ACCOUNT BANK'S OBLIGATION TO ENABLE ACCESS TO THEIR CUSTOMERS' ACCOUNT DATA AND AUTHENTICATION PROCEDURES UNDER THE PAYMENT SERVICE DIRECTIVE 2 – ITS RELATION TO REFUSAL TO SUPPLY DATA AND ACCESS TO PROCEDURE

Pauliina Sutinen

Master's Thesis

January 2019

University of Helsinki

Faculty of Law

International Business Law

Supervisor: Ville Pönkä

HELSINGIN YLIOPISTO
HELSINGFORS UNIVERSITET
UNIVERSITY OF HELSINKI

Tiedekunta/Osasto - Fakultet/Sektion – Faculty Faculty of Law		Laitos - Institution – Department
Tekijä - Författare – Author Pauliina Sutinen		
Työn nimi - Arbetets titel – Title Account bank's obligation to enable access to their customers' account data and authentication procedures under the Payment Service Directive 2 – its relation to refusal to supply data and access to procedure		
Oppiaine - Läroämne – Subject European law		
Työn laji - Arbetets art – Level Master's Thesis	Aika - Datum – Month and year January 2019	Sivumäärä - Sidoantal – Number of pages XXIII + 65 pages

Tiivistelmä - Referat – Abstract

The Payment Services Directive 2 (PSD2) introduces novel obligations for the account servicing payment service providers (i.e. account banks) to enable access to their customers' account data, when such access is explicitly consented by the customer, unless a refusal to enable such access is justified. Further, the account banks have an obligation to allow third-party payment service providers to utilize authentication procedures, which are provided by the account banks. Jointly, these obligations may be described as "access obligations", either to data or procedure.

The PSD2 reform and in particular its access obligations directed the account banks are expected to be significant for the payment services market requiring the account banks to implement new business models in order to comply with the PSD2. When the account banks are subject to these novel supply obligations, and the payment service market will be opened for the new kinds of payment service providers, this may also facilitate the possible abusive behavior amongst the account banks from a competition law perspective. As seen in the Commission's investigations with respect to several account banks refusing to grant access to their customer account data even before the PSD2, the refusal to supply considerations under Article 102 TFEU are possible in this context.

The questions underlying in this setting are examined in the thesis, such as whether the account banks' refusal to supply access to their customers' account data and authentication procedures constitutes an abuse of dominant position as a refusal to supply under Article 102 TFEU even if such refusal would be justified under the PSD2. Ultimately, the discussion concerns the interaction between competition law and the PSD2 and which assessment should prevail. As a prerequisite for the assessment of the PSD2 obligations under the refusal to supply doctrine, such doctrine is assessed generally in a data context.

With respect to the refusal to supply data, the assessment requires analyzing the market dynamics. The definition of dominance in data-driven markets requires shifting the emphasis from the market shares to the characteristics of the market and the exclusivity of data. The aspect of exclusivity is closely held with the debate on the essentiality or indispensability of data having also relevance when defining the actual abuse of dominance. However, the considerations on the essentiality of data are limited only to forced data sharing without a regulatory duty to supply. This means that the Commission is forcing an undertaking to share its data solely based on the doctrine under Article 102 TFEU and thus is required to prove the abuse-specific criteria on the refusal to supply. With respect to regulatory duties to supply, the Commission will consider only the likelihood of anti-competitive foreclosure in its refusal to supply assessment. This burden of proof may be seen lower than compared to the traditional refusal to supply data test that requires to prove, for instance, the indispensability of data, which may be met only in exceptional situations.

In the PSD2 context, the payment service market has its specialties, which need to be taken into consideration in the refusal to supply assessment. As a result of the equivalent supply obligation for all account banks, market shares may have more relevance in the dominance assessment. The problem is that access to all account banks' data may be considered as essential, when account information or payment initiation services may not function properly without this access. Further, the PSD2 access obligations are regulatory duties due to which the element of indispensability is not required to be considered in the abuse assessment. If the account bank refuses to provide access to the account data for the third-party payment service providers, it is likely that such refusal will eliminate competition from payment initiation and account information service markets. Thus, the account banks' refusal to supply access to their customers' account data and authentication procedures may constitute an abuse of dominant position as a refusal to supply under Article 102 TFEU. In contrast, the compliance with the PSD2, for instance with respect to justified refusal, does not entail that such conduct is also compliant with competition law. However, justified refusal under the PSD2 should not trigger Article 102 TFEU and in these situations the PSD2 should prevail over competition law. The supply obligations beyond the PSD2 may be addressed solely under Article 102 TFEU and the refusal to supply-specific assessment requiring the indispensability of input, whether either data or data processing system.

From a practical perspective, the account banks have addressed the PSD2 access obligations by creating an open banking system and cooperating with the FinTech companies. Further, some account banks will grant the access beyond the PSD2 obligations. The system of open banking may, however, imply competition law problems with respect to refusal to supply and other types of Article 102 TFEU abuses. However, the actual effect of the PSD2 and its implications to competition will be seen, when the transition period of the PSD2 ends on 14 September 2019 and the novel market practice will commence to evolve.

Avainsanat – Nyckelord – Keywords
PSD2 - Refusal to supply – Essential facilities doctrine – Article 102 TFEU – Big data

Säilytyspaikka – Förvaringställe – Where deposited
E-thesis

Muita tietoja – Övriga uppgifter – Additional information

HELSINGIN YLIOPISTO
HELSINGFORS UNIVERSITET
UNIVERSITY OF HELSINKI

Tiedekunta/Osasto - Fakultet/Sektion – Faculty Oikeustieteellinen tiedekunta		Laitos - Institution – Department
Tekijä - Författare – Author Pauliina Sutinen		
Työn nimi - Arbetets titel – Title Tilipankkien velvollisuus avata pääsy asiakkaidensa tilidataan ja tunnistamisprosesseihin toisen maksupalveludirektiivin mukaan sekä niiden suhde dataan ja prosesseihin pääsyn kieltämiseen		
Oppiaine - Läroämne – Subject Eurooppaoikeus		
Työn laji - Arbetets art – Level Pro gradu -tutkielma	Aika - Datum – Month and year Tammikuu 2019	Sivumäärä - Sidoantal – Number of pages XXIII + 65 sivua

Tiivistelmä - Referat – Abstract

Toinen maksupalveludirektiivi (PSD2) tuo tilejä ylläpitäville maksupalveluntarjoajille (tilipankeille) uudenlaisia velvoitteita. Tilipankkien tulee avata pääsy asiakkaidensa tilidataan, kun asiakas on antanut nimenomaisen suostumuksensa kyseiseen pääsyyn, jollei pääsystä kieltäytyminen ole oikeutettu. Tämän lisäksi tilipankeilla on velvollisuus antaa kolmansille maksupalveluntarjoajille pääsy tilipankkien tarjoamiin tunnistamisprosesseihin. Näitä tilipankin velvollisuuksia voidaan yhdessä nimittää pääsyvelvoitteiksi, joko dataan tai prosessiin.

PSD2-uudistuksen ja erityisesti tilipankkien pääsyvelvoitteiden voidaan olettaa olevan merkityksellisiä maksupalvelumarkkinalle, sillä ne velvoittavat tilipankkeja implementoimaan uusia liiketoimintamalleja toimiakseen PSD2:n asettamien vaatimuksien mukaisesti. Tilipankkien uudenlaiset pääsyvelvoitteet sekä maksupalvelumarkkinan avautuminen uusille maksupalveluntarjoajille voi kuitenkin edesauttaa tilipankkien mahdollisia väärinkäytöksiä kilpailuoikeuden näkökulmasta. Jo ennen PSD2:sen voimaantuloa Euroopan komissio on aloittanut tutkinnan koskien useiden tilipankkien kieltäytymistä antaa pääsy asiakkaidensa tilidataan. Tästä käy ilmi, että SEUT artikla 102:n toimituksista kieltäytymisen soveltuminen on mahdollista tässä kontekstissa.

Tutkielmassa tarkastellaan edellä mainittuun asetelmaan liittyviä ongelmia, kuten onko tilipankkien kieltäytyminen antaa pääsy asiakkaidensa tilidataan sekä tilipankkien tunnistamisprosesseihin määräävän markkina-aseman väärinkäyttöä toimituksien kieltäytymisenä SEUT artiklan 102 mukaisesti, vaikka kyseinen kieltäytyminen olisi oikeutettu PSD2:n mukaan. Viime kädessä kysymys on kilpailuoikeuden ja PSD2:n vuorovaikutuksesta sekä siitä, kumman arvioinnin tulisi saada etusija. Esikysymyksenä PSD2-velvoitteiden arviointiin toimituksista kieltäytymisopin näkökulmasta kyseistä oppia arvioidaan datakontekstissa.

Datan toimittamisesta kieltäytymisen arviointi vaatii markkinadynamiikan arviointia. Määräävän markkina-aseman arviointi dataan keskittyneillä markkinoilla vaatii siirtymistä markkinaosuuksien painottamisesta markkinalle tyypillisien ominaisuuksien ja datan yksinomaisuuden arviointiin. Yksinomaisuuden näkökulma liittyy läheisesti väittelyyn datan olennaisuudesta tai välttämättömyydestä, millä on myös merkitystä määriteltäessä määräävän markkina-aseman tosiasiallista väärinkäyttöä. Datan olennaisuuteen liittyvät näkökulmat koskevat kuitenkin vain pakotettua datan jakamista ilman lainsäädännöstä tulevaa toimitusvelvoitetta. Tämä tarkoittaa tilannetta, jossa komissio velvoittaa yrityksen jakamaan datansa SEUT artikla 102:n perusteella ja on näin ollen velvollinen todistamaan väärinkäytölle ominaiset kriteerit koskien toimituksista kieltäytymistä. Lainsäädännöstä tulevien toimitusvelvoitteiden kohdalla komissio taas arvioi ainoastaan toimituksista kieltäytymisestä aiheutuvaa kilpailunvastaista markkinoiden sulkemista. Tämän osalta näyttökynnys voidaan nähdä matalampana verrattuna perinteiseen testiin arvioitaessa toimituksista kieltäytymistä. Perinteisen testin mukaan toimituksista kieltäytymisen todistaminen vaatii esimerkiksi datan välttämättömyyden näyttämistä, jonka voidaankin katsoa täyttyvän vain poikkeuksellisesti.

Asiaa arvioitaessa PSD2:n kontekstissa maksupalvelumarkkinalla on tiettyjä erikoispiirteitä, jotka tulee ottaa huomioon arvioitaessa toimituksista kieltäytymistä. Kaikkien tilipankkien vastaavasta toimitusvelvoitteesta johtuen markkinaosuuksilla voi olla enemmän merkitystä määräävän markkina-aseman määrittelyssä. Ongelmana on, että pääsy kaikkien tilipankkien tilidataan voidaan katsoa olennaiseksi, kun tilitieto- tai maksutoimeksiantopalvelujen asianmukainen toiminta vaatii kyseisen pääsyn. PSD2:n pääsyvelvoitteet ovat lisäksi lainsäädännöstä tulevia toimitusvelvoitteita, mistä johtuen olennaisuus -elementin arviointia ei vaadita väärinkäyttöä arvioitaessa. Tilipankin kieltäytyessä antamasta pääsyä tilidataan kolmansille maksupalveluntarjoajille, on todennäköistä, että kyseinen kieltäytyminen poistaa kilpailun maksutoimeksianto- ja tilitietopalveluiden markkinoilta. Näin ollen tilipankkien kieltäytyminen antamasta pääsyä asiakkaidensa tilitietoihin ja tilipankkien tunnistamisprosesseihin voi olla määräävän markkina-aseman väärinkäyttöä toimituksista kieltäytymisenä SEUT artikla 102 mukaisesti. Toisaalta PSD2:n mukaisesta toiminnasta, kuten oikeutetusta kieltäytymisestä, ei seuraa, että kyseinen toiminta noudattaisi kilpailuoikeutta. PSD2:n mukaisen oikeutetun kieltäytymisen ei kuitenkaan tulisi käynnistää SEUT artiklaa 102 koskevaa tutkintaa, sillä näissä tilanteissa PSD2:n tulisi saada etusija suhteessa kilpailuoikeuteen. PSD2:n ulkopuolella olevat toimitusvelvoitteet voidaan arvioida vain SEUT artikla 102:n ja toimituksista kieltäytymiselle ominaisen arvioinnin mukaisesti, jolloin vaaditaan tuotantopanoksen välttämättömyyttä, joko dataan tai datan käsittelyjärjestelmään.

Käytännön näkökulmasta tilipankit ovat vastanneet PSD2:n tuomiin pääsyvelvoitteisiin luomalla open banking -systeemin ja toimimalla yhteistyössä FinTech -yhtiöiden kanssa. Osa pankeista aikoo lisäksi antaa pääsyn PSD2-velvoitteiden ulkopuoliseen dataan. Open banking -systeemi voi kuitenkin aiheuttaa kilpailuoikeudellisia ongelmia toimituksista kieltäytymisenä tai muunlaisina SEUT artikla 102 väärinkäytöksinä. PSD2:n tosiasialliset vaikutukset ja sen seuraukset kilpailulle voidaan kuitenkin nähdä vasta, kun PSD2:n siirtymäaika päättyy 14.9.2019 ja uusi markkinakäytäntö alkaa kehittymään.

Avainsanat – Nyckelord – Keywords
PSD2 – Toimituksista kieltäytyminen – Olennaiset toimintaedellytykset -oppi – SEUT 102 artikla – Massadata

Säilytyspaikka – Förvaringställe – Where deposited
E-thesis

Muita tietoja – Övriga uppgifter – Additional information

TABLE OF CONTENTS

BIBLIOGRAPHY

LITERATURE

Akman Pinar. *The Concept of Abuse in EU Competition Law, Law and Economic Approaches,* Hart Publishing 2012. (Akman 2012)

Areeda Phillip E. – Hovenkamp Herbert. *Antitrust Law: An Analysis of Antitrust Principles and Their Application,* Wolters Kluwer 2018. (Areeda – Hovenkamp 2018)

Ayal Adi. *Fairness in Antitrust: Protecting the Strong from the Weak,* Hart Publishing 2014. (Ayal 2014)

Bailey David – John Laura Elisabeth. *Bellamy and Child: European Union Law of Competition*, 8th edition Oxford University Press 2018. (Bailey – John 2018)

Coates, Kevin. *Competition Law and Regulation of Technology Markets*, Oxford University Press 2011. (Coates 2011)

Cooter Robert – Ulen Thomas. *Law and Economics*, Addison-Wesley 2016. (Cooter – Ulen 2016)

Drexl Josef – Di Porto Fabiana. *Competition Law as Regulation*, Edward Elgar Publishing 2015. (Drexl – Di Porto 2015)

Drexl Josef – Lee Nari. *Pharmaceutical Innovation, Competition and Patent Law*, Edward Elgar Publishing 2013. (Drexl – Lee 2013)

Dunne Niamh. *Competition Law and Economic Regulation: Making and Managing Markets*, Cambridge University Press 2015. (Dunne 2015)

Fatur Andrej. *EU Competition Law and the Information and Communication Technology Network Industries Economic versus Legal Concepts in Pursuit of (Consumer) Welfare*, Hart Publishing 2012. (Fatur 2012)

Faull Jonathan – Nikpay Ali. *Faull & Nikpay: The EU Law of Competition*, 3rd Edition Oxford University Press 2014. (Faull – Nikpay 2014)

Govaere Inge – Quick Reinhard – Bronckers Marco. *Trade and Competition Law in the EU and Beyond*, Edward Elgar Publishing 2011. (Govaere – Quick – Bronckers 2011)

Graef Inge. *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility,* Wolters Kluwer 2016. (Graef 2016)

Guimaraes Denis Alves – Cugia di Sant'Orsola Fabrizio – Noormohamed Rehman. *Communications and Competition Law. Key Issues in the Telecoms, Media and Technology Sectors*, Wolters Kluwer 2014. (Guimaraes – Cugia di Sant'Orsola– Noormohamed 2014)

Hirvonen Ari. *Mitkä metodit? Opas oikeustieteen metodologiaan*, Yleisen oikeustieteen julkaisuja 17 Helsinki 2011. (Hirvonen 2011)

Husa, Jaakko – Mutanen Anu – Pohjolainen Teuvo. *Kirjoitetaan juridiikkaa: ohjeita oikeustieteellisten kirjallisten töiden laatijoille*, 2nd edition Talentum 2008. (Husa – Mutanen – Pohjolainen 2008)

Jones Alison – Sufrin Brenda. *EU Competition Law: Text, Cases and Materials*, 6th edition Oxford University Press 2016. (Jones – Sufrin 2016)

Leczykiewicz Dorota – Weatherill Stephen. *The Images of the Consumer in EU Law Legislation, Free Movement and Competition Law*, Hart Publishing 2016. (Leczykiewicz – Weatherill 2016)

Lianos Ioannis – Geradin Damien. *Handbook on European competition law: enforcement and procedure*, Edward Elgar Publishing 2013. (Lianos – Geradin 2013)

Monti, Giorgio. *EC Competition Law*, Cambridge University Press 2007. (Monti 2007)

Moore Martin – Tambini Damian. *Digital Dominance - The Power of Google, Amazon, Facebook, and Apple,* Oxford University Press 2018. (Moore – Tambini 2018)

Nazzini, Renato. *The Foundations of European Union Competition Law: The Objectives and Principles of Article 102*, Oxford University Press 2011. (Nazzini 2011)

Ortiz Luis Blanco. *Market Power in EU Antitrust Law*, Hart Publishing 2011. (Ortiz 2011)

Stucke Maurice – Grunes Allen. *Big Data and Competition Policy,* Oxford University Press 2016. (Stucke – Grunes 2016)

Van den Bergh Roger – Camesasca Peter D. *European Competition Law and Economics: A Comparative Perspective,* Sweet & Maxwell 2006. (Van den Bergh – Camesasca 2006)

Whish Richard – Bailey David. *Competition Law,* 9th edition Oxford University Press 2018. (Whish – Bailey 2018)

Wils Wouter. *Principles of European Antitrust Enforcement*, Hart Publishing 2005. (Wils 2005)

Witt Anne. *The More Economic Approach to EU Antitrust Law,* Bloomsbury Publishing 2016. (Witt 2016)

Zimmer Daniel. *The Goals of Competition Law*, Edward Elgar Publishing 2012. (Zimmer 2012)

ARTICLES

Albæk Svend. *Consumer Welfare in EU Competition Policy* in Heide-Jørgensen Caroline – Bergqvist Christian – Neergaard Ulla – Poulsen Sune Troels (eds.), *Aims and Values in Competition Law,* DJØF Publishing, 2013. (Albæk 2013)

Björkroth Tom. *Rahasta, maksamisesta ja maksamisen markkinoista* in Castrén Martina (ed.) *Kilpailuvirastosta markkinavirastoksi – Juhani Jokisen juhlakirja,* Kilpailu- ja kuluttajavirasto 2018. (Björkroth 2018)

Bourreau Marc – de Steel Alexandre – Graef Inge. *Big Data and Competition Policy: Market Power, Personalised Pricing and Advertising* (2017). (Bourreau – de Steel – Graef 2017)

Brockhoff Julia – Jehanno Bertrand – Pozzato Vera – Buhr Carl-Christian – Eberl Peter – Papandropoulos Penelope. *Google/DoubleClick: The first test for the Commission's non-horizontal merger guidelines,* Competition Policy Newsletter Number 2 (2008). (Brockhoff–Jehanno – Pozzato – Buhr – Eberl – Papandropoulos 2008)

Broos Sébastien – Ramos Jorge Marcos. *Google, Google Shopping and Amazon: The Importance of Competing Business Models and Two-Sided Intermediaries in Defining Relevant Markets*. The Antitrust Bulletin, Vol 62, Issue 2, (2017). (Broos – Ramos 2017)

Bughin Jacques – Chui Michael – Manyika James. (2010). *Clouds, big data, and smart assets: Ten tech-enabled business trends to watch*, McKinsey Quarterly 56. 75–86 (2010). (Bughin – Chui – Manyika 2010)

Colangelo Giuseppe – Maggiolino Mariateresa. *Big Data as Misleading Facilities*, European Competition Journal, Bocconi Legal Studies Research Paper No. 2978465 (2017). (Colangelo – Maggiolino 2017)

Cortet Mounaim – Rijks Tom – Nijland Shikko. *PSD2: The digital transformation accelerator for banks,* Journal of Payments Strategy & Systems, Volume 10, Issue 1 (2016). (Cortet – Rijks – Nijland 2016)

De La Torre Fernando Castillo, *State Action Defence in EC Competition Law*, 28 World Competition, Issue 4 (2005). (De La Torre 2005)

Daskalova, Victoria. *Consumer Welfare in EU Competition Law: What is It (Not) About?* The Competition Law Review Volume 11, Issue 1 (2015). (Daskalova 2015)

Döderlein Daniel. *What is the optimal mix between banks and FinTechs in the payments architecture?* Journal of Payments Strategy & Systems, Volume 12, Issue 1 (2018). (Döderlein 2018)

Geerling Max. *E-commerce: A merchant's perspective on innovative solutions in payments,* Journal of Payments Strategy & Systems, Volume 12, Issue 1 (2018). (Geerling 2018)

Geradin Damien – Kuschewsky Monika. *Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue* (2013). (Geradin – Kuschewsky 2013)

Geradin Damien. *Refusal to Supply and Margin Squeeze: A Discussion of Why the 'Telefonica Exceptions' are Wrong*, TILEC Discussion Paper No. 2011-009 (2011). (Geradin 2011)

Geradin Damien – Girgenson Ianis. *The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach* (2011). (Geradin – Girgenson 2011)

Gerard Damien. *The effects-based approach under Article 101 TFEU and its paradoxes: modernisation at war with itself?* in Bourgeois Jacques and Waelbroeck Denis (eds), *Ten Years of Effects-Based Approach in EU Competition Law Enforcement,* Bruylant (2012). (Gerard 2012)

Graef Inge. *Market Definition and Market Power in Data: The Case of Online Platforms,* World Competition: Law and Economics Review, Vol. 38, No. 4 (2015). (Graef 2015)

Grunes Allen P. – Stucke Maurice E. *No Mistake About It: The Important Role of Antitrust in the Era of Big Data, Antitrust Source*, University of Tennessee Legal Studies Research Paper No. 269 (2015). (Grunes – Stucke 2015)

Haubrich Dirk. *The development of regulatory requirements for payment services: The European Banking Authority and the revised Payments Services Directive*, Journal of Payments Strategy & Systems Volume 12 Number 2 (2018). (Haubrich 2018)

Jackson Olly. *PSD2 gives banks chance to evolve*, International Financial Law Review (2018). (Jackson 2018)

Jokinen Juhani. *Maksamisratkaisut 2020-luvulla - KKV:n näkökulma* in Suomen Pankki, *Millä tavoin maksamme 2020–luvulla? Näkökulmia tulevaisuuden maksamisratkaisuihin* (2016). (Jokinen 2016)

Krämer Jan – Wohlfarth Michael. *Market power, regulatory convergence, and the role of data in digital markets*, Telecommunications Policy Volume 42 (2018). (Krämer – Wohlfarth 2018)

Lambrecht Anja – Tucker Catherine E. *Can Big Data Protect a Firm from Competition?* (2015). (Lambrecht – Tucker 2015)

Lerner Andres V. *The Role of 'Big Data' in Online Platform Competition* (2014). (Lerner 2014)

Lindberg Rainer. *Muodostaako kilpailu riskin pankkien vakavaraisuudelle?* in Castrén Martina (ed.) *Kilpailuvirastosta markkinavirastoksi – Juhani Jokisen juhlakirja,* Kilpailu- ja kuluttajavirasto 2018. (Lindberg 2018)

Lundqvist Björn. *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World* in Bakhoum Mor – Conde Gallego Beatriz – Mackenrodt Mark-Oliver – Surblytė-Namavičienė Gintarė (eds) *Personal Data in Competition, Consumer Protection and Intellectual Property Law*, Springer (2018). (Lundqvist 2018)

Manne Geoffrey A. – Sperry Raymond. *The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework*, CPI Antitrust Chronicle, (2015). (Manne – Sperry 2015)

McAfee Andrew – Brynjolfsson Erik. *Big Data: The Management Revolution. Harvard Business Review*, 90. 60-6, 68, 128 (2012). (McAfee – Brynjolfsson 2012)

Mansfield-Devine Steve. *Open banking: opportunity and danger*, Computer Fraud & Security, Volume 2016, Issue 10 (2016). (Mansfield-Devine 2016)

Mosso Carles Estev – Mottl Michal – De Coninck Raphaël – Dupont Franck. *Digital maps go vertical: TomTom/Tele Atlas and Nokia/NAVTEQ,* Competition Policy Newsletter Number 3 (2008). (Mosso – Mottl – De Coninck – Dupont 2008)

Noctor Mark. *PSD2: Is the banking industry prepared?* Computer Fraud & Security Volume 2018, Issue 6 (2018). (Noctor 2018)

Packin Nizan Geslevich – Lev-Aretz Yafit. *Big Data and Social Netbanks: Are You Ready to Replace Your Bank?*, Houston Law Review, Volume 53, Issue 5 (2016). (Packin – Lev-Aretz 2016)

Pattaro Enrico. *A Treatise of Legal Philosophy and General Jurisprudence*, Volume 4: Scienta Juris, Legal Doctrine as Knowledge of Law and as a Source of Law, Springer (2005). (Pattaro 2005)

Röller Lars-Hendrik. *Economic Analysis and Competition Policy Enforcement in Europe* in Peter A. G. van Bergeijk Peter A. G. – Kloosterhuis Erik (*eds*) *Modelling European Mergers: Theory, Competition Policy and Case Studies*, Edward Elgar (2005). (Röller 2005)

Salmony Michael. *Access to accounts: Why banks should embrace an open future*, Journal of Payments Strategy & Systems, Volume 8, Issue 2 (2014). (Salmony 2014)

Santamaría Javier. *The emergence of new payment service providers and their impact on the regulatory and market environment*, Journal of Payments Strategy & Systems Volume 8 Issue 4 (2014). (Santamaría 2014)

Schepp Nils-Peter – Wambach Achim. *On Big Data and Its Relevance for Market Power Assessment,* Journal of European Competition Law & Practice, Volume 7, Issue 2 (2016). (Schepp – Wambach 2016)

Stucke Maurice E. – Grunes Allen P. *Debunking the Myths Over Big Data and Antitrust,* CPI Antitrust Chronicle, University of Tennessee Legal Studies Research Paper No. 276. (2015). (Stucke – Grunes 2015)

Tapia Javier – Mantzari Despoina. *The Regulation/Competition Interaction* in Lianos Ioannis – Geradin Damien (eds) *Handbook on European Competition Law - Substantive Aspects* (Edward Elgar 2013). (Tapia – Mantzari 2013)

Tucker Darren S. – Wellford Hill. *Big Mistakes Regarding Big Data*, Antitrust Source, American Bar Association (2014). (Tucker – Wellford 2014)

Vezzoso Simonetta. *Fintech, Access to Data, and the Role of Competition Policy*, Competition and Innovation, São Paulo: Scortecci (2018). (Vezzoso 2018)

Zenger Hans – Walker Mike. *Theories of Harm in European Competition Law: A Progress Report* in Bourgeois Jacques and Waelbroeck Denis (eds), *Ten Years of Effects-Based Approach in EU Competition Law Enforcement*, Bruylant (2012). (Zenger – Walker 2012)

LEGISLATION

TREATIES

Consolidated version of the Treaty on the European Union (TEU) [2012] OJ C 326.

Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326.

REGULATIONS

Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L 303.

Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication [2017] OJ L 69.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119 (General Data Protection Regulation, GDPR).

DIRECTIVES

Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L 319. ("PSD1")

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337. ("PSD2")

Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257.

ACTS

Act on the Financial Supervisory Authority (878/2009, as amended).

Payment Institutions Act (297/2010, as amended).

Act on Credit Institutions (610/2014, as amended).

Payment Services Act (290/2010, as amended).

PREPARATORY ACTS

HE 132/2017 vp. Government proposal for the Parliament on the act amending the Payment Services Act and other related Acts (available in Finnish or Swedish).

HE 143/2017 vp. Government proposal for the Parliament on the act amending the Payment Institutions Act and other related Acts (available in Finnish or Swedish).

GUIDELINES

Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 [102] of the abusive exclusionary conduct by dominant undertakings (2009/C 45/02) [2009] OJ C 45/7. ("Commission's Enforcement Guidelines")

Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/07. ("Non-Horizontal Merger Guidelines")

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Online Platforms and the Digital Single Market Opportunities and Challenges for Europe [2016] COM/2016/0288 final.

OTHER DOCUMENTS

Article 29 Data Protection Working Party. *Guidelines on the right to data portability*, adopted on 13 December 2016 as last Revised and adopted on 5 April 2017 (2017). (Article 29 Data Protection Working Party 2017)

Autorité de la concurrence – Bundeskartellamt, *Competition Law and Data,* 10 May 2016. (Autorité de la concurrence – Bundeskartellamt 2016)

Baker Jennifer, *Vestager on the intersection of data and competition,* IAPP (2018). (Baker 2018)

Brodsky Laura – Oakes Liz. *Data sharing and open banking,* McKinsey & Company (2017). (Brodsky – Oakes 2017)

Busemann Hans-Edzard – Schimroszik Nadine. *German court rules Facebook use of personal data illegal,* Reuters (2018). (Busemann – Schimroszik 2018)

Busvine Douglas. *Facebook's hidden data haul troubles German cartel regulator,* Reuters (2018). (Busvine 2018)

Competition and Markets Authority, *CMA paves the way for Open Banking revolution*, 9 August 2016. (Competition and Markets Authority 2016)

Competition and Markets Authority. *The commercial use of consumer data - Report on the CMA's call for information* (2015). (Competition and Markets Authority 2015)
Crowley Terry. *Apple Pay Cash: A step in the right direction for mobile payments?*, Mobile Payments Today (2017). (Crowley 2017)

Danske Bank's Open Banking and APIs. Available at https://danskebank.com/openbanking. Visited on 22 December 2018.

Du Toit Gerard – Cheris Aaron. *Banking's Amazon moment*, Bain & Company (2018). (Du Toit – Cheris 2018)

European Commission. *Payment Services Directive: frequently asked questions,* MEMO/15/5793 (2018). (European Commission 2018 A)

European Commission. *Study in Support of the Evaluation of the Database Directive* (2018). (European Commission 2018 B)

European Commission. *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Report on Competition Policy 2017*, COM(2018) 482 final (2018). (European Commission 2018 C)

European Commission. *Antitrust: Commission confirms unannounced inspections concerning access to bank account information by competing services*, MEMO/17/3761 (2017). (European Commission 2017 A)

European Commission. *Commission launches public consultation on Database Directive* (2017). (European Commission 2017 B)

European Commission. *Report from the Commission - Report on Competition Policy 2012*, COM(2013) 257 final (2013). (European Commission 2013)

European Commission. *Antitrust: Commission renders legally binding commitments from Thomson Reuters* (2012). (European Commission 2012)

European Commission. *Antitrust: Commission probes allegations of antitrust violations by Google,* IP/10/1624 (2010). (European Commission 2010)

European Data Protection Supervisor. The Preliminary Opinion on the topic of *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy* (2014). (European Data Protection Supervisor 2014)

European Parliament. *Competition issues in the Area of Financial Technology (FinTech)*, Policy Department for Economic, Scientific and Quality of Life Policies (2018). (European Parliament 2018)

Facebook's response on the Commission's Statement of Objections (2017).

Financial Times. *European banks brace for shake-up in customer data access,* 11 January 2018. Available at https://www.ft.com/content/e026eb2e-f6c7-11e7-8715-e94187b3017e. (Financial Times 2018)

Financial Times. *EU raids Polish and Dutch banking groups over fintech access*, 8 October 2017. Available at https://www.ft.com/content/a8a208e8-ac3d-11e7-aab9-abaa44b1e130. (Financial Times 2017)

Finanssialan Keskusliitto. *Pankkisalaisuusohjeet 2009* (2009). (Finanssialan Keskusliitto 2009)

Finnish Financial Supervisory Authority. *Statement on regarding the reform of the Payment Services Act,* FIVA 4/01.01.00/2017, 27.4.2017. (Finnish Financial Supervisory Authority 2017)

Fioretti Julia. *EU data protection watchdogs warn WhatsApp, Yahoo on privacy,* Reuters (2016). (Fioretti 2016)

Glazer Emily – Seetharaman Deepa – Andriotis AnnaMaria. *Facebook to Banks: Give Us Your Data, We'll Give You Our Users,* The Wall Street Journal (2018). (Glazer – Seetharaman – Andriotis 2018)

Haselton Todd. *Google just launched another answer to Apple Pay,* CNBC (2018). (Haselton 2018)

Heritage Fred. *Facebook launches UK mobile payments tool via Messenger app,* Business Advice (2017). (Heritage 2017)

House of Lords. *Online Platforms and the EU Digital Single Market*, 10th Report of Session 2015–16 (2016) (House of Lords 2016).

Nordea Open Banking Developer Portal. Available at https://developer.nordeaopenbanking.com. Visited on 22 December 2018.

OECD. *Exploring Data-Driven Innovation as a New Source of Growth: Mapping the Policy Issues Raised by "Big Data"*, OECD Digital Economy Papers, No. 222, OECD Publishing (2013). (OECD 2013)

OP Financial Group. *Statement on the Memoranda of the Ministry of Justice's Working Group regarding the reform of the Payment Services Act,* 28.4.2017. (OP Financial Group 2017)

OP Developer. Available at https://op-developer.fi. Visited on 22 December 2018.

Reuters. *Facebook to appeal German order on WhatsApp data,* 27 September 2016. Available at https://www.reuters.com/article/us-germany-facebook/facebook-to-appeal-german-order-on-whatsapp-data-idUSKCN11X149. (Reuters 2016)

S-Pankki – Open Banking. Available at https://www.s-pankki.fi/fi/yhtiot/open-banking/. Visited on 22 December 2018.

Vestager Margrethe. Speech on the topic of *Competition in a big data world*, DLD 16 Munich, 17 January 2016. (Vestager 2016)

INTERVIEWS

The interview of the Finnish Financial Supervisory Authority (the FIN-FSA) on 14 December 2018. (FIN-FSA's interview 2018)

The interview of the OP Financial Group on 11 December 2018. (OP Financial Group's interview 2018)

TABLE OF CASES

THE EUROPEAN COURT OF JUSTICE

Case C-123/16 P Orange Polska SA v European Commission [2018] ECLI:EU:C:2018:590.

Case C-179/16 *F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato* [2018] ECLI:EU:C:2018:25.

Case C-295/12P *Telefónica SA and Telefónica de España SAU v European Commission* [2014] ECLI:EU:C:2014:2062.

Case C-457/10 *P AstraZeneca AB and AstraZeneca plc v European Commission* [2012] ECLI:EU:C:2012:770.

Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527.

Case C-280/08 *Deutsche Telekom AG v European Commission* [2010] ECR I-09555.

Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.

Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities (C-501/06 P) and Commission of the European Communities v GlaxoSmithKline Services Unlimited (C-513/06 P) and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities (C-515/06 P) and Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities (C-519/06 P)* [2009] ECR I-9291.

Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125.

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

Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055.

Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] ECR I-07791.

Joined Cases C-359/95 P and C-379/95 *P Commission and France v Ladbroke Racing* [1997] ECR I-6265.

Case C-219/95 P *Ferriere Nord SpA v Commission of the European Communities* [1997] ECR I-04411.

Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill)* [1995] ECR I-00743.

Case C-202/88 *French Republic v Commission of the European Communities* [1991] ECR I-01223.

Case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [1991] ECR I-5941.

Case 238/87 *AB Volvo v Erik Veng (UK) Ltd.* [1988] ECR 06211.

Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359.

Case 193/83 *Windsurfing International Inc. v Commission of the European Communities* [1986] ECR 00611.

Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831.

Case 41/83 *Italian Republic v Commission of the European Communities* [1985] ECR 873.

Joined Cases 209/78 to 215/78 and 218/78 *Heintz van Landewyck SARL and Others v Commission of the European Communities* [1980] ECR 03125.

Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 00207.

Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663.

Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 00215.

THE GENERAL COURT

Case T-460/13 *Sun Pharmaceutical Industries Ltd, formerly Ranbaxy Laboratories Ltd and Ranbaxy (UK) Ltd v European Commission* [2016] ECLI:EU:T:2016:453.

Case T-79/12 *Cisco Systems Inc. and Messagenet SpA v. Commission* [2013] ECLI:EU:T:2013:635.

Case T-336/07 *Telefónica and Telefónica de España v Commission* [2012] ECLI:EU:T:2012:172.

Case T-486/11 *Orange Polska S.A., formerly Telekomunikacja Polska S.A. v European Commission* [2015] ECLI:EU:T:2015:1002.

Case T-461/07 *Visa Europe Ltd and Visa International Service v European Commission* [2011] ECR II-01729.

Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission* [2010] ECR II-02805.

Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission of the European Communities* [2009] ECR II-03155.

Case T-201/04 *Microsoft Corp. v. Commission of the European Communities* [2007] ECR II-3601.

Case T-83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II-755.

Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] ECR II-01439.

THE EUROPEAN COMMISSION

Commission decision of 6.9.2018 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.8788 – *Apple/Shazam*) [2018].

Commission decision of 27.6.2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (Case AT.39740 - *Google Search (Shopping)*) [2017].

Commission decision of 17.5.2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 – *Facebook/WhatsApp*) [2017].

Commission decision of 06.12.2016 pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area (Case M.8124 – *Microsoft/LinkedIn*) [2016].

Commission decision of 09.01.2014 pursuant to Article 6(1)(b) of Council Regulation No 139/2004 (Case COMP/M.7023 *Publicis/Omnicom*) [2014].

Commission decision of 20.12.2012 addressed to: Thomson Reuters Corporation and Reuters Limited relating to a proceeding under Article 102 of the Treaty on the Functioning

of the European Union and Article 54 of the EEA Agreement (Case COMP/39.654 – *Reuters Instrument Codes (RICs)*) [2012].

Commission Decision of 4.9.2012 addressed to: Telefónica UK, Vodafone Group, Everything Everywhere declaring a concentration to be compatible with the internal market and the functioning of the EEA Agreement (Case No COMP/M.6314 – *Telefónica UK/Vodafone UK/Everything Everywhere/JV*) [2012].

Commission decision of 07.10.2011 pursuant to Article 6(1)(b) of Council Regulation No 139/2004 (Case No COMP/M.6281 - *Microsoft/Skype*) [2011].

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

Commission decision of 29.09.2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union ('TFEU') and Article 54 of the EEA Agreement (Case COMP/39.315 – *ENI*) [2010].

Commission decision of 3.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.316 – *Gaz de France*) [2009].

Commission decision of 18.03.2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – *RWE Gas Foreclosure*) [2009].

Commission decision of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Cases COMP/39.388 — *German Electricity Wholesale Market* and COMP/39.389 — *German Electricity Balancing Market*) [2008].

Commission decision of 02.07.2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4942 - *Nokia/NAVTEQ*) [2008].

Commission decision of 14/05/2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4854 - *TomTom/TeleAtlas*) [2008].

Commission decision of 11.03.2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.4731 – *Google/DoubleClick*) [2008].

Commission decision of 04.07.2007 relating to a proceedings under Article 82 of the EC Treaty (*Case COMP/38.784 – Wanadoo España vs. Telefónica*) [2007].

Commission decision of 11.10.2007 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/B-1/37966 - *Distrigaz*) [2007].

Commission decision of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369 *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag*) [2004] OJ L 75/32.

ADVOCATE GENERAL

Opinion of AG Mazák in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527.

Opinion AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] ECR I-07791.

THE NATIONAL COURTS WITHIN THE EU

The Finnish Supreme Administrative Court - KHO:2013:20.

NATIONAL COMPETITION AUTHORITIES

Autorità Garante della Concorrenza e del Mercato. *WhatsApp fined for 3 million euro for having forced its users to share their personal data with Facebook*, Press Release [2016]. (Autorità Garante della Concorrenza e del Mercato 2016)

Bundeskartellamt. *Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive*, Press Release [2017]. (Bundeskartellamt 2017)

Autorité belge de la Concurrence. *Beslissing n° BMA-2015-P/K-27-AUD van 22 september 2015, Zaken nr. 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. v. Nationale Loterij NV* [2015]. (Autorité belge de la Concurrence 2015)

Autorité de la concurrence. *Décision n° 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* [2014]. (Autorité de la concurrence 2014)

The Finnish Competition and Consumer Authority. Docket no. 1097/61/2003. *Määräävän markkina-aseman väärinkäyttö tilaajaluettelotietojen tukkumarkkinoilla* [2005]. (The Finnish Competition and Consumer Authority 2005)

THE U.S. COURTS

Aspen Skiing Co. v *Aspen Highlands Skiing Corp.*, 427 U.S. 585 (1985).

Eastman Kodak Co. v *Southern Photo Materials Co.*, 273 U.S. 359 (1927).

United States v Terminal Railroad Association, 224 U.S. 383 (1912).

MCI Communications v AT&T, 708 F.2d 1081 (7th Cir. 1983).

Fishman v *Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986).

Andrew Byars v *Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1980).

United States of America v. Bazaarvoice, Inc., No. 3:2013cv00133 - Document 286 (N.D. Cal. 2014).

ABBREVATIONS

API	Application Programming Interface
CJEU	The Court of Justice of European Union
ECJ	The European Court of Justice
EU	The European Union
FIN-FSA	The Finnish Financial Supervisory Authority
GC	The General Court
GDPR	The General Data Protection Regulation
NCA	National Competition Authority
PSD2	Payment Service Directive 2
PSP	Payment Service Provider
RTS	Regulatory Technical Standard
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union

1 INTRODUCTION

1.1 Background

"*For too long banks have existed in an environment without competition*"[1]. This statement by a member of the European Parliament describes well the legislative framework concerning provision of payment services and the functioning of the payment service market within the European Union (EU) before the payment service market reform. The former legislative system had facilitated fragmentation amongst Member States by excluding certain payment services outside the scope of the legal framework of Payment Service Directive 1[2] and undermined legal certainty and consumer protection.[3] The European Commission (the Commission) found that payment service market has more potential to be explored, when innovative, safe and accessible digital payment services may be launched by payment service providers (PSPs, also called as FinTechs) benefitting consumers and retailers with more effective, convenient and secure payment methods within the EU.[4]

Ultimately, the Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC ("the Payment Service Directive 2, the PSD2") was introduced to tackle aforementioned issues and fully harmonizing the area of payment services within the EU.[5] The implementation of the PSD2 to the Finnish national legislation entered into force on 13 January 2018.[6] The relevant amendments are included in the Payment Services Act (290/2010, as amended) and the Payment Institutions Act (297/2010, as amended) and other related acts. However, at practical level, the PSD2 is not effective yet

[1] Olle Ludvigsson, a member of the European Parliament who worked on the new law. Financial Times 2018.
[2] Innovative payment products or services not within the scope of Directive 2007/64/EC. Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L 319 ("PSD1").
[3] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337, ("PSD2") Recital 4.
[4] PSD2, Recital 4.
[5] *ibid.* Recital 5. art 107
[6] HE 132/2017 vp. Government proposal for the Parliament on the act amending the Payment Services Act and other related Acts (available in Finnish or Swedish). HE 143/2017 vp. Government proposal for the Parliament on the act amending the Payment Institutions Act and other related Acts (available in Finnish or Swedish).

since the lacking Regulatory Technical Standards (RTSs) will enter into force on 14 September 2019.[7]

The aim of the PSD2 is to provide equivalent operating conditions for all payment service providers, to enable new payment methods enter into the payment services market and, at the same time, to ensure a high level of consumer protection.[8] In order to fulfill its aims, the main changes introduced by the PSD2 in the legal environment are so-called "access obligations". Firstly, the account servicing payment service providers (i.e. account banks) have an obligation to enable access to their customers' account data, when such access is explicitly consented by the customer, unless a refusal to enable access is justified. Secondly, the account banks have an obligation to allow third-party payment service providers to utilize authentication procedures, which are provided by the account banks. Jointly, these obligations may be described as "access obligations", either to data or procedure.

In general, these access obligations aim to facilitate the emergence and the growth of new payment service providers.[9] The PSD2 identifies two types of third-party payment service providers – Payment Initiation Service Providers[10] (PISP) and Account Information Service Providers[11] (AISP).[12] PISPs and AISPs do not hold the user's funds, when they are exclusively providing those services and thus they do not have similar capital requirements compared to the traditional banks.[13] Additionally, PISPs and AISPs do not either directly access customers' bank account. The access is made possible through application programming interfaces (APIs) by which the data is received.[14] As a result, the concept of

---

[7] Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication [2017] OJ L 69. On the challenges of implementation and varying objectives, see Haubrich 2018.
[8] PSD2, Recital 6.
[9] Cortet – Rijks – Nijland 2016, p. 13-20.
[10] PISPs provide payment initiation services, which enable them to comfort a payee (the payment has been initiated) and incentive the payee to provide goods or services without undue delay. The payment initiation services provide an option for the utilizing payment cards in online stores and with lower costs for both merchants and consumers. PSD2, Recital 29.
[11] In contrast, AISPs provide account information services by accessing the aggregated payment account data via online interfaces and gathering this data from one or more other payment service providers (account banks). Ultimately, the customer is able to have an overall view of its financial situation instantly at any time. PSD2, Recital 28.
[12] *ibid.* Recital 27-29.
[13] Rather they are required to hold either professional indemnity insurance or a comparable guarantee. *ibid*. Recital 31, 35.
[14] *ibid.* Recital 28. Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication [2017] OJ L 69, recitals 20-25

open banking has emerged which means the joint cooperation with the account banks and FinTechs either by FinTech's accessing account data via APIs or participating in the development of APIs or new services together with the account bank.

However, the liberalization of the payment service market and the entry of new market players may cause account banks' abusive behavior from competition law perspective. On 3 October 2017, the Commission has confirmed unannounced inspections concerning restrictions on gaining access to customers' bank account information under Article 101 (a cartel prohibition) and/or Article 102 (an abuse of dominant position) of the Treaty on the Functioning of the European Union (TFEU). The refusal to supply access to customers' account data is aimed at excluding non-bank owned payment service providers although the customers had consented such access.[15] These investigations had been initiated even before the PSD2 access obligations had entered into force.

The issue herein is that after the PSD2 had entered into force, whether the account banks' refusal to give access to their customers' account data and authentication procedures constitute an abuse of dominant position as refusal to supply under Article 102 TFEU. When the account banks have justified grounds for refusal under the PSD2, whether the conduct that is in compliance with the PSD2 could still trigger the refusal to supply doctrine under Article 102 TFEU. Ultimately, this discussion is a matter of the intersection between competition law and financial regulation - how these areas laws should be applied simultaneously and whether one should prevail in case of conflicting interests?

1.2 Research questions

The thesis examines the key legal issues associated with the PSD2 access obligations in the context of a refusal to supply. The main research question is whether the account banks' refusal to supply access to their customers' account data and authentication procedures constitutes an abuse of dominant position as a refusal to supply under Article 102 TFEU. The problem is how regulatory supply obligations, such as the PSD2 access obligations, are treated within the Article 102 TFEU context. From sanctions perspective, the dominant account bank may face harsher punishments, when in addition to penalty payment under financial regulation, the punishment under competition law is still possible and *vice versa*.

[15] European Commission 2017 A. Financial Times 2017. Glazer – Seetharaman – Andriotis 2018.

The assessment of dominance in the context, wherein every account bank has the similar obligation, is problematic, when solely the dominant company may face the competition law scrutiny under Article 102 TFEU.

When the refusal to supply is a "traditional" concept of the EU competition law, it may further be questioned, how it adapts to innovation and digital economy. In other words, does the EU competition law even recognize concepts such as refusal to supply data or procedure, that are the core of the PSD2 access obligations. Thus, it is essential consider the Commission's approach on the refusal to supply in a data context under Article 102 TFEU in order to assess the approach in relation to the PSD2.

Another important consideration herein is the compliance with the PSD2 and its relation to refusal to supply doctrine. In other words, whether the lawful conduct under the PSD2 could constitute still a refusal to supply and thus ultimately the abuse of dominant position under Article 102 TFEU. The PSD2 provides an exemption for the access obligation, when the account bank may deny unauthorized or fraudulent access to the customers' bank account in certain circumstances. The question is whether the denial of access based on the PSD2 justification still triggers Article 102 TFEU. Further, it is questioned whether competition law should intervene in these situations if the behavior is in compliance with the PSD2. Thus, from a policy perspective, the issue is which legal assessment should prevail. Further, whether the access obligations are even justified, when the account banks are subject to higher regulatory burden (e.g. capital requirements) and particularly with the risk of competition law consequences. Ultimately, what are the practical implications of the refusal to supply doctrine and the PSD2 access obligations?

Currently, there is no comprehensive study on the PSD2 access obligations and its relation to the refusal to supply doctrine. The discussion has its ultimate basis on the essential facilities doctrine in the context of data, which has raised a wide debate among scholars.[16] The main subject of a dispute is whether data may be considered as an essential facility or an indispensable input. Although the essential facilities doctrine is an U.S. concept established in *United States v. Terminal Railroad Association*[17], it has its implications on the EU law (referred as indispensability of an input). Further, the essential facilities doctrine in a data context or the indispensability of data has been traditionally assessed with respect to

[16] See Section 3.2.3.
[17] *United States v Terminal Railroad Association*, 224 U.S. 383 (1912).

big data or from data protection perspective.[18] However, the doctrine has relevance also in other circumstances, such as in the PSD2 context with respect to access obligations. In the thesis, the refusal to supply data and the essential facilities doctrine will be considered as a preliminary question for the assessment of the PSD2 access obligations under Article 102 TFEU.

Hypothesis underlying the thesis is that in the account banks' refusal to supply access to their customers' account data and authentication procedures may constitute an abuse of dominant position as refusal to supply under Article 102 TFEU in certain cases. This would require categorical discrimination of a particular service provider but may be triggered even with "less severe" anti-competitive practice. A dominant company's behavior which is justified under the PSD2 should not trigger Article 102 TFEU. However, as the application of access obligations is unclear, the PSD2 justifications may not have relevance in practice but should have meaning as a black-letter law. Access obligations being pro-competitive will ultimately have efficiencies, when they benefit the consumer and lower the costs of merchants.

Personally, I find the topic relevant reflecting the current discussion in the financial industry. The PSD2 has wide implications, when it does not affect solely banks and other payment service providers but also various authorities, amongst others, competition authorities and financial supervisory authorities from perspective of supervision. Further, I find the intersection and interaction with the different branches of law in general interesting since law is not an isolated discipline. One legal matter or issue may be affected by various branches of law. For instance, the PSD2 access obligations are affected by the PSD2 itself, competition law and IP law on data protection matters. Eventually, this is a question about whether either branch of law should prevail.

1.3 Methodology and scope of the research

The aim of the thesis is to clarify the current issues of the PSD2 regime in the refusal to supply context. The PSD2 introduces several novel obligations for the account banks and the new PSPs. However, the research is conducted from the account bank's perspective, when they are the subject of the access obligations under the PSD2. Thus, the assessment is

[18] For instance, Lundqvist 2018, Graef 2016, Stucke – Grunes 2015, Tucker – Wellford 2014 and Geradin – Kuschewsky 2013.

limited to account banks' supply obligations (access to data and procedure) and the obligations for the PSPs are excluded from the scope of the thesis.

The research is conducted by using legal methodology of doctrinal analysis, which refers to the interpretation and systematization of valid law.[19] The concepts of competition law and financial regulation are considered and systematized in the research. The data protection considerations are taken into account when approach on data is assessed under the EU competition law but are not analyzed in depth in this thesis. Rather the analysis focuses on the relationship between the PSD2 and Article 102 TFEU. The EU legislation is the main subject of examination, in particular the PSD2. For the competition law assessment, the examination is limited to Article 102 TFEU and particularly to refusal to supply practices. This limitation is chosen due to the fact that the PSD2 access obligations are essentially supply obligations refusal of which falls within the scope of refusal to supply doctrine. The textual interpretation of legislation is supported by teleological interpretation whereby preparatory acts and other related documents are examined. Jurisprudence and legal scholarship perspectives are also considered through writings of legal scholars included in books and articles.

In addition to legislative instruments, case-law of the Commission and the CJEU is analyzed. Due to the lack of explicit case-law on the PSD2 access obligations and refusal to supply (except for the Commission's initiated investigations), analogy is used by reference to related cases on supply obligations in general or refusal to supply data or access to procedure. Besides EU case-law, relevant decisions of National Competition Authorities (NCAs) are examined. Several cases on different aspects of this thesis are examined whereas fewer cases are investigated by means of a more detailed analysis. Further, the U.S. case-law is taken into account in the context of the essential facilities doctrine due to its U.S. nature.

Qualitative research method is moreover employed in the thesis. In order to gain market actors perspective, persons responsible for the implementation of the PSD2 in OP Financial Group were interviewed. Further, the Finnish Financial Supervisory Authority (the FIN-FSA) as the supervisor of the PSD2 was interviewed for getting also the supervisory authority's perspective on the PSD2 reform. The questions posed related to the benefits and possible downsides of the PSD2. Further, the current and future challenges of the payment

[19] Pattaro 2005, p. 1. Husa – Mutanen – Pohjolainen 2008, p. 20. Hirvonen 2011, p. 21–22.

service market were examined from PSD2 perspective. The aim for employing the research method is to understand more practical issues underlying the PSD2 and address them in the thesis.

For the purpose of the competition law assessment, "*law and economics*" perspectives are also essential to consider. Law and economics refer to a behavioral theory aiming to predict how addressees of legislation respond to it.[20] From predictions, efficiency considerations can be drawn.[21] For instance, it may be inquired whether the PSD2 or competition law is effective in terms of deterrence or cost-efficiency objectives. Thus, law and economics provide a rational approach of scrutinizing legislation. Competition law is heavily based on economic considerations, such as economies of scale[22] and scope[23], when effects on competition are being assessed.[24] For the purposes of this thesis, a theory of harm needs to be established to analyze the effect of the PSD2 obligations on the market and company behavior by reference to competition law rules. In particular, the theory of harm is beneficial in analyzing Article 102 TFEU abuse of dominance cases, which are usually scrutinized under an effect-based approach.[25]

1.4 Structure of the research

The research is structured as follows. The first section examines more in depth the payment service market reform, in particularly the content of the account banks' obligations under the PSD2 - the obligation to enable access to their customers' account data and the justifications available for denying the access and the obligation to allow third party payment service providers to utilize authentication procedures provided by the account bank. In this relation, the implementation into Finnish law and considerations of market players and supervisory authorities on the PSD2 are discussed.

In the second section, the legislative framework for the refusal to supply analysis under Article 102 TFEU in data context is set. The traditional test for the refusal to supply and the

---

[20] Cooter – Ulen 2016, p. 3. See also, Fatur 2012, Chapter 3.
[21] *ibid.* p. 4.
[22] Economies of scale mean that the average cost of producing a commodity decreases the more is produced or "*where efficiency in production is achieved as output is increased*." Jones – Sufrin 2016, p. 6.
[23] Economies of scope mean that "*it is cheaper to produce two different products jointly than each separately*". *ibid.* p. 6.
[24] *ibid.* p. 45-46.
[25] Jones – Sufrin 2016, p. 45-46.

essential facilities doctrine are introduced. Particularly, the distinction between regulatory duty to supply and duty to supply under Article 102 TFEU is drawn. With respect to data considerations, the European Commission's general approach on data is assessed in order to define the position of data in competition law assessments in general. In other words, whether the notion of data is considered or even recognized. Three notions of data are recognized – data as a barrier to entry, data as an asset and concentration of these assets and data as an input. The discussion of data and the definition of dominance are closely held. The section is concluded by combining the two elements together by discussing the refusal to supply data.

In the third section, after the legislative framework has been set for the competition law analysis of refusal to supply data, these concepts are consequently applied in the PSD2 context. The notion of banking data is discussed and particularly account data's indispensability for the Payment Service Providers. The access obligations of PSD2 are contrasted with each other, when the different nuances are examined for the purposes of competition law analysis. The problem of assessing dominance in the PSD2 context is raised after which the breach of access of obligations are considered as a trigger for refusal to supply. Further, the relevance of justifications is assessed. The discussion is elaborated further whether there could be forced data sharing beyond the PSD2 access obligations and whether the Commission's different burden of proof is justified for the regulatory duties than supply duties under Article 102 TFEU without such duty. The fourth section discusses the research findings at more practical level by analyzing the requirement of open banking. The fifth section concludes and establishes future considerations.

2 THE REFORM ON THE PROVISION OF PAYMENT SERVICES WITHIN THE EU – THE PAYMENT SERVICE DIRECTIVE 2

In the following section, the PSD2 reform is discussed more in detail by elaborating access obligations under the PSD2. After considering the access obligations, the implementation into Finnish law is considered on relevant parts. Further, the market players' and supervisory authorities' considerations on the PSD2 is examined for establishing the current attitude towards the reform.

2.1 Account bank´s obligations under the PSD2

2.1.1 Access to account data

The PSD2 introduces a novel obligation for the account banks to enable access to their customers' account data unless refusal to supply the access is justified.[26] The obligation may be generally described as an access to data obligation. Under Article 66 and 67 of the PSD2, the access to data obligation stems from the payment service user's legal right to use payment services and is dependent on the nature of the payment service provided (whether the service is question is payment initiation or account information service).[27] It follows that the bank's obligation is dependent on the explicit consent of the payment service user authorizing the third-party services provider to access the customers' account data.[28]

In case of payment initiation services, the account bank has a multifold obligation. First, the account bank has an obligation to provide or make available all information concerning the initiation of the payment transaction. Second, the account bank needs to provide or make available the same information that is accessible to the account bank regarding the execution of the payment transaction. The access should be granted on a non-discriminatory basis other than for objective reasons, such as in terms of timing, priority charges vis-á-vis payment orders.[29] If indirect access to payer's account is granted for the payment initiation service providers, the account bank is required to grant direct access to the account.[30] In contrast, with respect to account information services, the account bank has a general obligation to

[26] PSD2, Article Article 66-67.
[27] *ibid.* Article 66-67.
[28] *ibid.* Article 66(2), Article 67(2)(a).
[29] *ibid.* Article 66(4). This also means that the account bank may charge the third-party service providers only the same amount of charges than the payment service user on the access. *ibid.* Recital 65, Article 66(4)(c).
[30] *ibid.* Recital 32.

supply account data for the account information provider. The data requests transmitted through third-party service provider's service must be treated in a non-discriminative manner except for objective reasons.[31]

However, the access to account data is subject to certain limitations. First, sensitive payment data[32] may not be stored in case of payment initiation services[33] or requested in case of account information services[34]. Additionally, the payment service providers' right to access, process and retain personal data is limited to data, which is *necessary* for them to provide payment services with the explicit consent of the data subject.[35] In relation to the General Data Protection Regulation (GDPR) (particularly data subject's right to access or right to data portability), the payment service user's right under the PSD2 overrides such general rights of data subject. In other words, the access to user's account data shall be granted under the PSD2 and in accordance with the provisions of the GDPR as the account data may be considered as personal data.[36]

Article 68 of the PSD2 introduces also limitations for the account bank's obligation to enable access to data.[37] The account bank may refuse to grant the access for objectively justified and duly evidenced reasons that relate either to unauthorized or fraudulent access to the payment account by the specific third-party payment service provider requesting the

---

[31] PSD2, Article 67(3). The wording of the provision differs slightly from the payment initiation services one with respect to possible costs charged from the third-party payment service providers. However, as the PSD2 does not contain any explicit provision on the charges that the account bank may charge from the third-party payment service providers on the access to the payment accounts data.

[32] Sensitive payment data refers to "data, including personalised security credentials which can be used to carry out fraud. For the activities of payment initiation service providers and account information service providers, the name of the account owner and the account number do not constitute sensitive payment data". Personalised security credentials refer to "personalised features provided by the payment service provider to a payment service user for the purposes of authentication". *ibid.* Article 4, Section 32.

[33] *ibid.* Article 66.

[34] *ibid.* Article 67.

[35] *ibid.* Article 94(2). Further, the provision of payment initiation services requires exchange of information between the PISP and the ASPSP, or that rely on information available to either the PISP or the ASPSP with respevt to customer consent, strong customer authentication, payment formatting, risk management and the confirmation of payment. Geerling 2018, p. 65-66.

[36] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119 (General Data Protection Regulation, GDPR) Article 4(1). However, with this respect, it has been questioned, how long the third-party service provider will have the access to account data. If the access to data is unlimited in terms of time, the account bank "should provide a way for customers to be able to manage when and what data is accessed and provide insight into issues such as who's got access to that account, when they last accessed that account and what data they accessed. Furthermore, they will have to enable the customers to block such access if they so wish." Noctor 2018, p. 10-11. See also Santamaría 2014. Article 29 Data Protection Working Party 2017 p. 8, footnote 15. Vezzoso 2018, p. 40.

[37] PSD2, Article 68(5-6).

access.[38] In other words, the refusal to supply the access is solely limited to these grounds under the PSD2.

2.1.2 Access to authentication procedure

Second account bank's obligation relates to customers' authentication procedures. Under the PSD2, the account banks have an obligation to allow third-party payment service providers to utilize the authentication procedures[39] provided by the account bank.[40] In this relation, it is essential notice that there does not exist necessarily a contractual relationship between the third-party service provider and the account banks.[41]

Reasoning for the access to procedure obligation is the fact that when the account banks are the common issuer of the personalized security credentials used for secure customer authentication, the payment service providers should be able to rely on these procedures.[42] This is applicable only, if the payer access its payment account online, initiates an electronic payment transaction or carries out other remote action implying a risk of payment fraud or other abuse.[43]

Contrasting the access obligation to authentication procedure to the access to data obligation, there is no justifications available under the PSD2 in respect of authentication procedures. Thus, such access may not be refused and justified but shall be provided in every situation.

2.2 Implementation into Finnish law – The relevant amendments

Besides the access obligation, the implementation of the PSD2 increases essentially the supervisory powers of the national financial supervisory authorities. Under Article 50 n of the Act on the Financial Supervisory Authority (878/2008, as amended), the FIN-FSA is the competent authority to supervise the compliance with the PSD2 in Finland.[44] The PISPs and AISPs are subsequently within the jurisdiction of the FIN-FSA.[45] In order to provide

[38] PSD2, Article 68(5).
[39] The PSD2 introduces also an obligation to provide access to payment system, which is however different from this obligation. *ibid*. Article 35, 97.
[40] *ibid.* Article 97.
[41] *ibid.* Recital 30.
[42] *ibid.* Recital 30.
[43] *ibid.* Article 97.
[44] Act on the Financial Supervisory Authority (878/2008, as amended), Article 50(n).
[45] Payment Institutions Act (297/2010, as amended), Section 6, 7(b).

payment initiation services in Finland, the PISPs are required to apply for a payment institution license in accordance with the Payment Institutions Act.[46] However, the AISPs are required solely to register with the FIN-FSA.[47]

It should be noted that both PISPs and AISPs are exempted from the capital requirements generally applicable to payment institutions.[48] The exemption is applicable only if the payment institution provides exclusively either payment initiation or account information services or both of them.[49] The account bank must also notify the FIN-FSA if it recognizes that the provider of payment initiation or account information service is utilizing payment account without authorization or by fraudulent means and for these reasons denies the access to payment account.[50]

Ultimately, when the new payment service providers are within the FIN-FSA's supervision, it may be questioned whether the account bank's justification for denying the access will be actually have relevance. The AISPs and PISPs will be presumed as being reliable market actors and thus it is for the account bank to prove that the provider of payment initiation or account information service is utilizing payment account without authorization or by fraudulent means.[51] Thus, the burden of proof will be placed on the account banks and the FIN-FSA has stated that such burden will be high subject to the FIN-FSA's consultation.[52]

2.3 Considerations of market players and supervisory authorities on the PSD2

The PSD2 has raised a lot of discussion among stakeholders, especially within the account banks. OP Financial Group expects that there will be an emergence of new innovative services and service providers together with "traditional" banks. The opening of the payment service market signifies for the banks that they are required to develop strongly their activities and find new courses of action for the provision of payment services.[53] There are

[46] Payment Institutions Act (297/2010, as amended), Section 6.
[47] *ibid.* Section 7 b.
[48] Payment Institutions Act (297/2010, as amended), Section 30.
[49] HE 143/2017 vp. Government proposal for the Parliament on the act amending the Payment Institutions Act and other related Acts (available in Finnish or Swedish). *ibid.* Section 30.
[50] *ibid.* Section 19 b.
[51] *ibid*. Also noted by the FIN-FSA. FIN-FSA's interview 2018.
[52] FIN-FSA's interview 2018.
[53] OP Financial Group 2017.

also certain challenges, for instance, what information specifically may be shared in APIs or even what kind of APIs there should be in place.[54]

The FIN-FSA agrees with the goals of the PSD2 to bring new payment service types within the relevant regulation and supervision at the same time increasing the competition on the payment service market.[55] The regulation has been necessary in order to open the competition for other players than the account banks. There will be more choice for the consumers and at the same time, the consumer protection will be also increased. The costs of merchants will decrease, when the merchants will be able to initiate payment transactions themselves having indirect decreasing effect also to the costs of consumers. At the same time, the payment procedures will be also simplified, when the bank does not initiate the payment transaction anymore. The FIN-FSA expects that bank mergers could be possible, but the more significant effect will be seen in other European countries, where they do not have as sophisticated systems in place as the Finnish banks already have.[56]

In respect of the new market players, the FIN-FSA stated that there have been few applications for the licensing of payment initiation services or the registration of account information services.[57] Further, the functioning and relevance of account information services has been somewhat unclear, when such services do not *de facto* produce revenues. Rather, these services will be seen as a supplementary, for instance, for the purposes of cash flow accounts, data analytics or tendering of consumer commodities.[58]

The entry of third-country payment service providers might not be as significant as written in media.[59] OP Financial Group has considered that in Finland the "traditional" banks will most likely lead the industry first. In this respect, the FIN-FSA has noted that third-country payment service providers are subject to licensing requirements, when they are required to establish a branch within the EEA and thus subject to, for instance, the EU rules on data protection. This may have a reducing effect for the third-country entrants to the EU market

[54] OP Financial Group's interview 2018.
[55] Finnish Financial Supervisory Authority 2017.
[56] FIN-FSA's interview 2018.
[57] *ibid.*
[58] FIN-FSA's interview 2018. OP Financial Group's interview 2018.
[59] Döderlein 2018, p. 127-129. See also Salmony 2014. Packin – Lev-Aretz 2016. Haselton 2018. Du Toit – Cheris 2018. Heritage 2017. Crowley 2017.

and to Finnish market.[60] However, both consider that the PSD3 and the further liberalization of payment services market is possible.[61]

Considering the discussion around the PSD2 reform, in particular the account banks' access obligations, several questions regarding the intersections with competition law may be raised. Article 102 TFEU concerning the abuse of dominant position, especially the refusal to supply has an overlapping scope of application with the PSD2 access obligations. Both laws have or may have the requirement of supply and this interaction or lack of it will be discussed more in detail in the following chapters.

[60] FIN-FSA's interview 2018.
[61] FIN-FSA's interview 2018. OP Financial Group's interview 2018.

3 REFUSAL TO SUPPLY DOCTRINE IN DATA CONTEXT UNDER ARTICLE 102 TFEU

As a prerequisite for the discussion on the PSD2 obligation on access to data and authentication procedures under Article 102 TFEU and the refusal to supply doctrine, such legal doctrine shall be first assessed generally in a data context. For such considerations, the legislative framework for refusal to supply under Article 102 TFEU shall be established.

In the following section, the traditional test for refusal to supply and relevant case-law is considered followed by discussion on a regulatory obligation to supply as an exception to the Commission's burden of proof on refusal to supply. Further, it is examined whether compliance with a regulatory duty or failure to comply with such duty establishes the presumption of compliance with or abuse of dominant position under Article 102 TFEU.

3.1 The traditional test for the refusal to supply

Traditional test for refusal to supply has been systematized in legal literature into two parts – a test established by the Court of Justice's (ECJ) and the General Court's (GC) case-law, referred together as the Court of Justice of the European Union (CJEU) and a test employed by the European Commission in its guidelines[62], both of which however resemble each other.[63] Generally, the Commission has recognized that the competition problems in terms of refusal to supply arise in downstream markets, when both dominant company and the buyer (subject to refusal) are within the same market.[64] In other words, the dominant undertaking refuses to supply the input, which is required for manufacturing a product or providing a service.[65] However, it is not necessary that the input is traded or there is an actual refusal by the dominant undertaking. Regarding the input, potential demand from purchasers or potential market for the input is sufficient.[66] Regarding the refusal, so-called "*constructive refusal*" is sufficient, for instance, when the dominant company is delaying unduly or

[62] Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 [102] of the abusive exclusionary conduct by dominant undertakings (2009/C 45/02) [2009] OJ C 45/7, ("Commission's Enforcement Guidelines").
[63] Faull – Nikpay 2014, p. 467-480.
[64] Commission's Enforcement Guidelines, para 76.
[65] *idem.*
[66] Case C-418/01 *IMS Health GmbH & Co. OHG. v NDC Health GmbH & Co. KG.* [2004] ECR I-05039, para 44. Commission's Enforcement Guidelines, para 79.

otherwise limiting the supply of a product or impose unreasonable conditions or contract terms for the supply.[67]

The traditional test for the refusal to supply consists of three cumulative criteria. According to the paragraph 81 of the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, the following circumstances shall be present:

- "the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market,
- the refusal is likely to lead to the elimination of effective competition on the downstream market, and
- the refusal is likely to lead to consumer harm."[68]

The aim of the refusal to supply test is to balance interests between the competition law intervention and the freedom to conduct business.[69] The Commission has recognized that the imposition of supply obligation under EU competition law requires careful consideration due to the fact that such obligation may undermine dominant undertaking's incentives to invest and innovate or facilitate competitor's free riding and thus ultimately harm consumers.[70]

The Commission's test for the refusal to supply resembles the approach taken by the CJEU in its case-law. In *Magill,* the ECJ stated in the context of intellectual property rights that "*the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct*".[71] These exceptional circumstances in *Magill* were present according to the ECJ. First, the supply of an indispensable *product* for carrying on business without which conducting such business would be impossible.[72] Second, the refusal to

---

[67] Commission's Enforcement Guidelines, para 79.
[68] Commission's Enforcement Guidelines, para 81.
[69] *ibid.* para 75.
[70] Joined cases C-241/91 P and C-242/91 *P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities (Magill)* [1995] ECR I-00743, para 50. Case C-418/01 *IMS Health*, para 35. Case T-201/04 *Microsoft Corp. v. Commission of the European Communities* [2007] ECR II-3601, para 319, 330, 331, 332, 336. *ibid.* para 75.
[71] Joined cases C-241/91 P and C-242/91 *Magill*, para 50. Case 238/87 *AB Volvo v Erik Veng (UK) Ltd.* [1988] ECR 06211, para 9.
[72] Joined cases C-241/91 P and C-242/91 *Magill*, para 53. Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] ECR I-07791, para 40.

supply a product prevented a new product appearing on the market and there was a potential consumer demand.[73] Third, there is no objective justifications[74] and fourth, as a result of the refusal to supply, all competition in the secondary market was likely to be excluded.[75]

In *Bronner,* reflecting *Magill* the ECJ established criteria which is required to be fulfilled in order to refusal to supply a *service* could constitute an abuse of dominant position. The elimination of *all* competition must be likely in the downstream market caused by the refusal incapable of objective justification. The access must be indispensable for the business of person requesting access and the input has no actual or potential substitute.[76]

Following *Bronner*, in *IMS,* the ECJ assessed refusal to supply a copyright license and considered three cumulative conditions for the abuse similar to previous tests that refusal prevents a new product with potential consumer demand to emerge and such refusal is not justified and excludes *any* competition on a secondary market.[77] Interestingly, the ECJ discussed in parallel on the exclusion of *all* competition on a secondary market in contrast with *any* competition.[78]

In *Microsoft*, the General Court considered refusal to supply in the context of the interoperability of operating systems that the following test must be fulfilled by considering and combining the slightly varying standards established in ECJ's case-law. The refusal is relating to a product or service indispensable to the exercise of a particular activity on a neighboring market and is excluding *any* effective competition on such market. Ultimately, such refusal prevents the appearance of a new product having a potential consumer demand.[79]

Contrasting the Commission's approach with the CJEU's one, several considerations may be drawn. The Commission has refrained from using the wording indispensability or essential facility in its enforcement criterion and rather used the wording "*objectively*

---

[73] Cited in Bronner. Joined cases C-241/91 P and C-242/91 *Magill*, para 54. Case C-7/97 *Oscar Bronner,* para 40.
[74] Joined cases C-241/91 P and C-242/91 *Magill*, para 55. Case C-7/97 *Oscar Bronner,* para 40.
[75] Cited in Bronner. Joined cases C-241/91 P and C-242/91 *Magill*, para 56. Case C-7/97 *Oscar Bronner,* para 40.
[76] Case C-7/97 *Oscar Bronner,* para 41. Jones – Sufrin 2016, p. 506
[77] Case C-418/01 *IMS Health*, para 38.
[78] *ibid.* para 52. Jones – Sufrin 2016, p. 519.
[79] Case T-201/04 *Microsoft Corp. v. Commission of the European Communities* [2007] ECR II-3601, para 332. Jones – Sufrin 2016, p. 523.

necessary".[80] Furthermore, the Commission utilizes effective competition in its test as in *Microsoft* but does not take a stance whether the exclusion of effective competition considers all competition or just any effective competition.[81] The Commission employs also broader criterion on the likelihood of consumer harm, contrasted with the CJEU's tests in which such wording is not present.[82] The emergence of a new product having potential consumer demand may be considered narrower than the consumer harm as such. Additionally, regarding the traditional test to refusal to supply, the Commission has taken a different approach for the regulatory obligation to supply in its application of Article 102 TFEU.[83] Such exception to the Commission's burden of proof is discussed in the following section.

3.1.1 Regulatory obligation to supply as an exception to the Commission's burden of proof

The Commission has distinguished "traditional" refusal to supply cases with specific cases involving a regulatory obligation to supply. If a regulation complying with the EU law imposes an obligation to supply for the dominant undertaking, the Commission will consider that there is no similar need of balancing interests[84] as in traditional refusal to supply cases.[85] In cases with the regulatory duty to supply, necessary balancing of interests is executed already by relevant regulatory authorities.[86]

As a consequence, for cases of regulatory supply obligations, the Commission does not apply the specific refusal to supply test but only its general enforcement standard of likely anti-competitive foreclosure.[87] In these cases, the Commission's burden of proof may be considered being lower, when it is not required to consider the abuse-specific considerations.[88] For instance, in *Telefónica*, the Commission considered that the traditional

---

[80] Commission's Enforcement Guidelines, para 81.
[81] Commission's Enforcement Guidelines, para 81.
[82] *idem.*
[83] *ibid.* para 82.
[84] Undermining incentives to invent and innovate and facilitating free riding in contrast with competition law intervention. *ibid.* para 75.
[85] *ibid.* para 82.
[86] *ibid.* para 82.
[87] In other words, the Commission will take into account the position of the dominant undertaking on the market, the market conditions of the relevant market, the position of other market players (i.e., the dominant undertaking's competitors), the position of the customers or input suppliers, the extent of the allegedly abusive conduct, the possible evidences of actual foreclosure and direct evidence of any exclusionary strategy. *ibid.* para 20–21, 82.
[88] AG Ján Mazák has also considered in TeliaSonera that "*the fact remains that the condition of indispensability is not required where the dominant undertaking is subject to a regulatory obligation compatible with EU law to supply the wholesale products*." Opinion of AG Mazák in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527, para 58. Jones – Sufrin 2016, p. 536.

criteria on the refusal to supply established in *Oscar Bronner* is not applicable to regulatory duties of supply.[89]

Additionally, it may be inferred from the lacking necessity to take into consideration incentives to innovate and invent that dynamic efficiency[90] as a defense is not available when undertaking has a regulatory duty to supply.[91] As the Commission stated in *Telefónica*, *ex ante* incentives to invest could have not been affected by the dominant company's responsibility to refrain from engaging in exclusionary conduct, when such undertaking had a regulatory obligation to provide access to its network.[92] In other words, pleading the increased innovation may not generally be successful in the context of a regulatory duty to supply.

The respective approach of the Commission has raised criticism among legal scholars. Geradin has criticized the Commission's approach not to consider the element of *indispensability* of the input as in *Bronner* line of case-law. According to Geradin, the objectives of Article 102 TFEU and other regulatory duties differ, when the regulatory duty to supply may have broader objectives compared to Article 102 TFEU. Thus, the Commission should not be entitled to enforce regulatory duties under Article 102 TFEU and with lower burden of proof.[93]

I agree with this legal standing point with certain reservations. The element of indispensability is an essential part of the refusal to supply test proving of which should be for the Commission. On the other hand, it may be argued whether the indispensability criterion is already present, when there is a regulatory obligation to supply certain input. Additionally, it may be questioned whether there should be allocation between regulatory duties based on the EU law and *purely* national law. For instance, if a duty is based on the

---

[89] Interest balancing regarding regulatory duties is not required. Such finding was ultimately confirmed by the GC and the CJEU in relation to margin squeeze. Commission decision of 04.07.2007 relating to a proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – *Wanadoo España vs. Telefónica*) [2007] paras 303-309. Case C-295/12P *Telefónica SA and Telefónica de España SAU v European Commission* [2014] ECLI:EU:C:2014:2062, para 128. Case T-336/07 *Telefónica and Telefónica de España v Commission* [2012] ECLI:EU:T:2012:172.

[90] Dynamic efficiency refers to efficiencies created "through the invention, development and diffusuion of new products and production processes that increase social welfare". Van den Bergh – Camesasca 2006, p. 29-30.

[91] Commission decision of 04.07.2007 relating to a proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – *Wanadoo España vs. Telefónica*) [2007] para 634-635. Nazzini 2011, p. 314.

[92] *idem.*

[93] Similar arguments have been presented also by several other scholars. Geradin 2011, p. 7-8. Govaere – Quick – Bronckers 2011, p. 398-402. Nazzini 2011, p. 314

EU law, the EU legislator may have also taken the objective of the EU competition law into account to a larger extent and in more coherent way compared to national legislator regardless the duty of sincere cooperation[94]. However, as legal scholars have argued, it is questionable whether the Commission should have the right to enforce regulatory duties via EU competition law due to the possible broader objectives[95]. One should, however, bear in mind also that Article 102 TFEU is not triggered unless an undertaking is in a dominant position and other conditions for the likely anti-competitive foreclosure should be met[96].

When the Commission has lower burden of proof with respect to the regulatory supply obligations, an interesting consideration to take into account is whether the failure to comply with such regulatory duty may be considered as a presumption of Article 102 TFEU breach and *vice versa* whether the compliance with a regulatory duty presumes the compliance with Article 102 TFEU.

3.1.2 Compliance with the regulatory duty or failure to comply and Article 102 TFEU – the presumption of compliance or abuse?

Regarding compliance with a regulatory duty, the Commission has stated as a matter of competition policy that such compliance does not mean that the conduct complies with

---

[94] "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives." Article 4(3) TEU.

[95] In this respect, also the Commission's commitment decisions under Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1. The Commission may terminate the investigation procedure and confirm the commitments offered by the party/parties that are subject to a threat of fine under Article 9 and Article 23(2) of the Regulation (EC) 1/2003. For instance, in energy sector, the Commission has closed multiple investigations under Article 102 as refusal to supply, predatory pricing or tying for the offered commitments. See, Commission decision of 11.10.2007 relating to a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/B-1/37966 - *Distrigaz*) [2007]. Commission decision of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Cases COMP/39.388 — German Electricity Wholesale Market and COMP/39.389 — German Electricity Balancing Market) [2008]. Commission decision of 3.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.316 – *Gaz de France*) [2009]. Commission decision of 18.03.2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – *RWE Gas Foreclosure*) [2009]. Commission decision of 29.09.2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union ('TFEU') and Article 54 of the EEA Agreement (Case COMP/39.315 – *ENI*) [2010]. Tapia – Mantzari 2013, p. 611-617. See also, Wils 2005, Chapter 1.

[96] "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States." Article 102 TFEU.

Article 102 TFEU.[97] Citing CJEU's judgment in *AstraZeneca,* the Commission stated that abuse of dominance generally involves behavior, which could be lawful under areas of law other than competition law.[98] In *AstraZeneca*, the CJEU considered that the illegality of abusive conduct under Article 102 TFEU does not relate to its compliance or non-compliance with other legal rules.[99] Additionally, the Commission itself has stated explicitly that the EU competition policy is not subordinate but rather complementary, to other branches of EU law.[100]

Neither the Commission is subject to national authorities' prior considerations when implementing Article 102 TFEU.[101] However, in *Hoffmann-La Roche,* the CJEU stated in pharmaceutical context that *national* competition authorities must take into account the outcome of competent authorities on manufacturing and marketing of pharmaceutical products.[102] This would suggest that at national level there would some kind of dependency with other competent authorities decisions regarding the sectorial regulation. However, the extent of such dependency is unclear.

In this relation, arguments regarding "state action defence"[103] has been presented, which could preclude the application of Article 102 TFEU, if any autonomous behavior of the undertaking is excluded.[104] The CJEU has considered in *TeliaSonera* that Article 102 TFEU is not applicable to anti-competitive conduct, which is not engaged in by the dominant undertaking on its own initiative. In other words, Article 102 TFEU is not applicable if undertakings' anti-competition behavior is required by national law or such national law

---

[97] Case C-295/12P *Telefónica SA and Telefónica de España SAU v European Commission* [2014] ECLI:EU:C:2014:2062, para 133. In patent context, for instance, Case 193/83 *Windsurfing International Inc. v Commission of the European Communities* [1986] ECR 00611, para 1. Case T-460/13 *Sun Pharmaceutical Industries Ltd, formerly Ranbaxy Laboratories Ltd and Ranbaxy (UK) Ltd v European Commission* [2016] ECLI:EU:T:2016:453, para 141.

[98] Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission* [2012] ECLI:EU:C:2012:770, para 132. Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission* [2010] ECR II-02805., para 677. European Commission 2013, p. 15. See also, Drexl – Lee 2013, p. 229.

[99] Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v European Commission* [2012] ECLI:EU:C:2012:770, para 132. Case T-321/05 A*straZeneca AB and AstraZeneca plc v European Commission* [2010] ECR II-02805, para 677.

[100] Also, the EU Competition Law is supreme over national legislation. European Commission 2013, p. 15. Commission decision of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369 *T-Mobile Deutschland/O2 Germany: Network Sharing Rahmenvertrag*) [2004] OJ L 75/32, para. 22. Tapia – Mantzari 2013, p. 604.

[101] *ibid*. para 135.

[102] Case C-179/16 *F. Hoffmann-La Roche Ltd and Others v Autorità Garante della Concorrenza e del Mercato* [2018] ECLI:EU:C:2018:25, para 61.

[103] De La Torre 2005, p. 407–431.

[104] Drexl – Di Porto 2015, p. 195.

eliminates any possibility of undertakings' competitive activity.[105] Thus, the autonomous conduct of the undertaking is required in order to Article 102 TFEU to apply.[106]

However, if the national legislation does not *preclude* such autonomous conduct preventing, restricting or distorting competition, Article 102 TFEU is applicable.[107] This means that if the national legislative framework only eases or encourages the engagement in autonomous anti-competitive conduct, the undertakings are still subject to Article 102 TFEU.[108] Thus, it follows that the arguments regarding the compliance with national legislation have been accepted by the CJEU only to a limited extent.[109]

Regarding a failure to comply with a regulatory duty to supply, in *Telekomunikacja Polska,* undertaking's repeated failures to comply with its regulatory duties amounted to an anti-competitive refusal to supply contrary to Article 102 TFEU.[110] For instance, delaying the

---

[105] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527, para 49.
[106] *ibid.* para 49. Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265, para 33. Case C-219/95 P *Ferriere Nord SpA v Commission of the European Communities* [1997] ECR I-04411. Case C-202/88 *French Republic v Commission of the European Communities* [1991] ECR I-01223. Case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [1991] ECR I-5941. Case 41/83 *Italian Republic v Commission of the European Communities* [1985] ECR 873. Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831. Joined Cases 209/78 to 215/78 and 218/78 *Heintz van Landewyck SARL and Others v Commission of the European Communities* [1980] ECR 03125.
Case C-280/08 *Deutsche Telekom AG v European Commission* [2010] ECR I-09555, para 80.
[107] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-00527, para 50. Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265, para 33-34. Case C-219/95 P *Ferriere Nord SpA v Commission of the European Communities* [1997] ECR I-04411. Case C-202/88 *French Republic v Commission of the European Communities* [1991] ECR I-01223. Case C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA* [1991] ECR I-5941. Case 41/83 *Italian Republic v Commission of the European Communities* [1985] ECR 873. Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831. Joined Cases 209/78 to 215/78 and 218/78 *Heintz van Landewyck SARL and Others v Commission of the European Communities* [1980] ECR 03125. Case C-280/08 *Deutsche Telekom AG v European Commission* [2010] ECR I-09555, para 80.
[108] Case C-280/08 *Deutsche Telekom AG v European Commission* [2010] ECR I-09555, para 82. Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, para 36-73. Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055, para 56.
[109] Case C-280/08 *Deutsche Telekom AG v European Commission* [2010] ECR I-09555, para 81. Case 41/83 *Italian Republic v Commission of the European Communities* [1985] ECR 873, para 19. Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831, para 27-29. Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055, para 67.
[110] Particularly, proposing unreasonable conditions governing AOs access to the wholesale broadband products (subsection 4.2.2); − delaying the negotiation process at the different stages (subsection 4.2.3); − limiting access to TP's network (subsection 4.2.4); − limiting access to subscriber lines (subsection 4.2.5); − refusal to provide the reliable and complete General Information (subsection 4.2.6). Commission decision of 22 June 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (COMP/39.525 – *Telekomunikacja Polska*) [2011] paras 695-706. para 712. Dunne 2015, p. 219. Appeal in ECJ is pending regarding the Commission investigation's procedural matters. Case T-486/11 *Orange Polska S.A., formerly Telekomunikacja Polska S.A. v European Commission* [2015] ECLI:EU:T:2015:1002. Case C-123/16 P *Orange Polska SA v European Commission* [2018] ECLI:EU:C:2018:590.

negotiation process[111] or providing unreliable or incomplete information had been considered as factors constituting the refusal to supply.[112] On the other hand, as previously discussed, the Commission will consider the likely anti-competitive foreclosure in relation to the refusal to supply.[113] However, it may be argued whether this failure to comply a regulatory duty to supply may be considered as, for example, a direct evidence of exclusionary strategy.[114] On the other hand, in *Telekomunikacja Polska,* the Commission did not consider directly the regulatory duty but rather its effects and different factors constituting refusal to supply.[115]

Considering the presumption of compliance with Article 102 TFEU when a regulatory duty is complied with, in general, such consideration is not valid. The *ex-post* application of Article 102 TFEU entails that the competition law scrutiny may be conducted regardless the compliance with a regulatory duty. However, if such compliance leaves no discretion for the dominant undertaking's autonomous conduct, Article 102 TFEU is not applicable. The exclusion from the scope of Article 102 TFEU does not nevertheless entail that such conduct complies with Article 102 TFEU. Thus, in certain situations, the competition law scrutiny could be avoided but the presumption of compliance may be considered as being too robust argument.

On the other hand, failure to comply with a regulatory duty may be considered as the presumption of an abuse for several reasons. Regulatory duties to supply are in general imposed in sectors, where one operator enjoys a monopolist position, is state-owned or financed with state funds.[116] Refraining access to a facility, which has been considered so indispensable that an obligation to supply has been imposed by a regulation, is a clear indication on the likelihood of anti-competitive foreclosure. Additionally, when regulatory supply obligations are imposed traditionally on undertakings being in a monopolist position, these obligations could be also considered as an indication of dominance. Still, the Commission has to establish the foreclosure effect but failure to comply with a regulatory

---

[111] Delaying could be also related to the access to system as in *Clearstream.* Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission of the European Communities* [2009] ECR II-03155, para 151.
[112] *ibid*.
[113] Commission's Enforcement Guidelines, para 20-21.
[114] *ibid.* para 20.
[115] Commission decision of 22 June 2011 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) (*COMP/39.525 – Telekomunikacja Polska*) [2011]. Dunne 2015, p. 219.
[116] Sectors such as energy, telecom or infrastructure. See, for instance, footnote above 95.

duty may be considered as a strong indication of foreclosure effects, which may have also effects as the presumption of an abuse.

To conclude, the interaction with competition law and sectorial regulation may be considered as being somewhat limited or one-sided. The compliance with sectorial regulation (except for state action defense) in general does not provide a safe harbor from competition law scrutiny. However, the failure to comply with sectorial regulation may trigger Article 102 TFEU. Combined with the Commission's lower burden of proof, certain imbalance may be found favoring competition law scrutiny over sectorial regulation. In the following section, these findings are employed in data context.

3.2 Refusal to supply data

In light of the traditional concepts of refusal to supply, refusal to supply data is assessed by first taking into account the Commission's general approach on data. Theory of harm underlying the refusal to supply and particularly data in relation to the essential facilities doctrine and the definition of dominance are further considered. For the purposes of the PSD2 access obligations, forced data sharing and a regulatory duty to share data under Article 102 TFEU shall be distinguished. The essential consideration aimed to answered is whether the refusal to supply doctrine is even applicable in a data context and thus having implications to the ultimate refusal to supply assessment within the PSD2 framework.

3.2.1 General approach on data under the EU competition law

In the context of EU competition law, data may be considered first as one type of barrier to entry. In the early case-law, the Commission has recognized the significance of data in competition law assessments as a potential vehicle for a competitive disclosure.[117] For

[117] In accordance with Point 29 of Non-Horizontal Merger Guidelines, "a merger is said to result in foreclosure where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: It is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of its competitors as well — are as a result able to profitably increase the price charged to consumers." Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/07. ("Non-Horizontal Merger Guidelines"). Mosso – Mottl – De Coninck – Dupont 2008, p.72. Stucke – Grunes 2016, p. 73. Commission decision of 02.07.2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4942 - *Nokia/NAVTEQ*) [2008], para 264 forwards. Commission

instance, in *TomTom/Tele Atlas,* building a navigable digital map database covering the EEA consumes resources and time, is expensive and its costs are not recoverable.[118] Market entry to this kind of market would not be timely or sufficient considering the scope and magnitude of market entry in order to outweigh any potential anti-competitive effects of the merger in question.[119]

On the other hand, the volume of data is not only relevant factor for assessing data as a barrier to entry. In *Google/DoubleClick,* the Commission considered that besides the actual size of databases, the multiplicity of data to which competitors have access and its application for the service provision is relevant.[120] Thus, data as such may not serve as barrier to entry but rather its relevance for producing a product or providing a service may have such capability. As in *TomTom/Tele Atlas* and *Nokia/NAVTEQ,* besides the amount and type of data, also the variety and velocity of data have relevance in competition law assessments.[121]

Second, data may be considered as an asset, particularly in a merger context. In *Google/DoubleClick*, one theory of harm presented by third-parties was that foreclosure was based on the combination of Google and DoubleClick's assets, particularly their customer provided information data collections.[122] This combination of data assets would cause centralization of market power to the merged entity not achievable by integrated or product competitors of the merged entity.[123] However, in the case, the Commission noted that the combination of data is not an unusual market practice but rather widely available for

decision of 14/05/2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4854 - *TomTom/TeleAtlas*) [2008], para 190 forwards.

[118] Commission decision of 14/05/2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4854 - *TomTom/TeleAtlas*) [2008], para 125, 132.

[119] However, the Commission considered that the merged entity would not have incentives to foreclose the competition due to which the merger was approved. The Commission employed similar argumentation also in *Nokia/NAVTEQ.* Commission decision of 14/05/2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4854 - *TomTom/TeleAtlas*) [2008] para 161, 211-230. Commission decision of 02.07.2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4942 - *Nokia/NAVTEQ*) [2008], para 195-204, 211, 232, 331-354.

[120] Commission decision of 11.03.2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.4731 – *Google/DoubleClick*) [2008] para 273.

[121] *ibid.* para 268-269. Vestager 2016.

[122] For instance, users' IP addresses, cookie IDs and connection times. Commission decision of 11.03.2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.4731 – *Google/DoubleClick*) [2008] Section 7.3.3, para 360.

[123] *ibid.* para 359.

Google's competitors due to which there is no competitive harm that could not be responded by other market players.[124]

Third, data may be assessed as an input under the EU competition law[125]. Data or its processing system is an essential input if competitors are not capable of providing comparable solutions without that particular input or there exists no alternative inputs. For instance, in *Microsoft/LinkedIn*, LinkedIn's data was considered as an input for the CRM software solutions market, however, which was not able to reduce the access to LinkedIn full data. Thus, such data could not be considered as or is not likely to become "an important input" on the market.[126] Rather, such data would constitute only one important input besides many of other data types and thus unlike to be essential.[127] The possible restricted access to this kind of data does not impede competitors' ability to compete and innovate or raise barriers to entry.[128] Further, in *Telefónica UK/ Vodafone UK/ Everything Everywhere/ JV,* market participants argued that the joint venture was expected to develop a database becoming an essential input for targeted mobile advertising but the Commission also disregarded the argument by noting that the element of essentiality is lacking when other market players were capable of providing comparable solutions.[129] However, competitive concerns may arise if the combined data creates a unique source and a barrier to entry for the particular market.[130]

Besides data, the algorithm processing the data may be considered as an essential input. In *Reuters Instrument Codes (RICs),* the RIC algorithm[131] was considered as an essential facility in the market for real-time data feeds and a compulsory license for the customers to

---

[124]Commission decision of 11.03.2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.4731 – *Google/DoubleClick*) [2008] para 363-366.

[125] The discussion on the essentiality or indispensability of data as an input will be considered further in the context of essential facilities doctrine below.

[126] Commission decision of 06.12.2016 pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area (Case M.8124 – *Microsoft/LinkedIn*) [2016] para 253, 256.

[127] *ibid.* para 259.

[128] *ibid.* para 276.

[129] Commission Decision of 4.9.2012 addressed to: Telefónica UK, Vodafone Group, Everything Everywhere declaring a concentration to be compatible with the internal market and the functioning of the EEA Agreement (Case No COMP/M.6314 – *Telefónica UK/Vodafone UK/Everything Everywhere/JV*) [2012], para 534, para 557.

[130] Baker 2018.

[131] RICs refers to algorithms that "identify securities, used by financial institutions to retrieve data from Thomson Reuters' real-time datafeeds". European Commission 2012.

utilize RICs for Thomson Reuters competitor's data was ordered.[132] Herein, the algorithm was considered essential rather than the data it processes. On the other hand, the creation of big data analytics as a result of merger without granting access to others may not be seen as a competitive concern if there are other big data analytics available.[133]

Further, these three functions of data recognized under the EU competition law ultimately leads to discussion on the intersection of EU competition law with privacy regulation. The Commission's merger decision in *Facebook/WhatsApp,* reflects the complexity of assessing data in competition law cases. The case will be discussed in the following section more in depth.

3.2.1.1 Intersection of competition law and privacy regulation – Facebook/WhatsApp merger

The core of the *Facebook/WhatsApp* decision was the intersection of privacy and competition law. The Commission explicitly stated in its decision that privacy-related issues on the concentration of data stemming from the merger are not within the scope of the EU competition law but rather assessed based on the applicable EU data protection rules.[134] A *concentration* of data assets was considered in relation to market power solely in respect of Facebook's market position.[135]

Similar approach on the overlapping aspects of EU competition law and data protection regulation had been previously employed, for instance, *Telefónica UK/ Vodafone UK/ Everything Everywhere/ JV*. [136] However, in *Microsoft/LinkedIn,* the relevance of privacy regulation was noted, when regardless the compliance with the applicable data protection

---

[132] In 2012, the European Commission imposed binding commitments on Thomson Reuters. The commitments were to create a new licence allowing customers to use Reuters Instrument Codes (RICs) for data sourced from Thomson Reuters' competitors. The European Commission was concerned that Thomson Reuters could be abusing its dominant position in the market for consolidated real-time data feeds through its licensing practices as restricting access to an essential facility. Commission decision of 20.12.2012 addressed to: Thomson Reuters Corporation and Reuters Limited relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.654 – *Reuters Instrument Codes (RICs)*) [2012].
[133] Commission decision of 09.01.2014 pursuant to Article 6(1)(b) of Council Regulation No 139/2004 (Case COMP/M.7023 *Publicis/Omnicom*) [2014], para 629–630.
[134] Commission decision of 17.5.2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (*Case No. M.8228 – Facebook/WhatsApp*) [2017], para 164.
[135] *ibid.* para 164.
[136] Brockhoff – Jehanno – Pozzato – Buhr – Eberl – Papandropoulos 2008, p. 60.

regulations, the Commission noted that the combining of data assets as a result of a merger may still cause horizontal competitive concerns by increasing market power[137], barriers to entry[138] or eliminating competition between two previously competing undertakings.[139]

In *Facebook/WhatsApp*, the Commission had similar considerations, when one theory harm presented (that actually materialized post-merger) was that WhatsApp would be utilized as a source of valuable user data for the advertising purposes.[140] Several market players also expected that Facebook's market position would be materially strengthened in the online advertising services resulting from the increased data in Facebook's control.[141] However, such allegations were denied by Facebook.[142] Regardless of these allegations, the Commission noted that *even if* the merged entity starts to collect and use WhatsApp's user data, there are no competition law concerns if such activity does not strengthen Facebook's market position.[143] Ultimately, the Commission considered that there will be still a large amount of data not controlled exclusively by Facebook and concluded that the merger is compatible with the internal market.[144]

In 2017, as a result of materialization of this theory of harm[145], the Commission imposed fines of 110 million euros for Facebook due to the breach of obligations not to supply

---

[137] Market power may be increased in the supply market of data or barriers to entry or expansion may be increased in the market for actual or potential competitors that need the particular data in order to operate in the market. Here also thematic of data as a barrier to entry and input. Commission decision of 06.12.2016 pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004 and Article 57 of the Agreement on the European Economic Area (Case M.8124 – *Microsoft/LinkedIn*) [2016], para 179.
[138] Combination of datasets requires competitors to collect a larger dataset in order to compete effectively with the merged entity. *ibid.*
[139] The Commission concluded, however, that such concerns are not present in the merger in relation to online advertising and that the merger did not raise competitive concerns as a result from the possible post-merger combination of Microsoft's and LinkedIn's data sets subject to applicable data protection regulation. *ibid.* para 176, 178-180.
[140] Commission decision of 17.5.2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 – *Facebook/WhatsApp*) [2017], Section 5.3.3.
[141] *ibid.* para 184.
[142] "The Transaction will not have any effect on the data potentially available for Facebook's use in targeting ads". *ibid.* para 183.
[143] *ibid.* para 187.
[144] *ibid.* para 189, 191.
[145] Terms of Service and Privacy Policy of WhatsApp were planned to be updated on July 2016 aiming to open access and use of WhatsApp's users' data for Facebook subject to a user "control". The existing WhatsApp users could have opted-out this update, however, the new users were automatically within the scope of the updated Terms including the authorization for Facebook to access their data. The existing user could also change its consent for 30 days after which the consent was considered irrevocable. In its response on the Commission's Statement of Objections, Facebook acknowledged that the information it had provided for the Commission was incorrect or misleading and its conduct was negligent. Commission decision of 17.5.2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 – *Facebook/WhatsApp*) [2017], para 46, 76, footnote 18. Facebook's response on the Commission's Statement of Objections (2017), para 13.

incorrect or misleading information under the EU Merger Regulation.[146] Facebook had provided at least negligently incorrect or misleading information on the possible cross-platform communication between Facebook and WhatsApp and the possible linking or matching of customer profiles on WhatsApp with Facebook's ones.[147] Measures had been taken also in relation to consumer protection and privacy laws at EU and national level.[148] German Cartel Office (GCO) had also warned Facebook over personal data collection, by means of which Facebook is abusing its dominant position.[149] GCO considered that the conditionality on the use of Facebook allows Facebook to collect data limitlessly from third-party websites, such as WhatsApp or Instagram (owned by Facebook) or other service operators with embedded Facebook APIs, and merge data with the user's Facebook account.[150] GCO also considered that due to the business model of Facebook and similar platforms, its users are not capable of switching to other social networks. Users may only accept the terms of service as a whole or not to use the service.[151] From a policy perspective, the President of the GCO stated that "Data protection, consumer protection and the protection of competition interlink where data, as in Facebook's case, are a crucial factor for the economic dominance of a company. [..] Competition law prohibits a company from abusing its market power."[152]

There are several implications resulting from this *Facebook/WhatsApp* saga. The competition and privacy laws are in fact intersecting and overlapping. The issue herein is the fact that to what extent the Commission or national competition authorities are capable or willing to take into account data implications. As emphasized in GCOs decision above, a

---

[146] Article 14(1)(a) and (b) of EUMR. Commission decision of 17.5.2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 – *Facebook/WhatsApp*) [2017], para 37, 56.
[147] For instance, Facebook had stated that this activity was not possible in an automated basis or significant effort was required by means of re-engineering the app code. It was also stated that linking may only be conducted manually by users. Facebook's response on the Commission's Statement of Objections (2017), para 11, 38. Commission decision of 17.5.2017 imposing fines under Article 14(1) of Council Regulation (EC) No. 139/2004 for the supply by an undertaking of incorrect or misleading information (Case No. M.8228 – *Facebook/WhatsApp*) [2017], para 61, 64, 92.
[148] In this relation, an interesting point of view has been presented by the Italian Competition Authority (ICA). On 11 May 2017, ICA fined WhatsApp for 3 million euros for forcing its users to share their personal data with Facebook and thus breaching Italian Consumer Code. The consumers were *de facto* forced to use the service with the updated Terms of Use and share their personal data with Facebook, when WhatsApp provided consumers with an impression that without granting the consent, they would not be able to use the service anymore. Similar proceedings had been enacted regarding the effective consent of the user from the consumer and data protection perspective at EU-level or in Germany. Fioretti 2016. Autorità Garante della Concorrenza e del Mercato 2016. Reuters 2016. Busemann – Schimroszik 2018.
[149] Bundeskartellamt 2017. Busvine 2018.
[150] Bundeskartellamt 2017.
[151] *ibid*.
[152] *ibid.*

breach of privacy laws may be also considered as Article 102 TFEU infringement, when company's behavior leads to consumer harm by abusing its market power conferred by concentration of data. Such concentration may be harmful for competition if it increases market power of a dominant company[153].

The Commission has attempt to keep the privacy issues strictly separate from competition law matters in general. Such approach resembles the CJEU's statement in *Asnef-Equifax* that data protection issues are not a matter of competition law but rather such problems are solved based on the relevant data protection regulation.[154] Rather, the Commission considers whether concentration of data increases market power and leads to foreclosure effects. The Commission is however interested on the intersection on competition law and privacy regulation and it will carefully consider whether privacy matter can actually become a competition issue as the Commissioner Vestager has emphasized recently.[155] From competition law perspective, the effects of concentrated data is essential to consider and not whether there is an actual breach of data protection rules. The economic power that data creates, and its abuse should be considered under competition law. As seen in *Facebook/WhatsApp*, the Commission would be capable of assessing privacy-related issues, such as a concentration of data, under EU competition law if market power is increased or abused. The approach has actually become more stringent post-*Facebook/WhatsApp.* For instance, in *Apple/Shazam,* the Commission had reviewed carefully effects that the acquisition of the important data sets is causing and put more emphasis on the possible restrictive effects on the competition.[156]

3.2.1.2 Considerations on the general approach

As described above, data has multiple implications in competition law context. Data may be considered as a barrier to entry on relevant market, which is closely connected with the discussion on data as an input and data's element of essentiality. It may constitute a barrier to entry if it is an essential input. For data being essential input, the Commission has considered that there should be no substitutes for the input in order to provide the comparable

[153] See on the assessment of market power in data-driven industries, for instance, Fatur 2012, Chapter 5.
[154] Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125, para 63.
[155] Baker 2018.
[156] Commission decision of 6.9.2018 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.8788 – *Apple/Shazam*) [2018]. Also, on the Commission's awareness with respect to digital economy. European Commission 2018 C.

solutions. The standard for an input being essential may be considered high, when in the decision discussed, the essentiality criteria was not fulfilled. Additionally, even algorithms for processing data may be essential rather than datasets processed. Thus, it may be inferred that data itself may not be indispensable in every situation but the data processing system of a dominant company.

Concentrated data assets may, however, constitute also a harmful concentration of market power for competition if the market power of dominant company is increased, and competition foreclosure occurs. Harmfulness of data concentration relates also to the essential nature of data, when the Commission will assess whether there are other available data sources for the competitors. Here again, the Commission has not found such essentiality.

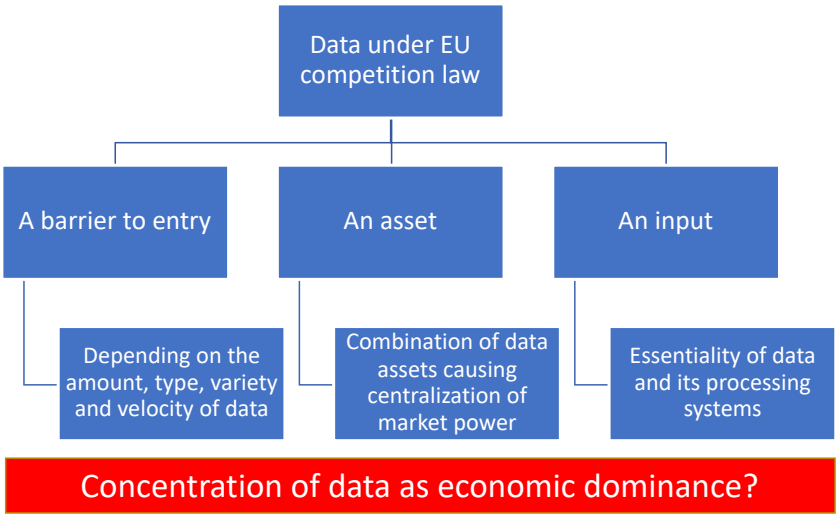

Table 1. Data under EU competition law.

As seen in Table 1, data has several functions in the competition law assessments. However, the Commission had become more aware on the essentiality of data but on the other hand, acknowledging the limitations of competition law in contrast with privacy regulations. It is true that EU competition law should not resolve pure privacy issues, which are subject to sector-specific regulation. However, as seen in merger context, data has also implications for competition, which should be addressed with competition law. For instance, a concentration of data (i.e. big data) may increase barriers to entry which may not be responded by the actual or potential market participants. Holding big data confers economic power for an undertaking and thus increases also economic dominance of that particular undertaking. Abusing such market power conferred by data will have foreclosure effects, for

instance, as refusal to supply data. Ultimately, in order to investigate these anti-competitive effects of data, it is essential to establish a theory of harm.

3.2.2 Theory of harm

In order to assess the compliance with competition law, a coherent theory of harm shall be established. Under Article 102 TFEU, there is no clear categorical "*by object*" restrictions of competition.[157] As a result, the theory of harm aims to provide a theoretical framework to examine actual or likely anti-competitive effects on the basis of the actual facts of each case.[158] Establishing the theory of harm requires also assessing the counterfactual situation meaning that the absence of alleged infringement is compared to effects of an agreement or a commercial practice under an examination.[159] In the context of an individual case, the aim is to derive a testable hypothesis concerning the underlying theory of harm of the commercial practice.[160] The theory of harm does not aim to provide the ultimate answer with respect to the potential competition law infringement but only to explain case-specific relationships between different variables.[161] Moreover, the party alleging that competition law is infringed has the burden of proof to provide a sufficient theory of harm in order to prove that the alleged abusive behavior causes competitive harm[162]. Thus, first, the counterfactual situation must be assessed, on which the developed theory of harm must be based on.

Zenger and Walker state that a well-developed theory of harm has certain specific characteristics. Harm on competition and consumers are established by an appropriately defined counterfactual, which is internally and logically consistent with the incentives that parties are facing and the available economic evidence.[163] This means that the theory of harm must describe how competition is or could be prevented, restricted, or distorted in this particular case, which requires case specific consideration on the nature of competition and on the consumer harming behavior.[164]

---

[157] As under Article 101 TFEU. Article 101-102 TFEU. See also on the unclear concept of harm under Article 102 TFEU, Witt 2016, p. 141-157.
[158] Jones – Sufrin 2016, p. 46-47.
[159] The effect-based approach refers to an economic approach since its basic premise is economical. Gerard 2012, p. 3. Geradin – Girgenson 2011, p. 12.
[160] This underscores that competition policy decisions need to be based on empirical evidence. Röller 2005, p. 16.
[161] Lianos – Geradin 2013, p. 35.
[162] Economic theory is required to frame a case, which in turn is fundamental to develop a particular theory of harm. Jones – Sufrin 2016, p. 46-47.
[163] Zenger – Walker 2012, p. 1.
[164] Röller 2005, p. 16.

Regarding refusal to supply data, competition may be foreclosed and abusive behavior under Article 102 TFEU may be committed, when the dominant company refuses rivals' access to its datasets.[165] However, it may be questioned whether data is actually capable of restricting competition in the meaning of refusal to supply doctrine. Additionally, the theory of harm should establish the likelihood of incentives to exclude. In light of the above discussed, refusal to supply data may cause competitive concerns, if such data is indispensable and valuable and thus creating barriers to entry to the market. In the abuse of dominance proceedings of *Facebook/WhatsApp,* the limitless collection of data through APIs and its analyzing facilitated by the contractual terms tied the consumer for the service provided. By increasing the *social* switching costs of the consumer, the advantage gained by data may cause serious problems. On the other hand, open API-based systems lower the consumer's switching costs by facilitating the free movement of data.[166] However, still the social problem remains.

In the context of PSD2, it has been suggested that in this relation, for instance, the precise position of the Fintech entity in the financial value chain must be determined.[167] Depending whether the payment services provided in the downstream market are complementary to or competing with the bank's upstream product or service, the incentives may vary.[168] In this context, the circumstances, in which the upstream and downstream payment services are competing with each other, the dominant company's incentives to exclude are more likely to be substantial.[169] However, the question remains whether data is capable of constituting an indispensable input.

3.2.3 Refusal to supply and the essential facilities doctrine – Data as an indispensable input

The element of indispensability in *Bronner* or so-called *essential facilities doctrine*[170] refers to the third element of the refusal to supply test that access to an input must be indispensable

[165] Graef 2016, p. 153. See also for instance, The Finnish Competition and Consumer Authority 2005. The FCCA's decision was upheld by the Finnish Supreme Administrative Court in KHO:2013:20.
[166] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Online Platforms and the Digital Single Market Opportunities and Challenges for Europe [2016] COM/2016/0288 final.
[167] Vezzoso 2018, p. 38.
[168] *ibid.* 2018, p. 38-39. See Competition and Markets Authority 2016, p. 27.
[169] Vezzoso 2018, p. 39. On the matter see, Areeda – Hovenkamp 2018, Section 787.
[170] Originally an U.S.-based doctrine. AG Jacobs in Bronner point 47 has stated that the doctrine "has developed to require a company with monopoly power to contract with a competitor where five conditions are met. First,

to carrying on business.[171] This means that it is not economically viable for the entrant to create comparable input to the dominant undertaking's one.[172]

With similar thematic, the Commission has defined the element of indispensability as an input, that having no *actual or potential* substitute which the downstream market's competitors could switch in order to counter the negative consequences of the refusal to grant access at least in the long-term.[173] In other words, the question is whether competitors are capable of *effectively* replacing the input produced by the dominant undertaking in the foreseeable future and thus capable of employing a competitive restraint on the dominant undertaking in the downstream market by establishing an alternative source of an efficient supply.[174]

In this setting, the essential consideration is whether data may be considered as an above-described input constituting an essential facility by meeting the requirement of indispensability. As discussed above, the Commission has considered the essentiality of data mainly in a merger context. The Commission's approach suggests that the standard for data being considered essential is high and is only met in exceptional circumstances if there are

---

an essential facility is controlled by a monopolist. A facility will be regarded as essential when access to it is indispensable in order to compete on the market with the company that controls it. [...] Secondly, a competitor is unable practically or reasonably to duplicate the essential facility. It is not sufficient that duplication would be difficult or expensive, but absolute impossibility is not required. Thirdly, the use of the facility is denied to a competitor. That condition would appear to include the refusal to contract on reasonable terms. Fourthly, it is feasible for the facility to be provided. Fifthly, there is no legitimate business reason for refusing access to the facility. A company in a dominant position which controls an essential facility can justify the refusal to enter a contract for legitimate technical or commercial reasons. It may also be possible to justify a refusal to contract on grounds of efficiency." Not used by the CJEU but referred by the AG in Bronner for example in point 35. Opinion AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] ECR I-07791, point 35, 47. *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 427 U.S. 585 (1985). *Eastman Kodak Co. v Southern Photo Materials Co.*, 273 U.S. 359 (1927). *United States v Terminal Railroad Association*, 224 U.S. 383 (1912). *MCI Communications v AT&T*, 708 F.2d 1081 (7th Cir. 1983). *Fishman v Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986). *Andrew Byars v Bluff City News Co*., 609 F.2d 843 (6th Cir. 1980).

[171] Case C-7/97 *Oscar Bronner,* para 41. Jones – Sufrin 2016, p. 506

[172] Case C-7/97 *Oscar Bronner,* para 46. Opinion AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG.* [1998] ECR I-07791, point 68. Jones – Sufrin 2016, p. 506.

[173] Commission's Enforcement Guidelines, para 83. Joined cases C-241/91 P and C-242/91 P *Magill*, para 52-53. Case C-7/97 *Oscar Bronner,* para 421.

[174] In general, an input is likely to be impossible to replicate when it involves a natural monopoly due to scale or scope economies, where there are strong network effects or when it concerns so-called 'single source' information. However, in all cases account should be taken of the dynamic nature of the industry and, in particular whether or not market power can rapidly dissipate. guidelines para 83. Case C-7/97 *Oscar Bronner*, para 46. Case C-418/01 *IMS Health*, para 29. Commission's Enforcement Guidelines, para 83.

no alternative sources of data for the provision of the comparable solutions. Further, the data processing system or algorithm may be considered as an essential facility.[175]

The question whether data, in particularly big data, constitutes an essential facility has raised an extensive debate amongst scholars. Data has distinctive characteristics compared to other assets, when it is capable of being both non-exclusive and exclusive. Generally, data is a non-exclusive and non-rivalrous good[176] capable of being used simultaneously by more than one undertaking and thus lacking the requirement of indispensability, when being substitutable.[177] Neither data as an input create barriers to entry for these reasons.[178] The consideration of big data as an essential facility has been also strongly opposed as being misleading due to the lack of intermediate step of extracting the knowledge from big data.[179] This also resembles the EU approach, when the algorithm processing the data has been considered essential rather than the data itself.

However, data may be considered exclusive in certain situations. If data is contracted[180] or is constituting sui generis database[181] or when trade secret protection is relied on (without the requirement of innovation as in case of "traditional" intellectual property).[182] This exclusivity may raise competitive concerns, when such data may be indispensable for market entry and create barriers to entry if not be capable of being obtained from other sources or

---

[175] See Section 3.2.1 above.
[176] Supported by the French and German Competition Authorities views. Autorité de la concurrence – Bundeskartellamt 2016, p. 36-37.
[177] Graef 2016, p. 267. This view has been also supported by Lambrecht and Tucker that data and in particularly big data is not inimitable or rare and is capable of being substituted. Lambrecht – Tucker 2015, p. 5-7, 11-15. Lerner has also questioned data as an essential input due to the fact that it is non-rivalrous and non-exclusive. Lerner 2014, p. 20-23.
[178] Tucker and Wellford have doubted data as an input creating barriers to entry since it is "ubiquitous, low cost, and widely available". Tucker – Wellford 2014, p. 7.
[179] Colangelo – Maggiolino 2017, p. 1.
[180] Commission decision of 20.12.2012 addressed to: Thomson Reuters Corporation and Reuters Limited relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.654 – Reuters Instrument Codes (RICs)) [2012]. See also European Data Protection Supervisor 2014, para 67. Regarding the exclusivity, the Commission's investigation against Google in its advertising practices concerned also "exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads on their web sites, as well as on computer and software vendors, with the aim of shutting out competing search tools […]" and "suspected restrictions on the portability of online advertising campaign data to competing online advertising platforms". However, these considerations were not taken into account in the SOs or in the infringement decision. European Commission 2010. Broos – Ramos 2017, p. 1. Commission decision of 27.6.2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (Case AT.39740 - *Google Search (Shopping)*) [2017].
[181] This is, however, under a review due to the possibility of enhancing the re-use of data. Currently, owners of protected databases can prevent reproduction, communication, extraction or re-use of their database content on the basis of the protection granted by this directive. European Commission 2017 B. European Commission 2018 B.
[182] Stucke – Grunes 2016, p. 267–268.

substituted.[183] Further, it is for the access seeker to prove that such data is indispensable and not substitutable supported by the Commission's view in *Google/DoubleClick.*[184] This burden of proof may be considered relatively high for that particular data being considered indispensable, when other kinds of data is generally available.[185]

Companies have also exclusive data streams or access and the exploitation of data must be briefer than their competitors. At the same time they need to ensure that such data is not available for competitors.[186] Significant barriers to entry may be created by the leverage of customer base data and data may be actually considered as a key competitive input capable of creating a significant competitive advantage for undertakings.[187] However, holding an exclusive control over data does not necessarily imply essentiality since data as such is not essential but in relation to certain products or services or in comparison with other inputs.[188] For instance, the European Data Protection Supervisor has stated that an exclusive control of data by a dominant undertaking may *in theory* be considered as an essential facility, when competitors are lacking the system or structure to create the dataset on the background of the service.[189] With similar view, French and German Competition authorities have noted that data may be indispensable when it is truly unique without possibility for the competitor to attain the data required for the performance its services.[190]

However, the core problem with the indispensability analysis is the valuation of data. In other words, how data should be valued in the competitive analysis, when data itself may be utilized differently or more cleverly by the competitors. It is undisputed that the value of data is dependent on the knowledge that can be extracted from it.[191] In other words, the

---

[183] Stucke – Grunes 2016*,* p. 256, 268.
[184] Geradin – Kuschewsky 2013, p. 15. Commission decision of 11.03.2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.4731 – *Google/DoubleClick*) [2008] para 365.
[185] Schepp – Wambach 2016, p. 123.
[186] Grunes – Stucke 2015, p. 7-8.
[187] *ibid*. p. 8. *United States of America v. Bazaarvoice, Inc.*, No. 3:2013cv00133 - Document 286 (N.D. Cal. 2014). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Online Platforms and the Digital Single Market Opportunities and Challenges for Europe [2016] COM/2016/0288 final. House of Lords 2016, p. 4-5. OECD 2013 p. 319.
[188] Colangelo – Maggiolino 2017, p. 7.
[189] European Data Protection Supervisor 2014, para 66.
[190] Autorité de la concurrence – Bundeskartellamt 2016, p. 17-18.
[191] Manne – Sperry 2015, p. 9. Stucke – Grunes 2016, p. 253. Similar views have been presented by Lambrecht and Tucker that data (in particularly big data) is not itself valuable but rather its practical implications. In order to data is to be considered as a barrier to entry, it has to contain certain characteristics – it has to be inimitable, rare, valuable and non-substitutable. Lambrecht – Tucker 2015, p. 11, 15-16. McAfee – Brynjolfsson 2012, p. 61-67. Bughin – Chui – Manyika 2010, p. 75-86.

implications of big data on competition is dependent on how well entities analyze data.[192] It is also dependent on the service provided and the competitive strategy of the undertaking, not solely on the volume of data.[193]

In relation to an obligation to supply data, when competitors on the downstream market may analyze and extract more knowledge on data creating potential new markets, such obligation may have effects beyond the relevant market. Views has been presented that such obligation should be limited to the type and amount of data necessary for remedying the negative effects on the downstream market caused by the dominant undertaking's refusal to supply.[194] Further, it has been argued that the competitive advantage created by data analytics is based on business acumen, which is the core of competition rather than a competitive concern.[195] On the other hand, "*volume, velocity, variety, and value*" of data enable companies to gain competitive advantage, which is not publicly available.[196] Thus, it is not entirely true, that the competitive advantage conferred by analyzing data, does not cause any competitive concerns.

To conclude, it is debatable whether data fulfills the indispensability requirement of the essential facilities doctrine. It is correct that there is a plenty of data available for undertakings to utilize and compete effectively. However, as pointed out, data may be exclusive in certain situations through exclusive data sharing agreements or database or trade secret protection. Again, the question is whether such exclusive data may be substituted by other available data. Additionally, data itself may not be valuable but rather the knowledge that may be extracted from it. It is, however, true that data may create market power and barriers to entry, when an undertaking holds different types and large volumes of valuable data and briefly collects novel data. On the other hand, the creation of market power or barriers to entry may not be purely caused by the particular dataset but also the method, how the undertaking is collecting and analyzing that specific data. Thus, a specific dataset may be exceptionally considered as an essential facility if it is exclusive having no substitutes. Rather than data itself, a data processing system or algorithm analyzing data could also constitute an essential facility if it is capable of eliminating effective competition.

---

[192] Tucker – Wellford 2014, p. 12.
[193] Lerner 2014, p. 23-27.
[194] Stucke – Grunes 2016, p. 268
[195] *ibid*.
[196] Stucke – Grunes 2015, p. 2.

3.2.4 Determining the dominance in data context

Before considering the actual abuse, dominance must be established. Article 102 TFEU is applicable only to situation, in which an undertaking is in a dominant position or collectively dominant with other undertakings[197]. The dominant position consists of the following elements:

- A position of an undertaking entailing economic strength;
- Such economic strength affords the undertaking the power to behave to an appreciable extent independently with respect to its competitors, customers and consumers; and
- thus, enables the undertaking to prevent effective competition on the relevant market.[198]

In other words, an undertaking for being considered as a dominant requires certain independence of undertaking's competitors and thus having effect its customers and consumers. Competitive structure in these markets may be distorted more easily, when the dominant company is capable of preventing effect company due to its economic strength.

After defining the relevant market[199], the dominant position of an undertaking is traditionally assessed by taking into account the competitive structure of the relevant market.[200] This is executed by considering the market position of the dominant undertaking and its competitors, the expansion of actual competitors or the entry of potential competitors or countervailing buyer power.[201] Market shares are not definitive but rather indicative, when assessing dominance.[202] However, the dominance is presumed, when an undertakings has a market share of 50 percent or more in the absence of exceptional circumstances.[203]

---

[197] Article 102 TFEU. Whish – Bailey 2018, p. 187. See also, Ortiz 2011, Chapter 3.
[198] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 00207, para 65.
[199] The definition of relevant market as a precondition for Article 102 TFEU assessment. Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] ECR 00215, para 32. See, for instance, Case T-321/05 *AstraZeneca AB and AstraZeneca plc v European Commission* [2010] ECR II-02805, para 30.
[200] Commission's Enforcement Guidelines, para 12.
[201] *idem.* para 12.
[202] Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para 39-41. Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359, para 60. Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] ECR II-01439, para 90-92. Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, para 100. Commission's Enforcement Guidelines, para 13.
[203] Established in *Akzo Nobel.*

Interestingly, barriers to expansion or entry may take forms of economic advantages, such as "privileged access to essential inputs".[204] In other words, the control of an essential facility conferring an economic advantage for the dominant company could constitute a factor establishing dominance.[205] Additionally, significant investments made by the dominant undertaking could constitute barriers to entry, when market entrants or competitors are required to correspond to such investments.[206]

In data context, this suggests that holding essential data for the market entry may constitute dominance. Further, significant investments made for data processing system may constitute barriers to entry on the market. However, when the problem with data is its valuation, it has been suggested that the dominance should be determined based on the ability to monetize the collected information, in other words, the ability to analyze the data.[207] However, the problem with this approach is that it suggests that companies not monetizing data are excluded from the assessment. In data-driven markets, the market shares are neither the definite factor for dominance[208] but the consumer's ability to switch and the dynamic characteristics of data-related industries in general have an impact on the undertaking's market power.[209] In this context, thus the exclusivity of data must be considered.

If an undertaking has a high market share but the consumers may switch easily to other product on the market, the competition may still function effectively. Additionally, the undertaking may still face an extensive competitive pressure due to the nature of markets. Data must be constantly collected and analyzed and also certain "pioneering" is required in order to keep up with the competitors. However, the exclusivity herein is the problem. If the data held by the undertaking may not be obtained from other sources, there is no potential substitute for it and such data is required for the market entry or competing effectively, this

---

[204] Commission's Enforcement Guidelines, para 17.
[205] Whish – Bailey 2018. p. 192, Commission decision of 04.07.2007 relating to a proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – *Wanadoo España vs. Telefónica*) [2007] para 224–226. Upheld in Case T-336/07 Telefónica and Telefónica de España v Commission [2012] ECLI:EU:T:2012:172, para 151–167. Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] ECR II-01439, para 19.
[206] Commission's Enforcement Guidelines, para 17.
[207] Graef 2015, p. 25. See on power over data, Guimaraes – Cugia di Sant'Orsola– Noormohamed 2014, p. 231-290
[208] Graef 2015, p. 26. Commission decision of 07.10.2011 pursuant to Article 6(1)(b) of Council Regulation No 139/2004 (Case No COMP/M.6281 - *Microsoft/Skype*) [2011], para 78. Case T-79/12 *Cisco Systems Inc. and Messagenet SpA v. Commission* [2013] ECLI:EU:T:2013:635, para 69.
[209] Commission decision of 07.10.2011 pursuant to Article 6(1)(b) of Council Regulation No 139/2004 (Case No COMP/M.6281 - *Microsoft/Skype*) [2011], para 120-132. Case T-79/12 *Cisco Systems Inc. and Messagenet SpA v. Commission* [2013] ECLI:EU:T:2013:635, para 68-95. Graef 2015, p. 26.

may be both an indication of dominance and market power but also cause foreclosure effects on the market.[210]

As noted before, the problem for data being considered indispensable is stemming from its nature. There is a lot of data available for utilization and thus the exclusivity of data criteria is not easily fulfilled. Further, the data possessed by the undertaking must be valuable and not receivable from any other sources to the extent that confers market power for the undertaking. One assessment does not fit to all situations, but a case-by-case basis assessment should be employed by taking into account also the market dynamics.[211] Thus, considering an undertaking being in a dominant position solely based on data possessed and processed is highly unlikely but may be possible. In this relation, it must be noted that Article 102 TFEU does not prohibit an entity for being a dominant on the market, but the abuse of such position is not allowed.[212] In the following sections, the abuse of dominance is assessed with respect to refusal to supply data.

3.2.5 The different treatment of forced data sharing with or without a regulatory duty to provide access to data under Article 102 TFEU

Regarding refusal to supply data, a distinction must be made between forced data sharing without a regulatory duty to provide access to data and a duty to share data under a sector-specific regulation. The regulatory scheme under Article 102 TFEU may be divided into two different categories – forced data sharing under the doctrine of refusal to supply and a regulatory duty to share data. It is essential to note that these two categories of data sharing have different regulatory treatment under Article 102 TFEU.

For forced data sharing without a regulatory duty to provide access, the traditional test for refusal to supply and essential facilities doctrine are applicable. This means that in order for the Commission to oblige a dominant undertaking to share their data under Article 102 TFEU, all of the three elements of the test must be fulfilled. Data must be objectively necessary (i.e. indispensable, an essential facility) in order to compete effectively on a downstream market, the refusal is likely to lead to the elimination of effective competition on such market and consumer harm. Regarding forced data sharing, it must be noted that

[210] Similar approach has been noted by Graef. Graef 2015, p. 26. Competition and Markets Authority 2015, Section 3.6. Tucker – Wellford 2014. See also, Krämer – Wohlfarth 2018.
[211] As suggested also in Bourreau – de Steel – Graef 2017, p. 37.
[212] Article 102 TFEU.

data subject's right to data portability under the GDPR does not entail a right for the service providers to claim access to customer data.[213] Additionally, forced data sharing must be consented by the data subject and be also otherwise in compliance with the provisions of the GDPR.[214] Dynamic efficiency defense is also available for the forced data sharing without a regulatory duty to provide access to data.[215]

At national level, French and Belgian competition authorities have considered the refusal to supply data without a regulatory supply duty as Article 102 TFEU infringement. In *Direct Energie*, French Competition Authority found GDP Suez abusing its dominant position in the market for natural gas.[216] GDP Suez had inherited customer files from its former monopoly status and was using such files in order to provide discounts outside the scope of its public service obligation.[217] In *Loterie Nationale*, Belgian Competition Authority found that the National Lottery was abusing its legal monopoly by using individual's contact data in the national market for public lotteries. The National Lottery was using such data in order to enter another market for sports betting.[218] In both cases the national competition authorities (NCAs) considered the reproducibility of the respective databases. The assessment was made by considering the nature and size of the dataset, whether the reproduction was possible under reasonable financial conditions and within a reasonable period of time.[219]

In contrast, for the regulatory duty to share data, the traditional test for refusal to supply and essential facilities doctrine under Article 102 TFEU is not applicable. The Commission will apply its regular enforcement standard, which means that the refusal to supply specific considerations are not required to be proven. It is sufficient that the Commission will establish that the anti-competitive foreclosure is likely and not to consider, for instance, whether data is indispensable. Additionally, there is no dynamic efficiency defense available for the regulatory duty to share data. As above discussed, the Commission has considered in its enforcement guidelines that the incentives to innovate have been already balanced. For this reason, such considerations may not be pleaded by the dominant undertaking in relation to a regulatory duty to share data. Thus, for the regulatory duties to share data, Article 102

[213] Graef 2016, p. 152. Geradin – Kuschewsky 2013, p. 10.
[214] European Data Protection Supervisor 2014, para 67-68.
[215] Stucke – Grunes 2016, p. 268-269.
[216] Moore – Tambini 2018, Chapter 3. Autorité de la concurrence 2014.
[217] *ibid.*
[218] *ibid*. See also, Graef 2016, p. 271-273. Autorité belge de la Concurrence 2015.
[219] *ibid*.

TFEU may be triggered with lower burden of proof and the dominant undertaking's possibilities to plead defenses are more limited compared to forced data sharing without such duty[220].

3.3 Concluding remarks regarding refusal to supply data

The application of doctrines on refusal to supply and essential facilities to data may be considered as complex and somewhat ambiguous. First, the definition of dominance is not simple in a data context. Characteristics of the data-driven market and the exclusivity of data should be taken into account rather than relying solely based on the market shares. If data or data analytics system possessed by an undertaking is considered as an essential facility, this may constitute a dominance. However, this aspect is connected with the debate on the essentiality or indispensability of data., which has also relevance when defining the actual abuse of dominance.

The debate is about whether data may be considered as an input, which is indispensable for the market access and there are no substitutes available. Data itself in general does not fulfill the requirement of indispensability but data processing system or algorithm may be considered as such essential input. However, when the significance of data is not only dependent of the volume of data but also its velocity, variety and value, it may be questioned whether it is possible for the entrant to collect and process data with reasonable efforts in order to effectively compete with the dominant undertaking possessing big data.

This leads to the question whether it is possible, in practice, to enter these data-driven markets. The Commission has noticed this point also in its merger decisions regarding *TomTom/Tele Atlas* and *Nokia/NAVTEQ*, when it considered that the market entry would last multiple years due to the collection of data and creating processing methods. However, the Commission did not foresee any possible entrants for the market.[221] *Reasonable efforts to enter into market* is an ambiguous concept, which, in data context, may not necessarily refer to an immediate entry on the market. Velocity of data, however, requires rapid

[220] As Lunqvist has stated, the access to big data seems to be granted by a sector-specific regulation rather than through general competition law. Lundqvist 2018, p. 211. This could be due to more "lenient" approach for the regulator to impose such obligation rather than enforce it through competition law.
[221] Commission decision of 14/05/2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4854 - *TomTom/TeleAtlas*) [2008], para 157. Commission decision of 02.07.2008 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.4942 - *Nokia/NAVTEQ*) [2008], para 232.

collection and processing of data due to which entry barriers may be high. The market-specific assessment should be utilized, when considering whether the entry is actually possible in practice.

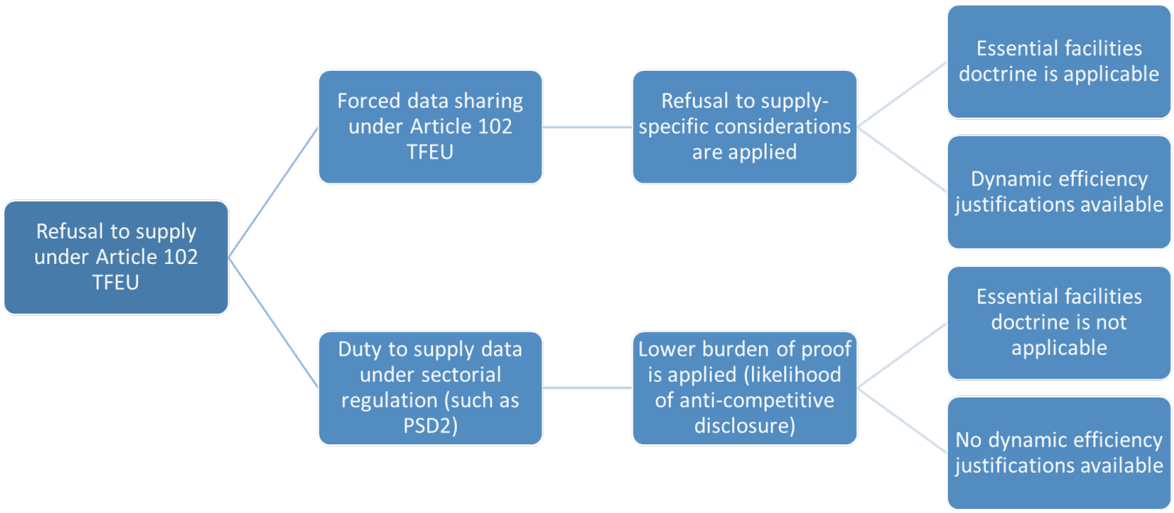

Table 2. Article 102 TFEU and two approaches on refusal to supply data.

As emphasized in Table 2, it must be borne in mind that with respect of abuse, the debate on the essentiality of data is only limited to forced data sharing without a regulatory duty, when the Commission forcing an undertaking to share its data solely based on refusal to supply doctrine under Article 102 TFEU. When an undertaking has a regulatory duty to provide access to its data, the Commission will consider only the likelihood of anti-competitive foreclosure in its refusal to supply assessment as discussed above. This lower burden of proof has raised criticism amongst scholars due to the lack of incentives to innovate and different objectives of sectorial regulation and competition law enforcement.

In light of this established legal framework on refusal to supply, the discussion will be advanced further to the PSD2 context. The Commission's lower burden of proof on regulatory obligations is also applicable to the access obligations under the PSD2. In the following section, the regulatory framework on refusal to supply under Article 102 TFEU is applied to the PSD2 obligations of account bank's obligation to provide access to their customers' account data and their authentication procedures.

4 REFUSAL TO SUPPLY DATA IN CONTRAST WITH ACCOUNT BANK'S OBLIGATION TO PROVIDE ACCESS TO THEIR CUSTOMERS' ACCOUNT DATA AND THEIR AUTHENTICATION PROCEDURES

When assessing the position of the PSD2 obligations in the refusal to supply context, first, the nature of banking data and its indispensability for the PSPs are considered in general. Secondly, the distinction between forced data sharing under Article 102 TFEU and under the PSD2 is assessed, after which the refusal to supply analysis is conducted in context of the PSD2 obligations. Lastly, the discussion is advanced to a policy level, when the objectives of Article 102 TFEU and the PSD2 are contrasted and the question whether the Commission's lower burden of proof on refusal to supply is justified in the PSD2 context is considered.

4.1 Customers' banking data – its nature and indispensability for the payment service providers

Customers' banking data, in particular account data, may be described as data that is necessary for the provision of payment services under the PSD2 (namely for the account information services and payment initiation services).[222] For instance, information regarding an account number, account transactions, balance or fund reservations may be considered as such necessary data. Also, depending on the nature of the service provided also incurring payments may fall into this category. However, the definite scope of the PSD2 access obligations are unclear in this respect.[223]

Considering the above discussion on the nature of data and its indispensability, banking data may be deviated from *traditional* data due to multiple reasons. The traditional characterization of data as being non-rivalrous, non-exclusive and capable of being substituted is not applicable entirely to customer banking data. In the pre-PSD2 scheme, banks have had an exclusivity and a monopoly over their customers' banking data, which have been used solely or at least controlled by the banks.[224] The banking data can be hence described as a bank-specific information, which may not be substituted with other kinds of data received from other sources, such as similar information from another bank. It is correct that customer banking data is non-rivalrous meaning that it may be utilized by multiple

[222] See PSD2, Article 66(3f), Article 67(2f).
[223] Referred as necessary data in the PSD2. OP Financial Group's interview 2018.
[224] See, for instance, Jackson 2018. Mansfield-Devine 2016, p. 13.

market players (which is the situation post-PSD2 as a result of the access to data obligations). Additionally, post-PSD2 the customer data is not exclusive any longer due to such obligations to provide access.

Interesting point to consider here is the protection of banking secrecy. As pointed out above on the trade secret aspect as a source of exclusivity of data, customer banking data enjoys similar exclusivity under the protection of banking secrecy.[225] The secrecy obligation concerns information on the financial position or private personal circumstances of a *customer* and of another person *connected with* its activities or on a trade or business secret.[226] The obligation may be however exempted if the person in whose *benefit* the secrecy obligation has been provided consents the disclosure of information or in certain cases of public interest.[227] Thus, the exclusivity of banking data has been able to be exempted before the PSD2 if the person has consented the disclosure of information. However, although being possible already before the PSD2, the banks have been reluctant to share their data.[228] Customer banking data may have been, thus, considered as exclusive also on the basis of the protection of banking secrecy.

Considering the indispensability of banking data for the provision of payment services, the essentiality is dependent on the nature of such service. As discussed above, the Commission will consider whether there are actual or potential substitutes for the input or whether such input may be duplicated in the foreseeable future by the competitors.[229] For the account information services, it is clear that in order to provide such services, the access to account data is essential.[230] For such data, there are no actual or potential substitutes available. Creating the input itself would mean that the account information service provider would be required to establish a payment or credit institution subject to higher regulatory burdens and obligations. On the other hand, for the payment initiation services, an access for account data may not be considered as a *sole* indispensable input but also the access to payment *systems* and authentication *procedures* for the purposes of initiation.[231]

---

[225] Act on Credit Institutions (610/2014, as amended), Chapter 14, Section 14(1). See also, Finanssialan Keskusliitto 2009, p. 4.
[226] Act on Credit Institutions (610/2014, as amended), Chapter 14, Section 14 (1).
[227] *ibid.* Chapter 14, Section 14 (1-2).
[228] For instance, as discussed with the FIN-FSA. FIN-FSA's interview 2018. Jackson 2018. Mansfield-Devine 2016, p. 13.
[229] See Section 3.3.2
[230] PSD2, Recital 28.
[231] Access to systems is discussed in more detail in Section 4.3.1. See PSD2, Recital 29 onwards.

Access obligations under the PSD2 enable account information service providers and payment initiation service providers to access these indispensable inputs for their particular service. Thus, the forced data sharing under the PSD2 shall be distinguished from the forced data sharing under competition law, particular Article 102 TFEU and the refusal to supply doctrine.

4.2 Distinction between forced data sharing under Article 102 TFEU and PSD2

As discussed above, forced data sharing purely under Article 102 TFEU is subject to the Commission's higher burden of proof, when objective necessity, the elimination of effective competition on downstream market *and* the likelihood of consumer harm[232] must be proven in addition to its regular enforcement standard of likely anti-competitive foreclosure.[233] Particularly, the element of indispensability may be considered high standard to be met. However, as discussed in the previous section, customer banking data or access to systems is capable of being considered as an indispensable input, when without such input the account information and payment initiation service providers are not able to provide their services with reasonable financial efforts.

Forced data sharing or access to systems under the PSD2 are subject to the Commission's lower standard of proof, when only the general enforcement standard is required to be proven. As above discussed, this has raised criticism due to the fact that the objectives of competition law and sectorial regulation are different. Additionally, the lower burden of proof entails that the non-compliance with the PSD2 obligations, the competition law scrutiny may be triggered more likely than without such obligations.

This setting raises several questions to be addressed. First, the different nuances of access to customer banking data and access to system in this context shall be assessed. Second issue is how the definition of dominance should be assessed in the context of PSD2, when all banks are subject to similar access obligations. Thirdly, whether a breach of access obligations under the PSD2 trigger or presume liability under the refusal to supply doctrine. Fourthly, the relevance of justifications under the PSD2 in relation to the refusal to supply doctrine shall be assessed. Other closely held considerations in this context are whether there could be forced data sharing or access to system obligations beyond the PSD2 obligations

[232] Commission's Enforcement Guidelines, para 81.
[233] *ibid.* para 20-21, 82.

and ultimately, whether this Commission's different burden of proof is justified. These questions are addressed in the following sections.

4.3 The PSD2 obligations and refusal to supply under Article 102 TFEU

4.3.1 The different nuances of obligations to provide access to customer account data and access to authentication procedures in relation to refusal to supply?

As emphasized above, different types of payment services require different types of inputs. Both account information services and payment initiation services require access to customer account data and access to authentication procedures. These obligations to provide access to customer account data and access to authentication procedures may be, however, considered having different nuances in relation to refusal to supply.

It may be argued that the account bank's obligation to provide access to their customers' account data may be considered as a *primary* obligation under the PSD2. Considering different fintech services, access to customers' account data is essential for many of them. For instance, in the EU study of July 2018 on FinTechs, refusing to grant access to customer account data and the use of algorithms in this relation were considered as a competitive challenge and a risk of an exclusionary conduct for FinTechs, particularly in the markets with established market players with market power.[234] On the other hand, access to authentication systems is also required for the provision of payment services due to the requirement of strong customer authentication.[235] One could consider this access to authentication procedures also a *supplementary* obligation depending on the nature of the payment service.

As previously discussed, from the perspective of refusal to supply, access to system[236] may be triggered more easily compared to access to data.[237] However, both of these PSD2 obligations are treated in similar manner due to the Commission's lower standard of proof for the regulatory obligations.

---

[234] European Parliament 2018, p. 52, 101.
[235] PSD2, Article 97.
[236] It should be remembered that access to *payment* system under Article 35 of the PSD2 differs from the access to authentication procedures regulated under Article 97 of the PSD2. PSD2, Article 35, 97.
[237] Thomson Reuters as an example. Commission decision of 20.12.2012 addressed to: Thomson Reuters Corporation and Reuters Limited relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.654 – *Reuters Instrument Codes (RICs)*) [2012].

In fact, the Commission has already initiated investigations against several banks concerning refusal to provide access to bank account data. Banks in question aimed at excluding the third-party payment service providers by refusing to supply data although the customers had consented such access. The Commission considered that Article 101 and/or Article 102 TFEU could be triggered.[238] Notably, such investigation had started before the implementation period of the PSD2 had lapsed.[239] The unannounced investigation indicates clearly the Commission's approach on the PSD2 obligations and particularly on the account access obligation under competition law. Such approach can be described strict, particularly in combination with sanctions under the PSD2 scheme.[240] The deterrence effect to comply with the PSD2 due to competition law scrutiny besides customers' ability switch bank[241] and competitive disadvantages may be considered higher than incentives for the non-compliance.

4.3.2 The problem of defining dominance in the payment service market in light of the PSD2 obligations

In the PSD2 context, the market for payment services in general may be described as consisting of different types and sized market players. Taking Finland as an example, the market is consisting of large and mid-sized banks and smaller fintech companies. There are few major payment service providers, OP Financial Group, Nordea and Danske Bank. Further, there are mid-sized service providers such as S-Pankki, Aktia, Handelsbanken, Oma Säästöpankki and POP Pankki. Additionally, service providers such as Bank Norwegian or smaller fintech companies, for example Mash, Qliro or Holvi, have entered into the market. Taking into consideration the PSD2 obligations, the question remains how the dominance should be defined in these market circumstances?[242]

The overall competitive structure of the general payment service market is complex and multi-sided. Large banks having a high market share in the market may be considered as

---

[238] European Commission 2017 A. Financial Times 2017.
[239] *ibid.*
[240] PSD2, Article 103 on penalties: "Member States shall lay down rules on penalties applicable to infringements of the national law transposing this Directive and shall take all necessary measures to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive. Member States shall allow their competent authorities to disclose to the public any administrative penalty that is imposed for infringement of the measures adopted in the transposition of this Directive, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.".
[241] The rights provided by the new account Directive facilitate the ability to switch. Vezzoso 2018, p. 35.
[242] The issue was also raised by OP Financial Group. OP Financial Group's interview 2018.

dominant, which, however, does not alone is a determinative factor. Large banks may be also considered collectively dominant, which has also potential for collusive behavior under Article 101 TFEU.[243] In respect of platforms, network effects are also possible, when payment services market may be considered as two-sided.[244]

Considering the expansion of actual competitors or the entry of potential competitors, the control of an essential facility may be considered as a factor constituting dominance. The discussion above about the essentiality of account data or access to authentication procedures is relevant from the dominance point of view in the analysis. For the third-party payment service providers, such access is essential.

In the context of dominance assessment, several observations shall be made in this relation. Small account banks have also similar regulatory duty under the PSD2 to provide access to their customer data and authentication procedures, which may be considered as an essential facility. In this relation, it is problematic to draw a line access to which bank is essential, when such assessment may vary on a case-by-case basis. For instance, a bank with smaller market share may hold an essential facility for a specific market service provider regardless the bank's size. The market share of the bank may be irrelevant in this relation, when the *specific* information held by the smaller market player is required to provide payment services. However, it may be questioned whether solely holding such essential facility may constitute dominance or should the emphasis put more on the market shares also. This leads to the question whether the smaller banks by refusing the access and hereby breaching PSD2 obligations may also trigger Article 102 TFEU?

Taking into consideration the overall structure of the payment service market, it more likely that a bank with a high market share triggers Article 102 TFEU as a dominant undertaking. However, it follows from the equal access obligation of all account banks regardless the market share that the essentiality of access will also have relevance in dominance assessment. For account information service providers or payment initiation service

[243] The reactions of the market players already operating in the market might be problematic from the perspective of the competition enforcement if these market players try to prevent their customers from switching to use more innovative services of new market entrants. Jokinen 2016, p. 52.
[244] Björkroth 2018, p. 87-88. See also, Fatur 2012, Chapter 9.

providers, it essential to gain access to *all* account data of the different account banks in order to effectively compete with the account banks.[245]

Ultimately, this means that even if an undertaking is not the biggest player in terms of market shares, Article 102 TFEU may be still triggered. However, Article 102 TFEU should not be utilized to enforce other sectorial regulation but rather the overall competition policy. Additionally, the limited application of Article 102 TFEU to dominant undertakings leads to questioning the effectivity of the PSD2 obligations. A dominant undertaking may face sanctions under competition law for the non-compliance of the PSD2 obligations, but non-dominant undertaking may not have similar kind of incentive to comply with the regulation although there is certain sanction mechanism under the PSD2. For the dominant company, the deterrence effect is much higher due to the dual sanction under competition law and the PSD2.

4.3.3 Whether a breach of obligations under the PSD2 could be considered as a presumption for the refusal to supply?

As discussed above, failure to comply with a regulatory duty may have similar effects as the presumption of an abuse. In the PSD2 context, refusal to supply access to customer account data or authentication procedure results into anti-competitive foreclosure, when third-party service providers are not capable of entering the market with reasonable financial efforts. The supply obligation under the PSD2 has been considered indispensable to be imposed for the account banks in order to facilitate digital and technical development and thus create efficiencies for a payment system as a whole.[246]

In order to consider the likelihood of anti-competitive foreclosure as a whole, various refusal situation may be identified. First, the account bank may refuse access from all payment service providers, who are seeking access to customer account data or authentication procedures. Second, the access may be refused from only one access seeker. Third, the access may be denied in one specific access situation. In the first situation, the foreclosure effect is clear, when the effective competition restricted by the dominant undertaking as a whole. In the second situation, refusal has also foreclosing effects, when the dominant

[245] In this relation, one should also note that account banks as payment service providers will have also similar right to access their competitor's data and authentication systems as third-party service providers.
[246] PSD2, Recital 4-6.

company is discriminating one payment service provider. In the third situation, the assessment is more problematic due to the narrower scale of anti-competitive effect.

It may be said generally that the breach of the PSD2 obligations may trigger Article 102 TFEU as seen in the Commission's investigations.[247] However, the account bank must be dominant as discussed previously. On the other hand, the compliance of the PSD2 obligations may not guarantee that a dominant undertaking is otherwise abusing its dominant position, for instance, by delaying tactics. The abuse itself may not be established or presumed solely based on the breach of the PSD2 obligations but a likelihood anti-competitive foreclosure is required. However, this is generally the case with the PSD2 obligations, when access is indispensable for account information service and payment initiation service providers. The issue, in the context of Article 102 TFEU, is, however, whether the refusal to supply may be justified under the PSD2, which explicitly provides certain justifications for the access obligations.

4.3.4 The relevance of justifications under the PSD2 for the refusal to supply

Under Article 68 of the PSD2, the banks may deny access to their customers' banks data only for objectively justified and duly evidenced reasons relating to unauthorized or fraudulent access to the payment account.[248] The only available justification for the dominant account bank are security reasons, in other words, if the access is not authorized by the customer or the payment account is accessed by fraudulent means. This means that, under the PSD2 regime, efficiency considerations are not available but only objective justifications for security reasons.

From the competition law perspective, the Commission will examine also justifications if pleaded by the dominant undertaking supported by necessary evidence.[249] The conduct may be justified either by objective necessary reasons or by efficiencies, which are indispensable and proportionate.[250] As above discussed, dynamic efficiency defenses are not available for the regulatory duties to supply, when these incentives to innovate and invent are already balanced.[251]

---

[247] European Commission 2017 A. Financial Times 2017.
[248] PSD2, Article 68(5).
[249] Commission's Enforcement Guidelines, para 28, 31.
[250] *ibid.*
[251] Commission decision of 04.07.2007 relating to a proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – *Wanadoo España vs. Telefónica*) [2007] para 634-635. Nazzini 2011, p. 314.

The Commission will also assess the objective necessity and proportionality based on the external factors to the dominant undertaking.[252] However, it has been noted that a dominant company should not engage in activities on its own initiative, that the company considers harmful, for instance, for health and safety. Rather, this type of activity is included in the discretion of the public authorities in order to set and enforce such standards for the harmful activity.[253]

In the PSD2 context, it follows ultimately that if there is an unauthorized or fraudulent access to the payment account or its attempt, the denial of access should not trigger Article 102 TFEU due to the objective necessity of securing safety. However, the issue here is what is the sufficient level of proof to deny the access. The PSD2 actually limits the dominant undertakings possibilities to plead justifications under Article 102 TFEU only to the fraudulent or unauthorized access. For account banks, the unauthorized access should be proven by simply providing an evidence of lacking consent. Either there is a consent or not therefore the analysis here is straightforward. On the other hand, the fraudulent access may be more difficult to be proven at least *ex ante*, when the account bank should be able to prove evidence on the fraudulent intention. In this relation, the case will be most likely the *ex post* denial of access due to the issue on the provision of the evidence.

A practical example will describe this issue. In practice, the third-party service provider will request access through APIs subject to the account banks approval. The account bank will check whether the third-party service provider holds a relevant license. If such license exists, the account bank will permit the access via APIs to the account data. However, the treatment of unauthorized access or fraud justification is unclear. For instance, there may exists situations that the APIs should be able to be closed for fraudulent access for risk management or sanctions list reasons.[254]

In this respect, the FIN-FSA has stated that that the burden of proof for such justification will most likely be high. The account banks may only exercise *ex post* control under the justification. Further, the access may be denied neither on a single transaction basis nor by

[252] Commission's Enforcement Guidelines, para 29.
[253] See, for instance, Case T-30/89 *Hilti AG v Commission of the European Communities* [1991] ECR II-01439, para 118-119. Case T-83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II-755, para 83-84, 138.
[254] In general, banks are required to monitor these. OP Financial Group's interview 2018.

discriminating the service providers accessing the account data via APIs. [255] Thus, it is for the account bank to prove that there exists for objectively justified and duly evidenced reasons relating to unauthorized or fraudulent access to the payment account. The main rule is that the access should always be granted, and only in highly exceptional situations, the account banks may justify the denial of access (subject to the FIN-FSA's guidance).

It may be thus stated that the PSD2 limitation has or at least should have relevance under Article 102 TFEU and refusal to supply and should effectively prevent consumer harm stemming from unauthorized or fraudulent use of its payment account. The standard of objective justification under the PSD2 and the objective necessity under Article 102 TFEU are both assessed from the external perspective. Denying access outside this PSD2 justification may trigger Article 102 TFEU but refusing access based on the justification should also fulfill the objective necessity criteria under Article 102 TFEU. In other words, the compliance with the PSD2 in relation to the available justification should not be considered as refusal to supply under Article 102 TFEU.

However, this considers solely the regulatory obligation to supply data under the PSD2. For instance, the denial of access to authentication procedures may not be justified under the PSD2. The application of Article 102 TFEU justification may be questioned, when there is a breach of regulatory duty, whether such conduct can be even objective necessary. Additionally, interesting consideration here is that whether there could be forced data sharing or access to procedure obligations beyond the PSD2 obligations under Article 102 TFEU. These questions are discussed in the following section.

4.4 Forced data sharing or access to system obligations beyond the PSD2 access obligations

For the forced data sharing or access to system obligations beyond the PSD2 access obligations, the traditional refusal to supply assessment under Article 102 TFEU is applied. As discussed above, for the regulatory duties, the Commission will apply lower burden of proof, when its general enforcement standard is solely applied. It follows that for the potential obligations beyond the PSD2, the Commission will apply in addition to its enforcement standard also the refusal to supply-specific standard. As stated above, the input must be objective necessary (i.e. indispensable, essential facility) in order to compete

[255] FIN-FSA's interview 2018.

effectively on a downstream market, the refusal is likely to lead to the elimination of effective competition on such market and cause consumer harm.

Considering other available data than customers' account data, the question of indispensability or essentiality of data is a prerequisite for imposing supply obligations under Article 102 TFEU. Similar thematic applies also to access to other procedures than authentication procedures. As concluded above, the data itself in general is unlikely to be considered as an essential facility but rather the processing systems of data to analyze it. However, under the PSD2 the access to account data itself is opened supported by the access to authentication procedures. It follows that it would be unlikely that the actual data processing systems of account banks are required to be opened too for the third parties. Due to the broad access obligations under the PSD2, it is currently unlikely that more extensive obligations are required under Article 102 TFEU. However, as new service providers emerge, there may be novel supply problems, which may be potentially addressed by Article 102 TFEU or a novel regulation opening the payment services markets even further[256].

Additionally, in relation to these potential obligations beyond the PSD2, the dynamic efficiency defense is available. This means that the dominant undertaking may plead that its incentives to innovate are undermined if there is a supply obligation.[257] Considering the competitive advantage of traditional banks gained by the amount of their customer account data, it may be questioned whether the access obligations under the PSD2 and the following lower standard of proof are justified. Banks are already subject to higher regulatory burden compared to the third-party payment service providers[258] and as a consequence of these access obligations under the PSD2, also subject to competition law scrutiny triggered with lower burden. This may have effect on the account banks' incentives to innovate. The policy level issue in question is addressed in the following section, after which the concluding remarks on refusal to supply data and access to systems in the PSD2 context are discussed.

[256] The access obligations could be extended, for instance, to data regarding investments or loans.
[257] Stucke – Grunes 2016, p. 268-269.
[258] For instance, in respect to capital requirements. Lindberg 2018, p. 109-110.

4.5 Whether the Commission's different burden of proof is justified? Comparison of objectives of the PSD2 and Article 102 TFEU

As above discussed, one of the main arguments against the Commission's lower burden of proof is the fact that sectorial regulation, such as the PSD2 and competition law, such as Article 102 are not pursuing the same objectives and they are undermining the incentives to innovate. When the objectives of sectorial regulation may be considered broader than one of competition law, the Commission should not be able to enforce competition law with lower burden of proof.[259]

The Commission has stated the following as the main objectives of the PSD2. The aim is to:

- contribute to more integrated and efficient European payments market,
- improve the level playing field for payment service providers by ensuring equivalent conditions for existing and new market players and enabling new payment methods to reach a broader market,
- make payments services safer and more secure and
- ensure the high level of protection consumers.[260]

In contrast, the objectives of competition law are widely debated and ambiguous to certain extent.[261] The types of benefits that competition law should produce is the consumer welfare[262] and economic efficiency.[263] Additionally, the CJEU has stated that besides protecting interests of competitors or of consumers, competition law protects the market structure and ultimately the competition as such.[264] However, protecting competitors does not mean that they are protected for their own sake but rather from the competitive process

[259] For instance, Geradin 2011, p. 7-8.
[260] European Commission 2018 A. PSD2, Recital 6-7.
[261] On the discussion, for instance, Monti 2007, Chapter 2. Coates 2011, Chapter 2. Nazzini 2011.
[262] However, the notion of consumer welfare is unclear under EU law. See, for instance, Daskalova 2015, Albæk 2013 and Leczykiewicz – Weatherill 2016.
[263] Jones – Sufrin 2016, p. 26-27. Zimmer 2012, p. 68. On the other hand, the objectives of Article 102 TFEU may be described at pursuing welfare and fairness. See on the matter, Akman 2012 and Ayal 2014.
[264] Bailey – John 2018, p. 11-12. Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 38. Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (C-501/06 P) *and Commission of the European Communities v GlaxoSmithKline Services Unlimited* (C-513/06 P) *and European Association of Euro Pharmaceutical Companies (EAEPC) v Commission of the European Communities* (C-515/06 P) and *Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) v Commission of the European Communities* (C-519/06 P) [2009] ECR I-9291, para 63. See also, Case T-461/07 *Visa Europe Ltd and Visa International Service v European Commission* [2011] ECR II-01729, para 126.

perspective and thus achieving economic welfare.[265] Additionally, it has been argued that consumer welfare objective is not itself definite objective but rather long-term objective of social welfare.[266]

Contrasting the objectives of the PSD2 and competition law with each other, several overlapping fields may be found. Firstly, consumer protection and consumer welfare have similar thematic, however, their meaning is slightly different. The aim of competition law is not to protect consumers but rather the competitive structure of the market and indirectly benefiting the consumers. On the other hand, the PSD2 actually aim to protect consumer directly, when requiring safety and security of payment services. Secondly, it may be said that the PSD2 actually conforms the competition law policy of efficient competition and the protection of market structure, when it facilitates new payment service providers to enter the payment services market. In this relation, the objectives are more or less the same.

From competition law perspective, the access obligations under the PSD2 facilitate effective competition on the payment services market. Banks will have in fact more incentives to innovate, when there are new market players on the market. Additionally, the mere compliance with the PSD2 is not sufficient but the banks need to go beyond the obligations and also innovate themselves in order to compete effectively. Ultimately, this will produce efficiencies for the consumers but also for the banks, when they are able to access their competitors' customer account data and authentication procedures. It may be also questioned whether this data sharing, i.e., sharing (possibly sensitive) information could have also negative effects for competition under Article 101 TFEU. However, such considerations are outside the scope of this thesis.

However, the Commission's lower burden of proof is debatable. The objectives of PSD2 and competition law are overlapping in terms of the efficient competition but the PSD2 goes also beyond competition law objectives, for instance, in relation to the consumer protection. It is true that with the lower burden proof on the enforcement of the Article 102 TFEU with PSD2 obligations the Commission enforces broader objectives than EU competition policy's ones. In relation to incentives to innovate, as above stated, the PSD2 facilitates innovation. Regardless the notion of competition scrutiny, all "traditional" banks are forced to innovate in order to keep up with the competition and provide access to their customers' account data

[265] Jones – Sufrin 2016, p. 28-29.
[266] Nazzini 2011, p. 140-141.

and authentication procedures. In this relation, the Commission's lower burden of proof may not be either seen as causing less innovation. The most importantly, the traditional indispensability analysis of the PSD2 obligations may not be necessary from the competition law perspective since it is clear that the input is essential *de facto* for the third-party service providers.

It may be stated that the Commission's lower burden of proof has not actually that much relevance due to the fact that there are significant overlaps with the objectives, the incentives to innovate are not undermined and the indispensability considerations are taken already into account under the PSD2. Thus, it follows that the burden of proof is justified in the PSD2 context and there is no prevailing interest to be balanced out.

4.6 Concluding remarks on refusal to supply data and access to procedure in the PSD2 context

Analysis of refusal to supply data and access to procedure in the PSD2 context is multilayered and consists of two basic elements – the assessment of dominance and the abuse. In relation to dominance, the payment service market has its specialties, which need to be noted in the dominance assessment. It follows from the equivalent PSD2 supply obligations that the market shares of account banks are not definitive but could have relevance, when every account bank has the same obligation to supply. In the PSD2 context, holding an essential facility has also relevance and Article 102 TFEU may be triggered even if an undertaking does not have the largest market share. Here, however the issue is that actually access to all account banks' data may be considered as essential, when account information or payment initiation services may not function properly without this access.

In relation to abuse, several peculiarities must be noted. PSD2 obligations in question are regulatory duties, which means to the element of indispensability is not required to be considered in the abuse assessment. Refusing access will eliminate competition from payment initiation and account information service markets. Thus, the breach of the PSD2 obligations may trigger Article 102 TFEU but the compliance with these obligations may not automatically indicate also the compliance with competition law. Further, the dual sanctions (administrative fines under the PSD2 and the possible competition law scrutiny) will be provide incentives for the dominant undertaking to open their account data via APIs unless already not been incentivized to comply with the PSD2 with other plausible

consequences (consumer switching bank). However, the justified refusal under the PSD2 should not be considered as Article 102 TFEU abuse. In these cases, the PSD2 should prevail over Article 102 TFEU.

There may be also access obligations beyond the PSD2 to be addressed solely with Article 102 TFEU. Currently, the broad access obligations under the PSD2 entail that it is unlikely that more extensive obligations are required under Article 102 TFEU. The obligations beyond the PSD2 may be considered if novel supply problems emerge at practical level. In the following section, practical implications of the assessment of refusal to supply doctrine and the PSD2 obligations are addressed from the perspective of open banking.

5 PRACTICAL IMPLICATIONS OF THE PSD2 ACCESS OBLIGATIONS AND THEIR RELATION TO REFUSAL TO SUPPLY

The practical implications are considered from the Finnish payment service market perspective. In the following section, it will be examined, how the Finnish market players have addressed the PSD2 requirements and created the system of open banking in Finland.

5.1 Creation of open banking system – beyond the PSD2?

From a strategical perspective, four options for the account banks have been presented to address the PSD2. First, the account banks may solely to comply with the PSD2 and offer the access to their account data and authentication procedures. Second, they may start competing as third-party services providers or third to expand their services to payment initiation or account information services. Fourth, the account banks may transform to provide advanced payment and information services to benefit the PSD2 fully.[267] This fourth option resembles the current open banking trend among the account banks.

The PSD2 access obligations together with the potential refusal to supply scrutiny under Article 102 TFEU facilitate shift from "closed" banking system into the creation of open banking system. Open banking refers to "a collaborative model in which banking data is shared through APIs between two or more unaffiliated parties".[268] The aim is to improve enhanced capabilities of that particular marketplace.[269]

In general, banks are inviting FinTechs for a joint collaboration. For instance, OP Financial Group has developed APIs for different types of services for the FinTechs to utilize. There are separate APIs for banking services, wealth management, insurance, mobility, health and housing.[270] Similar to OP Financial Group, Nordea and Danske Bank invite software developers and companies to join them to create the open banking system.[271] Some banks,

[267] Cortet – Rijks – Nijland 2016, p.21.
[268] Brodsky – Oakes 2017.
[269] *ibid*.
[270] OP Developer. Available at https://op-developer.fi. Visited on 22 December 2018.
[271] Nordea Open Banking Developer Portal. Available at https://developer.nordeaopenbanking.com. Visited on 22 December 2018. Danske Bank's Open Banking and APIs. Available at https://danskebank.com/openbanking. Visited on 22 December 2018.

such as S-Pankki, are opening their payments and account APIs and thus solely complying the PSD2.[272]

It may be seen that some account banks are actually going themselves beyond the PSD2 obligations. One should note that the access under the PSD2 should be free of charge in general.[273] However, the access obligations beyond PSD2 and not under the refusal to supply doctrine but voluntarily must be assessed under the relevant data protection rules, such as data portability. Also, the data subject's explicit consent for data sharing is required similar to the PSD2.[274] From competition law perspective, the possible costs charged by the banks for the APIs may cause competition law problems if effective competition is restricted.

Herein, it should be noted that the scope of the PSD2 is not entirely clear what is the definite scope of account information or access to payment account, when these are not defined in the PSD2. The definition of the Payment Account Directive may provide indications that a payment account is "an account held in the name of one or more consumers which is used for the execution of payment transactions".[275] It may be inferred that account information refers to information contained in the account and also information that may be utilized for the execution of payment transactions.

The undefined scope may be problematic, for instance, in relation to wealth management, which may be fall either within the scope of the PSD2 supply obligations depending on the form of investments. Account-formed savings may be considered as being within the scope of the PSD2 rather than securities stored in a book-entry account. On the other hand, areas such as insurances, mobility, health and housing are not within the scope of the PSD2 supply obligations.

---

[272] S-Pankki – Open Banking. Available at https://www.s-pankki.fi/fi/yhtiot/open-banking/. Visited on 22 December 2018.
[273] It should be noted that this aspect is not entirely clear. The access via APIs should be free for the third-party payment service providers but for instance, the execution of payment transactions may be subject to non-discriminatory charges. However, the PSD2 does not directly address this matter. See, PSD2, Recital 65, Article 66(4)(c), Article 67(3). The Finnish Government proposal, nevertheless, explicitly states that the account bank may not charge costs from the payment initiation service provider, in the absence of a contract between them, on the fulfillment of its obligations under law (such as the fulfilling the access obligations). HE 132/2017 vp. Government proposal for the Parliament on the act amending the Payment Services Act and other related Acts (available in Finnish or Swedish), p. 38.
[274] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119 (General Data Protection Regulation, GDPR) Article 20.
[275] Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257, Article 2(3).

As a result of the PSD2, the payment service market has been truly liberalized having also wider implications to complementary markets. Banks operating in these complementary markets provide access to their data and thus increase effective competition on complementary markets but also on payment service market. For a dominant undertaking, such supply and especially refusal should be carefully assessed and in general provided on a non-discriminatory basis. The refusal to supply doctrine may be triggered if the access to API is ultimately considered indispensable for operating in such market. Additionally, other types of abusive behavior may be also involved if for instance customer or third-party service providers are tied either contractually or by applications to the bank.

Ideally, open banking within and beyond the PSD2 facilitates effective competition in the financial industry and should be encouraged. However, from the competition law perspective, the cooperation between banks and third-party service providers may actually reduce competition if competition is eliminated entirely. The emphasis should be put also on the contractual terms imposed by the banks for accessing their APIs. For instance, the long term and duration of the contract or otherwise exclusive contracting may cause competitive problems. However, the problems related to the refusal to supply and other novel problems established by the open banking system are to be seen in practice, when the PSD2 will gain its full force in September 2019.

6 CONCLUSION

The PSD2 reform and in particular its access obligations directed to the account banks are expected to be significant for the payment services market requiring the account banks to implement new business models in order to comply with the PSD2. When the account banks are subject to novel supply obligations, and the payment service market will be opened for the new kinds of payment service providers, this may also facilitate the possible abusive behavior amongst the account banks from a competition law perspective. As seen in the Commission's investigations with respect to several account banks refusing to grant access to their customer account data even before the PSD2, the refusal to supply considerations under Article 102 TFEU are possible in this context.

Although the refusal to supply doctrine may be seen as a traditional concept of the EU competition law, it will have its applications also in a data context in general. However, the application of the doctrine to data is not straightforward and requires a careful assessment of the market dynamics. The definition of dominance in data-driven markets requires shifting the emphasis from the market shares to the characteristics of the market and the exclusivity of data. The aspect of exclusivity will be closely held with the debate on the essentiality or indispensability of data having also relevance when defining the actual abuse of dominance.

The issue with the assessment is whether data may be considered as an input, which is indispensable for the market access and there are no substitutes available. It may be said that generally data itself does not fulfill the indispensability requirement but rather data processing system or algorithm may be considered as such essential input. However, the volume of data is not solely the determinative factor but also its velocity, variety and value will have relevance. Data and in particular big data will have increasing effect on the barriers to entry on these data-driven markets. Thus, the question remains whether it is possible for the entrant to collect and process data with reasonable efforts in order to effectively compete with the dominant undertaking possessing big data and whether it is in practice even possible to enter these markets putting the emphasis to assessing the market-specific characteristics and dynamics.

However, with respect to the abuse assessment of the refusal to supply data under Article 102 TFEU, the considerations on the essentiality of data are limited only to forced data

sharing *without* a regulatory duty to supply. This means that the Commission is forcing an undertaking to share its data solely based on the doctrine under Article 102 TFEU and thus is required to prove the abuse-specific criteria on the refusal to supply. With respect to regulatory duties to supply, the Commission will consider only the likelihood of anti-competitive foreclosure in its refusal to supply assessment. This burden of proof may be seen lower than compared to the traditional refusal to supply data test that requires to prove, for instance, the indispensability of data, which may be met only in exceptional situations. The Commission's lower burden of proof has been subject to criticism amongst scholars due to the lack of incentives to innovate and different objectives of sectorial regulation and competition law enforcement.

Considering the refusal to supply data in the PSD2 context, same two stage assessment applies, when the dominance and the abuse shall be proven by the Commission. In relation to dominance assessment, the payment service market has nevertheless its specialties, which need to be taken into consideration. As a result of the equivalent supply obligation for all account banks, market shares may have more relevance in this assessment. The problem is that actually access to all account banks' data may be considered as essential, when account information or payment initiation services may not function properly without this access.

With respect to the abuse assessment, the PSD2 access obligations, access to customers' account data and authentication procedures, are regulatory duties due to which the element of indispensability is not required to be considered in the abuse assessment. If the account bank refuses to provide access to the account data for the third-party payment service providers, it is likely that such refusal will eliminate competition from payment initiation and account information service markets. It follows that a breach of the access obligations may trigger Article 102 TFEU scrutiny. In other words, the account banks' refusal to supply access to their customers' account data and authentication procedures may constitute an abuse of dominant position as a refusal to supply under Article 102 TFEU.

On the other hand, the compliance with the access obligations, for instance with respect to justified refusal, does not entail that such conduct is also compliant with competition law. However, justified refusal under the PSD2 should not trigger Article 102 TFEU and in these situations the PSD2 should prevail over competition law. The practical application of the justified refusal may nevertheless be marginal, when the third-party payment service providers are subject to the FIN-FSA's supervision and the justified refusal will be subject

to initial discussions with the FIN-FSA. This leaves only a little discretion for the account bank's independent actions regarding the justified refusal but as a black-letter law should have some practical relevance for the sake of legal certainty.

All in all, the threat of possible competitive scrutiny combined with the possible administrative fines in case of non-compliance with the PSD2 will provide incentives for the dominant undertaking to comply with the PSD2 unless already incentivized with, for instance, the potential effects of consumers switching account bank. Further, although the account banks are subject to stricter financial regulation, for instance, with respect to capital requirements, and a risk of both administrative and competition law sanctions, the Commission's lower burden of proof is still justified in the abuse assessment, when there are significant overlaps with the objectives of the PSD2 and competition law, the incentives to innovate are not undermined and the indispensability considerations are taken already into account under the PSD2.

However, the potential access obligations beyond the PSD2 may be addressed solely with Article 102 TFEU and the refusal to supply-specific assessment requiring the indispensability of input, whether either data or data processing system. The access obligations with respect to account data are extensive due to which it is unlikely that more extensive supply obligations with this respect are required under Article 102 TFEU. Nevertheless, such obligations may be imposed if novel supply problems emerge at practical level, which have not been addressed with financial regulation. If such problems emerge, it may be easier to enforce these with a sector-specific supply obligation (such as potential PSD3) than solely under Article 102 TFEU. However, this is apt to fade the line between competition law and sectorial regulation and also brings closer these areas of law. From policy perspective, however, competition law should not be utilized to enforce solely sectorial regulation but the objectives of competition law.

From a practical perspective, the account banks will address the PSD2 access obligations by creating an open banking system. In Finland, some banks are planning to open their APIs with respect to other data than account data and thus going even beyond the PSD2 obligations. The account banks are seeing this as an opportunity rather than solely threat to their business. However, as the open banking may have wider effects to the complementary markets besides the payment services market, the dominant company should carefully consider not only the refusal to data but also its supply. When the dominant company

supplies data for one third-party provider voluntarily, it should, in principle, supply data also to other services providers on a non-discriminatory basis. The refusal to supply doctrine may be triggered if the access to API is ultimately considered indispensable for operating in such market. This is the case with the supply beyond the PSD2 obligations. Further, other types of abusive behavior may be also triggered if customers or third-party service providers are tied either contractually (long-term and exclusive contracting) or by applications to the account bank. The system of open banking may have also reducing effects on the effective competition if the account banks and third-party service providers solely cooperating but do not compete with each other. Also, mergers are possible with this respect.

In the future, the payment service market may be liberalized even further. For instance, the Payment Service Directive 3 may be possible to open account banks data facilities even further with respect to investments or loans. Further, the standardization of APIs could be ahead, when under the PSD2 regime since there is no harmonization on the technical execution of the APIs. As free movement of data (other than personal data) will be facilitated at EU-level[276], this may have implications also on the payment service market. Further, besides regulation directed to the account banks, it may be questioned whether there would be an emerging need to regulate also the FinTech companies or whether more stringent regulation is even desirable. However, the actual effect of the PSD2 and its implications to competition will be seen, when the transition period of the PSD2 ends on 14 September 2019 and the novel market practice will commence to evolve.

[276] See Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L 303.