensable' in order to compete, and what is nice to have but not necessary, may be particularly difficult when applying the essential facilities doctrine to digital markets where data plays an important role.

2.32 Nevertheless, the challenges which may arise in relation to data or digital markets in meeting the indispensability condition should not be seen as suggesting that competition authorities could, or should, not seek to enforce against refusal to supply in digital markets.

The elimination of competition

2.33 It has been argued that the standard of foreclosure which should be adopted in assessing whether there has been an abusive refusal to supply is whether it is capable of eliminating effective competition.[48] This is understood to mean that it must be the harm to competition which must be evaluated, not the harm to a particular competitor due to not being able to access the desired input. In our hypothetical example, this means that, if there were competitors to Domco which were able to compete effectively on the relevant downstream market without access to Domco's data, then refusal to supply access would not be an abuse. This is consistent with the requirement that access to the data truly is indispensable to compete.

2.34 The requirement to show the elimination of competition in the downstream market indicates that there may be a need to define a relevant downstream market.[49] This may add a further challenge to authorities seeking to require access to an important input in digital markets, particularly when downstream markets are multi-sided, as may frequently be the case with respect to digital markets.[50] The complexities of defining relevant antitrust markets when markets may be multi-sided in nature has played a critical role in the

[47] Agrawal, Ajay, Joshua Gans, and Avi Goldfarb. 2018a. Prediction Machines: The Simple Economics of Artificial Intelligence. Cambridge, MA: Harvard Business Review Press

[48] See page 552-553, O'Donoghue and Padilla.

[49] However, commentators have queried whether the case law requires any new product to be in the same relevant market as the market in which the dominant firm is dominant (page 562, O'Donoghue and Padilla).

[50] Multi-sided markets are platforms that match two or more groups of customers. Evans and Schmalensee, define multi-sided platforms as having (a) two or more groups of customers; (b) who need each other in some way; (c) but who cannot capture the value from their mutual attraction on their own; and (d) rely on the catalyst of the platform to facilitate value creating interactions between them. The Industrial Organization of Markets with Two-Sided Platforms (2007).

application of competition law in the UK to digital markets (though not, yet, the application of the essential facilities doctrine).

Emergence of a new product for which there is consumer demand

2.35 If access to Domco's data, and any intellectual property rights which Domco held over this data, allowed Challenger to develop a new product for which there may be expected to be consumer demand, which is not currently met, then it is likely that consumer welfare would increase through the grant of access. The criteria for a refusal to supply to be an abuse of a dominant position, are then more likely to be met.

2.36 In addition, if Challenger produces a product which is highly differentiated from that of Domco, then Domco is less likely to lose sales from the supply of the input to Challenger. Therefore, imposing a requirement to supply would be less likely to reduce the dominant firm's incentive to continue to invest in the creation of the input, here valuable data.[51]

2.37 The above demonstrates that the competition authority may wish to understand well the proposed offering of Challenger; how consumers would respond to this; how its product differs from what is already available to consumers; and why Domco (or anyone else) does not already meet this demand.[52] However, the requirement to provide a new product, or some important innovation, may be demanding in the context of digital markets given the advantages of the incumbents and the behaviour of users.[53]

2.38 In any case, competition and regulatory authorities often view competition in terms of price (or quality) competition, rather than focusing on the creation of new products for unmet demand. The underlying principle behind this approach is that prices set above (or quality set below) the competitive level represent a consumer harm. Authorities may also value consumer choice and product differentiation which meet heterogenous consumer preferences, which may not amount to the creation of a new product. The criteria developed by competition case law means that authorities may be constrained by intervening to achieve these outcomes, even where they consider them to be welfare-enhancing (including taking the impact on investment incentives into account).

2.39 Even were an authority successfully to find a refusal to supply to be a competition law infringement, the authority may face challenges in inducing Domco to set a fair price. Some commentators have identified a risk that Domco could instead set a high royalty rate which

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[51] There seems to be some tension between (i) only imposing a duty to supply when a downstream rival wishes to produce a new product which is unavailable to consumers currently; and (ii) why a refusal to supply would arise in the first place if the new product would be so differentiated to the current offer of the incumbent that it would not hurt its sales.

[52] This approach was used in the Magill case, where the CJEC upheld the Commission and CFI decisions to order a compulsory license, drawing on the principle of exceptional circumstances.

[53] "*External market failures such as the presence of network effects and switching costs may make it commercially unviable for competitors to introduce a new product. If, for instance, consumers are locked-in to a particular standard, a requirement that access seekers have to introduce a new product is of no relevance because consumers are not willing to switch to a different system. Instead of making the applicability of the new product dependent on whether the asset to which access is requested is protected by intellectual property law, the new product condition could differentiate based on whether external market failures occur in the market*." Page 69, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy', Inge Graef.

would limit the intensity of any price competition and the potential benefits of this type of competition to consumers.[54] Ex ante sectoral regulation may, however, give the authority greater freedom to set access prices and to support downstream competition on price and quality. However, setting access terms in relation to data could be a complex and challenging task.

Objective justification

2.40 The final condition, identified at paragraph 2.5 above, is that the dominant firm has no objective reason for refusing to supply access. It has been noted that much of the decisional practice has taken a very strict approach to objective justification (in other words, assuming the other criteria are met Domco would need good reasons to refuse supply in order to satisfy this standard).[55] Nevertheless, we consider some objective justifications which may arise in relation to data being the input for which supply is sought, and justifications which would not apply to data.

2.41 In relation to some physical asset, a dominant company might argue that it could not reasonably grant access because it has limited capacity and so no spare capacity with which to supply a third party. Data is, by its nature, non-rivalrous.[56] Therefore, this possible defense would not apply. Moreover, the CMA and ICO also noted that "*the marginal cost of sharing data is very low. Sharing data can therefore create significant efficiencies from which society as a whole can benefit, particularly where such sharing allows data to be reused or combined in different ways and for different purposes*".[57]

2.42 On the other hand, Domco could raise concerns about sharing data with a third party without the consent of its users, and this may, in turn, depend on what the third party intends to do with the data. Moreover, the personal data may be subject to data protection laws, such as GDPR, which may mean that the data could not actually be supplied to third parties, or that such supply would require consent from those users from which data has been generated. One potential solution to this is anonymising or otherwise only mandating access to non-personal data. However, where it is personal data that is the 'indispensable' facility, and to which downstream rivals seek access, such steps might undermine the usefulness of such a data access remedy. The CMA and ICO recently recognised some of the challenges that may arise in relation to remedies requiring access. However, the CMA and ICO have concluded that such remedies may still be feasible within data protection law.[58]

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[54] See page 555, O'Donoghue and Padilla.
[55] See page 563, O'Donoghue and Padilla.
[56] This means that data is not used up or deteriorated when it is copied. Once collected, sharing data does not decrease its value for the initial collector. See CMA/ICO Joint Statement, footnote 33.
[57] Paragraph 72, CMA/ICO joint statement.
[58] The CMA and ICO noted that "*data access interventions may be seen as having the potential to create tensions with data protection objectives, for example if they may lead to more widespread processing of personal data by a larger number of controllers. However, it is important to note that data protection law facilitates data sharing where it is both fair and proportionate and complies with legal requirements*." Similarly, "*Should data access interventions be an appropriate*

2.43 In the *Microsoft* case, Microsoft sought to justify its refusal to give access to interoperability information on the grounds that the technology concerned was covered by IP rights, and it was 'secret' and 'valuable' because it contained 'important innovations' that represented the fruit of 'significant investment'.[59] In the context of that case, the EU General Court dismissed these arguments. Similar arguments may have greater validity in other cases and circumstances, but it is also clear that they cannot be used as a blanket justification for refusing access.

2.44 Another justification may be that it is not simply the raw data collected by Domco to which Challenger wants access. Rather, it may be the interpretation of this data by Domco which is valuable. It may even be that Domco would need to undertake additional work to make any dataset useable by Challenger. Whether it is reasonable or not for Domco to undertake additional work to make data useable will be specific to the circumstances of the case. However, it seems likely that the greater the work which Domco would need to undertake in order to make its data useable by, and useful for, Challenger, then the more difficult it is to say that the essential facilities doctrine applies. On the other hand, the intentions of competition law should not be undermined by Domco choosing to make the possibility of licensing data more difficult – for example, by the integration of data into its products, or the use conditions which it guarantees to those customers from which data is gathered. Clearly, there is complexity in deciding what is strategic behaviour to exclude a rival and frustrate ex ante (or ex post) regulatory interventions, and what is legitimate development of products, security features, and protection of consumer data.

remedy, we therefore think any perceived tensions can be resolved through designing them carefully, such that they are limited to what is necessary and proportionate, are designed and implemented in a data protection-compliant way, that related processing operations are developed in line with the principles of data protection by design and by default, and they do not result in a facilitation of unlawful or harmful practices". Paragraphs 73 and 75. CMA/ICO Joint Statement.

[59] Page 567, O'Donoghue and Padilla.

3. Conclusions

3.1 We make the following points in conclusion:

a) The essential facilities criteria set by the courts in the context of competition law provide an important set of standards to meet in finding a refusal to supply to be a competition law infringement.

b) Nevertheless, there appear to be particular considerations and, in some cases, challenges in meeting these criteria in the case of digital markets, and especially if one were to assess whether data might be an essential facility.[60]

c) There is merit in assessing whether the essential facilities criteria, or the interpretation of the criteria, should be reconsidered in the context and characteristics of digital markets; the strengths of incumbents in those markets; and the importance which access to data may play in facilitating effective competition in such markets. However, depending on the circumstances of the case, there may be alternative characterisations of the conduct such that the essential facilities criteria do not apply (for example, where the conduct relates to unfair terms of access which is already provided rather than whether a dominant firm should be forced to conclude a contract with a competitor).

3.2 These conclusions are consistent with those of commentators who have observed that "*Although the decision to intervene in a market amounts to a policy choice, the specific characteristics and stage of development of the market may thus inform competition authorities about the appropriate approach in a particular situation. When the market is locked-in due to the presence of network effects or switching costs, and the incumbent has had a stable dominant position for some time, it seems justified for a competition authority to intervene on the basis of looser conditions in order to open up the process of competition in the market through the imposition of a duty to deal. Considering the market characteristics of the digital economy, such situations may become more prevalent*."[61]

3.3 If competition law, particularly the abuse of dominance provision, is not well-placed to deal with refusal to supply in relation to data, then, depending on the circumstances and the details of the particular regulatory frameworks adopted, ex-ante regulation may provide a more effective means of doing so.[62]

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[60] This is not to say that these challenges are insurmountable such that a competition authority could not show that the essential facilities criteria have been met in the context of a refusal to supply in a particular digital market. Rather, it is to point out some particular issues and challenges that may arise in those markets, particularly with respect to data being the key facility to which access is sought.

[61] Pages 55-56, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy', Inge Graef.

[62] This view is consistent with commentators who have identified settings "*where duties to ensure data access – and possibly data interoperability – may need to be imposed. This would be the case, in particular, of data requests for the purpose of serving complementary markets or aftermarkets – i.e. markets that are part of the broader ecosystem served by the data controller. However, in these cases competition authorities or courts will need to specify the conditions of access. This, and the concomitant necessity to monitor, may be feasible where access requests are relatively standard and where*

the conditions of access are relatively stable. Where this is not the case, in particular where a dominant firm is required to grant access to continuous data (i.e. to ensure data interoperability), there may be a need for regulation – which must, at times, be sector specific. Nonetheless, competition law can specify the general preconditions and inform the possible regulatory regimes." Pages 9-10, Competition policy for the digital era, 2019.