

BIG DATA, POWER, AND KNOWLEDGE. REGULATORY ASPECTS OF ACCESS TO BIG DATA AND THE DIGITAL SERVICES ACT PACKAGE

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INDEX

- 1. A BRIEF NOTE ON THE SCOPE OF RESEARCH**
- 2. DATA AND NEW FORMS OF "ENCLOSURE": BETWEEN EX-POST REGULATORY INTERVENTION TO PROTECT COMPETITION AND MARKET REGULATION**
- 3. BEYOND COMPETITION: ACCESS TO DATA FOR GENERAL INTEREST PURPOSES**
- 4. THE ROLE OF THE DIGITAL SERVICES ACT PACKAGE IN THE CURRENT CONTEXT**
- 5. TOWARDS A NEW PERSPECTIVE**

1. A BRIEF NOTE ON THE SCOPE OF RESEARCH

Nowadays, data play an ambivalent role in our society. Whereas they can be considered as commodities, i.e. goods that can be traded on the market and generate a competitive value,²

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² This statement, as pointed out by H. ZECH, *A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data*, in *Journal of Intellectual Property Law & Practice*, n. 11, 2016, 460, can be considered true when considering that data are at present essential features for the development of services and access to them

they also acquire a dimension of general interest.³ Their knowledge, interpretation and use are also useful for public policymakers and, more generally, for understanding the economic and social dynamics we have to face.⁴

It is generally argued that data are non-rival goods, the use of which by one subject does not necessarily result in the loss of their utility for other subjects.⁵ Moreover, data are infinitely reproducible, which would exclude in the first place the possibility of an exclusive right to them. Nevertheless, these purely theoretical statements should go hand in hand with

is actually quite limited, as demonstrated by the ever increasing trade of data on the market and the relevant jurisprudence on the matter. This statement will be widely discussed in the present paper.

³ A. GALIANO, A. LEOGRANDE, S.F. MASSARI, A. MASSARO, *I dati non personali: la natura e il valore*, in *Rivista italiana di informatica e diritto*, 1/2020, 61. The relevance of access to data held by private economic operators in order to respond to social needs has drastically come to light during the Covid-19 pandemic, as data has been key elements to develop effective public health measures, on which among others: G. DE MINICO, M. VILLONE, *Stato di diritto - Emergenza – Tecnologie*, Collana di Studi di Consulta Online, 2020, 2; V. ZAMBRANO, *Il diritto umano alla scienza e l'emergenza da CoViD-19*, in *Rivista di BioDiritto*, 1/2020, 259; KAI KUPFERSCHMIDT, *A completely new culture of doing research. Coronavirus outbreak changes how scientists communicate*, in *Science*, 2020, 1. The "general interest" can be defined as an interest identified by a competent authority for the satisfaction of social needs, that prevail over private interest: F. POCAR, M.C. BARUFFI, *Commentario breve ai Trattati dell'Unione Europea*, Cedam, Padova, 2014. This term is used, rather than the term "public interest", as it is used by article 106(2) TFEU, which is a cornerstone of this analysis (see section 5).

⁴ According to R. CAVALLO PERIN (eds.), *L'amministrazione pubblica con i big data: da Torino un dibattito sull'intelligenza artificiale*, Quaderni del Dipartimento di giurisprudenza dell'Università di Torino, 2020, the techniques of big data analysis, through which it is possible to derive from the data meanings otherwise not visible to the naked eye, allow greater statistical, probabilistic and predictive knowledge of the functioning of modern society and are a resource both for the planning of public services and for public administration's cognitive activity. See also: D.U. GALETTA, *Public Administration in the Era of Database and Information Exchange Networks: Empowering Administrative Power or Just Better Serving the Citizens*, in *European Public Law*, 2/2019, 171 -181; A. GALIANO, A. LEOGRANDE, S.F. MASSARI, A. MASSARO, *I dati non personali: la natura e il valore*, cit., 61.

⁵ On the matter: A. MANTELERO, *Big data: i rischi della concentrazione del potere informativo digitale e gli strumenti di controllo*, in *Il diritto dell'informazione e dell'informatica*, 1/2012, 135; A. DE FRANCESCHI, M. LEHMANN, *Data As Tradable Commodity and New Measures for Their Protection*, in *The Italian Law Journal*, n. 1/2015, 51; V. ZENO-ZENCOVICH, *Dati, grandi dati, dati granulari e la nuova epistemologia del giurista*, in *Rivista di diritto dei media*, 2/2018, 1.

a concrete market structure analysis, when discussing the most appropriate legal instruments to regulate data.⁶

The current shape of digital services, i.e. markets based on the use of data, leads to the emergence of forms of quasi-monopoly over information.⁷ Those responsible for managing the reading software or who own the physical or intangible digital record on which the data is stored end up adopting a proprietary stance, claiming the exclusivity of the data and closing off access to the outside world.⁸ The concentration of data - and the power that comes with it - is both a cause and a consequence of the formation of vertical economies of scale,⁹ thus drastically reducing the benefits that could be derived from sharing data.¹⁰ Opening Big Data

⁶ For example, although it is argued that data are infinitely reproducible, the high initial costs of such activity and the technical feasibility of exclusion of access by third parties may be a barrier to market entry, as widely argued in section 2.

⁷ T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, Egea, Milano, 2021. Indeed, considering the scale of certain data – such as data held by search engines but also by other economic operators of the digital sector, in particular those who go under the name of G.A.F.A.M. (Google, Apple, Facebook, Amazon and Microsoft) – it is argued that data markets are akin to a natural monopoly: F. DUCCI, *Natural Monopolies in Digital Platform Markets*, Cambridge University Press, Cambridge, 2020, 10. Such market structure is particularly relevant when analyzing case law on the application of the essential facilities doctrine to data holders (section 2) and making a comparison to other markets which can be considered natural monopolies (section 5). See also: F. DI PORTO, *Scambi di informazioni e abusi di posizione dominante: una rilettura degli “abusi informativi” e dei relativi rimedi*, in *Concorrenza e mercato*, 1/2014, 27; G. GIANNONE CODIGLIONE, *Libertà d’impresa, concorrenza e neutralità della rete nel mercato transnazionale dei dati personali*, in *Diritto dell’Informazione e dell’Informatica*, 4-5/2015, 909; B. LUNDQVIST, *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World. The Issue of Access*, in *Stockholm Faculty of Law Research Paper*, 1/2017, 1. More precisely, there is a distinction between data – a sequence of symbols or numbers – and information – the meaning that can be extracted from data. On this matter, please refer to: A. MANTELERO, *Big data: i rischi della concentrazione del potere informativo digitale e gli strumenti di controllo*, cit., 135. For a partially different opinion see: H. ZECH, *Information as Property*, in *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 3/2015, 192; H. ZECH, *A Legal Framework for a Data*, cit., 460.

⁸ A. GALIANO, A. LEOGRANDE, S.F. MASSARI, A. MASSARO, *I dati non personali: la natura e il valore*, cit., 61.

⁹ P. MANZINI, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act*, in *I Post di AISDUE*, 3/2021, 30.

¹⁰ T.L. HARRIS, J.M. WYNDHAM, *Data Rights and Responsibilities: a Human Rights Perspective on Data Sharing*, in *Journal of Empirical Research on Human Research Ethics*, 3/2015, 334-337. See also: A. MANTELERO, *Big data: i rischi della concentrazione del potere informativo digitale e gli strumenti di controllo*, cit., 135; I. GRAEF, S.

of large private economic actors to the outside world would bring systemic benefits that could sway both the market, by encouraging innovation and the development of new products and services, and society in general, by enabling data analysis for the development of coherent and effective public policies.¹¹ It would also enable the removal of barriers to access to and development of digital markets, while reducing the waste of resources. It is estimated that more than 80% of the data currently collected and available on the market is not being used.¹²

The regulation of digital markets and data analytics-based products and services lags behind the growth of these markets, both because there was an initial desire not to shroud them in regulatory requirements that could hinder their development, and because their exponential growth does not match the timing of the law.¹³

There is not yet a unified data regulation capable of responding to market and social needs and counteracting current trends.¹⁴ On the contrary, there are various sectoral regulations, which are often inadequate to meet the current situation, yet, at the same time, that point to a growing interest of the European institutions in this subject. First, the General Data Protection

YULIANA WAHYUNINGTYAS, P. VALCKE, *Assessing data access issues in online platforms*, in *Telecommunications Policy*, 2015, 375; G. GIANNONE CODIGLIONE, *Libertà d'impresa, concorrenza e neutralità della rete nel mercato transazionale dei dati personali*, cit., 909; T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit.; L. LIONELLO, *La creazione del mercato europeo dei dati: sfide e prospettive*, in *Diritto del Commercio Internazionale*, 3/2021, 675.

¹¹ A. GALLIANO, A. LEOGRANDE, S.F. MASSARI, A. MASSARO, *I dati non personali: la natura e il valore*, cit., 61; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Building a European Data Economy*, COM/2017/9 final.

¹² T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit.

¹³ The reference goes to the image of the tortoise competing with Achilles, used by P. MANZINI, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act*, cit., 30.

¹⁴ B. LUNDQVIST, *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World. The Issue of Access*, cit., 1; L. ZOBOLI, *Fueling the European Digital Economy: A Regulatory Assessment of B2B Data Sharing*, in *European Business Law Review*, 4/2020, 663.

Regulation¹⁵ and the Regulation on the free flow of non-personal data¹⁶ provide some rules to facilitate data flows. The distinction between personal and non-personal data has been contested by many, arguing that it is difficult to distinguish on a case-by-case basis whether the data is personal or not, especially in databases that contain information of both categories.¹⁷ Furthermore, there is a European framework for databases, which are basically collections of works, data or other independent elements arranged systematically or methodically and accessible individually by electronic or other means.¹⁸ If the said Directive grants databases as defined above a *sui generis* right in cases where they cannot be protected by copyright law, such protection cannot be extended to the data and information stored in them.¹⁹ Special rules also apply to data held by the public administration.²⁰

¹⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of the 27th 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 (General Data Protection Regulation) OJ L 119/1-88. In particular, see article 29 (Right to data portability).

¹⁶ 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 OJ L 303/59-68.

¹⁷ A. GALIANO, A. LEOGRANDE, S.F. MASSARI, A. MASSARO, *I dati non personali: la natura e il valore*, cit., 61; L. ZOBOLI, *Fueling the European Digital Economy: A Regulatory Assessment of B2B Data Sharing*, cit., 663. The Commission therefore took a step on this point to lay down guidelines for the application of the Regulation: Communication from the Commission to the European Parliament and The Council, *Guidance on the Regulation on a framework for the free flow of non-personal data in the European Union*, COM(2019)250 final.

¹⁸ Art. 2, par. 2, Directive 96/9/EC of the European Parliament and of the Council of 11th March 1996 on the legal protection of databases, OJ L 77/20-28.

¹⁹ E.C.J., Case C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus AB* [2004] ECLI:EU:C:2004:694; E.C.J., Case C-203/02 *British Horseracing Board Ltd v William Hill Organization Ltd* [2004] ECLI:EU:C:2004:695; E.C.J., Case C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2004] ECLI:EU:C:2004:696; E.C.J., Case C-444/02 *Fixtures Marketing Ltd v Organismos Prognostikon Aganon Podosfairou (OPAP)* [2004] ECLI:EU:C:2004:697; E.C.J., Case C-762/19 *SIA "CV-Online Latvia" v SIA "Melons"* [2021] ECLI:EU:C:2021:434. For a comment see: A. DE FRANCESCHI, M. LEHMANN, *Data As Tradable Commodity and New Measures for Their Protection*, 51; H. ZECH, *A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data*, cit., 460; V. FALCE, "L'insostenibile leggerezza" delle regole sulle banche dati nell'unione dell'innovazione, in *Rivista di diritto industriale*, 4/2018, 377; M. LILLÀ MONTAGNANI, *IP and data (ownership) in the new European strategy on data*, in *European Intellectual Property Review*, 3/2021, 156.

²⁰ Directive (EU) 2019/1024 of the European Parliament and of the Council of 20th June 2019 on open data and the re-use of public sector information OJ L 172/56-83. Despite partly referring to the previous legislation, see anyhow

It is beyond the scope of this article to analyse these sectoral regulations. On the contrary, this paper aims to systematise the two emerging trends in EU law - one aimed at fostering the creation of a competitive data market²¹ that breaks the current oligopolies (section 2), the other aimed at ensuring universal access to data for general interest purposes (section 3). The paper will ultimately unveil the existence of a general principle of openness of data at a European level, critically analysing the instruments created for this purpose in the Digital Services Act Package (section 4).

The Digital Services Act Package, i.e. the set of proposals for regulations - on the data,²² on the markets²³ and on the digital services²⁴ - adopted by the European Commission last year, fits into the aforementioned framework outlining a regulation of a general nature,²⁵ intended to integrate what is not yet regulated by sectors' rules. In particular, the said package of proposals fully reflects the ambivalence of data mentioned at the beginning, according to which the information represents both an asset of economic nature and with exchange value, and a good of general interest.

in this regard: B. PONTI, *Titolarità e riutilizzo dei dati pubblici*, in B. PONTI (eds.) *Il regime dei dati pubblici*, Maggioli, Sant'Arcangelo di Romagna, 2008; D. MARONGIU, *I dati delle pubbliche amministrazioni come patrimonio economico nella società dell'informazione*, in *Informatica e diritto*, 1-2/2008, 355; D.U. GALETTA, *Open Government, Open Data e azione amministrativa*, in *Istituzioni del Federalismo*, 3/2019, 663; R. CAVALLO PERIN (eds.), *L'amministrazione pubblica con i big data*, cit., 11.

²¹ Note that on one hand there are traditional markets, where data are collected to develop goods and services; and on the other hand, there are data markets, in which data are used as a bargaining chip: H. ZECH, *A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data*, cit., 460. Regardless of the context within which data are generated, collected or processed, this work will focus on the latter and therefore on the possibility for data to be subject to exchange and access obligations.

²² European Commission, Proposal for a regulation of the European Parliament and of the Council on European data governance (*Data Governance Act*), COM/2020/767 final.

²³ European Commission, Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (*Digital Markets Act*), COM/2020/842 final.

²⁴ European Commission, Proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (*Digital Services Act*) and amending Directive 2000/31/EC, COM/2020/825 final.

²⁵ L. LIONELLO, *La creazione del mercato europeo dei dati: sfide e prospettive*, cit., 675.

The Commission recognises that different types of market players contribute to the “data economy”, including manufacturers and infrastructure providers, as well as researchers and public authorities. The regulation of data should enable the value to be derived from them, “*creating a variety of applications with great potential to improve daily life*”²⁶ and supporting the data sharing among economic operators (B2B) and between them and public authorities (B2G).

The goal of the European Union is therefore to create a single market for data, in which the free movement of data goes hand in hand with the other four fundamental freedoms of the European single market, namely the freedom of movement of capital, goods, services and people.²⁷ Therefore, it is essential that the rules governing access to and use of data are “*fair, practical and clear*”, and are accompanied by the identification of clear and reliable governance structures.²⁸

The Commission, however, mostly focuses on how to ensure an international flow of data in line with European values,²⁹ rather than identifying an appropriate model for allocating resources (i.e. data). Therefore, such issues will fall out of the scope of this article.³⁰

²⁶ Communication *Building a European Data Economy*, COM/2017/9 final (n. 11) 1. For a comment: W. KERBER, *Rights on Data: The EU Communication ‘Building a European Data Economy’ From an Economic Perspective*, in S. LOHSSE, R. SCHULZE, D. STAUDENMAYER (eds.), *Trading Data in the Digital Economy: Legal Concepts and Tools*, Nomos, Münster, 2017, 109.

²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European Strategy for Data*, COM/2020/66 final. For a comment: B. LUNDQVIST, *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World. The Issue of Access*, cit., 1; L. LIONELLO, *La creazione del mercato europeo dei dati: sfide e prospettive*, cit., 675.

²⁸ Communication *A European Strategy for Data*, COM/2020/66 final, 5. For a comment: H. ZECH, *A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data*, cit., 160; L. LIONELLO, *La creazione del mercato europeo dei dati: sfide e prospettive*, cit., 675.

²⁹ Communication *A European Strategy for Data*, COM/2020/66 final; *Data Governance Act*, COM/2020/767 final, 1.

³⁰ It is worth noticing that the debate on this topic is wide. Different analyses have been carried out so far, each carrying to a different degree of openness, as they recognise on data an exclusive right or a form of public property.

On the contrary, this paper aims to pinpoint legal instruments that can justify provisions of mandatory access to data, both addressing the digital and data market structure – considering the relevant jurisprudence on the matter (section 2) – and unveiling the existence of a principle of openness of data for general interest purposes (section 3). Accordingly, this paper proposes to bring the so reconstructed framework back into the discipline of services of general economic interest (art. 106, para. 2, TFUE) and to make proposals for future lines of research. Indeed, from the analysis of the tools implemented by the Commission to achieve the goal of a single market for data, it will ultimately emerge that there are clear similarities between the development of digital markets and the development of networked markets – these include, for example, rail transport, energy and telecommunications – whose discipline is aimed at realising both competition on the market and a general interest, as defined by public authorities, in order to meet social needs.

2. DATA AND NEW FORMS OF “ENCLOSURE”: BETWEEN EX-POST INTERVENTION TO PROTECT COMPETITION AND MARKET REGULATION.

Big Data is a key resource in today’s economy, the control of which can lead to competitive advantages and potential risks to market competition³¹. Economic operators who

Anyhow, both run into the significant dilemma of defining data as immaterial goods. Yet, this is one of the most controversial issues in most European legal systems. On this matter, among others, see also: S. LIETO, “*Beni comuni*”, *diritti fondamentali e Stato sociale. La Corte di Cassazione oltre la prospettiva della proprietà codicistica*, in *Politica del Diritto*, 2/2011; P. MADDALENA, *I beni comuni nel codice civile, nella tradizione romanistica e nella Costituzione della Repubblica italiana*, in *federalismi.it*, 19/2011; B.M. FRISCHMANN, *Infrastructure – The Social Value of Shared Resources*, OUP, Oxford/New York, 2012; N. PURTOVA, *Health Data for Common Good: Defining the Boundaries and Social Dilemmas of Data Commons*, in R. LEENES, S.A. NADEZHDA PURTOVA (eds.), *Under Observation - The Interplay Between eHealth and Surveillance*, in *Tilburg Law School Research Paper* no. 15/2016, Springer, 2017; J.J. ZYGMUNTOWSKI, L. ZOBOLI, P.F. NEMITZ, *Embedding European values in data governance: a case for public data commons*, in *Internet Policy Review*, 10(3), 2021.

³¹ On the matter, please refer to: A. MANTELERO, *Big data: i rischi della concentrazione del potere informativo digitale e gli strumenti di controllo*, cit., 135; J. QI, *Application of essential facilities doctrine to “big data”*: US and EU perspectives, in *European Competition Law Review*, 4/2014, 182; T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit.

have control over significant amounts of data can offer a better service based on users' behaviour research.³² Therefore, the theoretical non-rivalry and unlimited availability of data should be considered in the context of the difficulty for small and medium enterprises to bear high initial infrastructure costs for data storage and analysis. Although marginal costs decrease over time, undeniably, initial costs create significant barriers to market entry.³³ This leads to a new form of "enclosure",³⁴ with *de facto* data exclusivity for those who own the infrastructure for data storage or the reading systems for data collection and analysis.³⁵

Against this backdrop, case law and antitrust authorities in both Europe and the US have resorted to the discipline of abuse of dominant position. Considering data as an "essential infrastructure" has allowed economic operators, seeking to offer products or services on secondary markets, access to data available to other economic operators, where denial of access would have crippled the development of that product or service.³⁶

³² J. QI, *Application of essential facilities doctrine to "big data": US and EU perspectives*, cit., 182.

³³ J. QI, *Application of essential facilities doctrine to "big data": US and EU perspectives*, cit., 182; T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit.

³⁴ The term is intended to deliberately recall the phenomenon of enclosure of common lands, which developed during the fourteenth century in England in order to ensure larger agricultural exploitation, with simultaneous suppression of the customary rights of the rural population. G.S. PENE VIDARI 'Storia del diritto in età medievale e moderna' (Giappichelli 2019); "Enclosures", in *Enciclopedia Treccani*, 2010. This analogy has been suggested both at the XIII Nexa Conference on Internet and Society 'Il digitale e lo Stato', held on November 30, 2021, at Politecnico di Torino, and by B. PONTI, *Titolarità e riutilizzo dei dati pubblici*, cit. On the matter, see also: C. FUCHS, *Critical Theory of Communication: New Readings of Lukacs, Adorno, Marcuse, Honneth and Habermas in the Age of the Internet*, Univeristy of Westminster Press, 2016; D. HARVEY, *The New Imperialism*, OUP, Oxford/New York, 2005; N. PURTOVA, *Health Data for Common Good: Defining the Boundaries and Social Dilemmas of Data Commons*, cit.

³⁵ A. GALIANO, A. LEOGRANDE, S.F. MASSARI, A. MASSARO, *I dati non personali: la natura e il valore*, cit., 61.

³⁶ E.C.J., Joint cases C-241/91P and C-242/91P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995]; E.C.J., 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]; E.C.J., Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004]; Case T-201/04 *Microsoft*

For this to be legally qualified as a form of abuse of dominant market position, three different conditions should be met under EU law.³⁷

First, the economic operator's conduct that is deemed unlawful should lead to the exclusion of any competition in a secondary market. This market does not necessarily have to be an actual market. It may be merely potential or hypothetical, provided that there is a potential consumer demand for the products or services, for the development of which access is sought.³⁸

Second, the denial of access to the infrastructure must be accompanied by the impossibility to obtain the resource by other means. This means that the infrastructure must be impossible to reproduce at all or at a reasonable price. The infrastructure is, therefore, essential to the extent that the available alternatives do not allow the competitors to put themselves on an equal footing with the owner of the infrastructure.³⁹

Finally, the denial of access to the infrastructure must be unjustified. In other words, it must not be supported by objective reasons. A refusal may also be unjustified, if an exclusive right to reproduce an intellectual work is exercised. Abuse of dominant position may indeed be envisaged if, in the specific case, how the exclusive right to reproduce is

Corp. v Commission of the European Communities [2007]; E.C.J., Case C-139/11 *Compass-Datenbank GmbH v Republik Österreich* [2012].

³⁷ For the jurisprudence, please refer to the previous note. For a comment, please refer to: F. DI PORTO, *Scambi di informazioni e abusi di posizione dominante: una rilettura degli "abusi informativi" e dei relativi rimedi*, cit., 27; G. GIANNONE CODIGLIONE, *Libertà d'impresa, concorrenza e neutralità della rete nel mercato transnazionale dei dati personali*, cit., 909; G. COLANGELO, M. MAGGIOLINO, *Big data as misleading facilities*, in *European Competition Journal*, 2-3/2017, 249; B. LUNDQVIST, *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World. The Issue of Access*, cit., 1; J. QI, *Application of essential facilities doctrine to "big data": US and EU perspectives*, cit., 182; P. MANZINI, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act*, cit., 30.

³⁸ *IMS Health GmbH & Co*, C-418/01; I. GRAEF, S. YULIANA WAHYUNINGTYAS, P. VALCKE, *Assessing data access issues in online platforms*, cit., 375.

³⁹ J. QI, *Application of essential facilities doctrine to "big data": US and EU perspectives*, cit., 182.

exercised pursues an aim that is manifestly contrary to the fundamental principles of free competition.⁴⁰

The essential facilities doctrine is similarly framed in the US.⁴¹ Indeed, it is believed that this doctrine was transposed into Europe based on the model of the United States, which recognises the obligation to grant access to the infrastructure when the denial cannot be justified, competition in a given market is practically excluded, and the resource is indispensable and cannot be reproduced at reasonable costs. These principles have also been affirmed under US law concerning digital platforms, although the Supreme Court narrowed down the scope of the essential facilities doctrine in comparison to the European Court of Justice,⁴² decided to neither endorse nor repudiate it. Therefore, solutions have sometimes gone in the opposite direction to those of the Court of Justice of the European Union,⁴³ and sometimes solutions have been reached that are consistent with the need to ensure access to data, in order to avoid the formation of mergers that may eliminate competition in certain markets. The latter is the case of Google's acquisition of ITA Software, where the US Department of Justice approved the acquisition on the condition that Google assumed the obligation to provide competitors with access to the merged company's data.⁴⁴

⁴⁰ *Radio Telefis Eireann (RTE)*, C-241/91P and C-242/91P.

⁴¹ F. DI PORTO, *Scambi di informazioni e abusi di posizione dominante: una rilettura degli "abusi informativi" e dei relativi rimedi*, cit., 27; J. QI, *Application of essential facilities doctrine to "big data": US and EU perspectives*, cit., 182.

⁴² The reference goes to *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP* 540 U.S. 398 (2004) which represent a turning point on this matter.

⁴³ For example, in the case *Facebook Inc v. Power Ventures Inc* it was stated that Zuckerberg's platform was not required to guarantee third parties unlimited access to its data, even if this privilege had been granted to Facebook by other economic operators in other occasions. United States District Court for the Northern District of California, *Facebook Inc v. Power Ventures Inc*, 11th May 2009, 91 U.S.P.Q. 2d 1430. For a comment and an in-depth analysis of the related cases, please refer to: J. QI, *Application of essential facilities doctrine to "big data": US and EU perspectives*, cit., 182.

⁴⁴ United States District Court for the District of Columbia *U.S. v. Google Inc. and ITA Software, Inc.* final judgment of 5th October 2011; T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit.

Although the application of the essential facilities doctrine may be a mean to address the current concentration of the data market⁴⁵ - assuming, of course, that the relevant conditions are met - there are many limitations to this approach.

First, this doctrine has been shaped by markets characterised by the physical nature of the essential infrastructure and the impossibility of its reproduction, as is the case with railroads, ports and energy transmission networks.⁴⁶ Because these characteristics are not easily found in digital markets, the application of this doctrine and case law to data is sometimes difficult.⁴⁷

When it comes to the physical nature of the infrastructure, although the traditional definition of “IT infrastructure” does not seem to be able to include data collected and stored in data centres, there is a growing need for a broader definition of the term, which can likewise include goods and services that are the essential skeleton of a broader system or organisation.⁴⁸ It is no longer possible to deny intangible assets the nature of infrastructure

⁴⁵ *Google/DoubleClick*, COMP/M.4731, Commission decision C(2008) 927 final [2008] OJ C 184/10-12; *TomTom/Tele Atlas*, COMP/M.4854, Commission decision C(2008) 1859 [2008] OJ C 237/8-13; *Microsoft/Yahoo/Search Business*, COMP/M.5727, Commission decision C(2010) 1077 [2010]; *Facebook/Whatsapp*, COMP/M.7217, Commission decision C(2014) 7239 final [2014]; G. GIANNONE CODIGLIONE, *Libertà d'impresa, concorrenza e neutralità della rete nel mercato transnazionale dei dati personali*, cit., 909; I. GRAEF, S. YULIANA WAHYUNINGTYAS, P. VALCKE, *Assessing data access issues in online platforms*, cit., 375.

⁴⁶ Among others, see: E. FERRARI, *I servizi a rete in Europa*, Giuffrè, Milano, 2000; F. CINTIOLI, *Le reti come beni pubblici e la gestione dei servizi*, in *Dir. amm.*, 2/2007, 293; F. TRIMARCHI BANFI, *Lezioni di diritto pubblico dell'economia*, 4th ed., Giappichelli, Torino, 2019.

⁴⁷ G. COLANGELO, M. MAGGIOLINO, *Big data as misleading facilities*, cit., 249. See also: B. LUNDQVIST, *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World. The Issue of Access*, cit., 1; J. QI, *Application of essential facilities doctrine to “big data”: US and EU perspectives*, cit., 182.

⁴⁸ OECD, ‘*Maximising the Economic and Social Value of Data. Understanding the Benefits and Challenges of Enhanced Data Access*’, 16-18 November 2016, DSTI/CDEP(2016)4. For a different definition of infrastructure, related to commons, also in an economic perspective, see B.M. FRISCHMANN, *Infrastructure – The Social Value of Shared Resources*, cit.

in such a broader meaning.⁴⁹ The use of certain data – in the form of big data analysis – and the access to specific datasets are indeed essential for the development of services in specific contexts.⁵⁰ Consequently, data must be considered as the source of competitive power in the market,⁵¹ especially if raw data are the necessary consequence of an activity that stands for its only direct source even for other companies wishing to use it in a secondary market.⁵² In such circumstances, the unjustified refusal of an economic operator to grant others access to the data in its possession may constitute a form of abuse of dominant position (Article 102, TFEU).⁵³

If the non-physicality of the infrastructure is not necessarily an obstacle to the application of the essential facilities doctrine, greater problems arise concerning its reproducibility or non-reproducibility. Given the characteristics of data and the nature of the relevant market, most of the requirements of the essential facilities doctrine cannot be clearly verified with respect to them.

First, it is difficult to demonstrate the impossibility of obtaining the data for technical or economic reasons, since the speed and variety of the data presuppose the

⁴⁹ On the other hand, there have been cases of application of the aforementioned jurisprudence in the presence of an intellectual property right, on which widely P. MANZINI, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act*, cit., 30.

⁵⁰ In this sense: A. MANTELERO, *Big data: i rischi della concentrazione del potere informativo digitale e gli strumenti di controllo*, cit., 135; H. ZECH, *A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data*, cit., 135; T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit. However, there is no lack of dissenting voices, according to which the source of power is not really the availability of data, but the ability to collect them in considerable quantities and to analyse them. According to G. COLANGELO, M. MAGGIOLINO, *Big data as misleading facilities*, cit., 249, “this is why, although there is a market for oil, there is no market for a resource named “big data” and – even more importantly – there is no point in discussing whether firms compete in the market for big data or whether collectors, aggregators and analysers of big data operate in this same market. Rather, there are markets where firms produce and, in some cases, trade digital data, and firms may compete in these many and diverse markets to collect great amounts of this multiplicity of different digital data”.

⁵¹ I. GRAEF, *Market Definition and Market Power in Data: The Case of Online Platforms*, in *World Competition Law and Economics Review*, 38(4)/2015, 473.

⁵² *Radio Telefís Éireann (RTE)*, C-241/91P and C-242/91P.

⁵³ In this regard, please refer to the jurisprudence cited in note 36.

accessibility of large datasets that are potentially interchangeable.⁵⁴ For the indispensability of access to a dataset to be verified, it is necessary to demonstrate its non-substitutability,⁵⁵ which is not easy to establish. Given that we can derive different information from each dataset, even taking into account the different methods of analysis available, it is one thing to acknowledge that there are many markets for digital data and another to know in advance the specific markets for digital data from which companies can derive the data that will be used to obtain the desired information. This is also because the same information can be derived from different data and the same data can lead to different information.⁵⁶ It is therefore difficult to rule out with certainty that a substitute for a particular dataset can be found in the market, thus making the evaluation of infrastructure essentiality uncertain. Moreover, once IoT technologies become more widespread, the doctrine of essential facilities will be difficult to apply, because the exceptional situation of market inaccessibility resulting from the dominant party's denial of access will no longer exist.⁵⁷

Second, it is possible to observe that the essential facilities doctrine is an *ex-post* approach to forms of abuse of dominant position, allowing access to data only after lengthy procedures aimed at correcting market distortions. On the contrary, in order to promote competition in markets characterised by oligopolies or natural monopolies, an *ex-ante* regulatory approach is required to regulate access to the infrastructure.⁵⁸ *Ex-post* interventions to correct market failures are not a stable tool to promote competition in the

⁵⁴ G. COLANGELO, M. MAGGIOLINO, *Big data as misleading facilities*, cit., 249. See also: OECD, *Maximising the Economic and Social Value of data*, cit.; J. QI, *Application of essential facilities doctrine to "big data": US and EU perspectives*, cit., 182.

⁵⁵ Indeed, the non-substitutability may not be created by specific data or subsets of data, but by the entire dataset as it is applied to a particular matching or prediction service.

⁵⁶ G. COLANGELO, M. MAGGIOLINO, *Big data as misleading facilities*, cit., 249.

⁵⁷ G. COLANGELO, M. MAGGIOLINO, *Big data as misleading facilities*, cit., 249; B. LUNDQVIST, *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World. The Issue of Access*, cit., 1.

⁵⁸ B. LUNDQVIST, *Big Data, Open Data, Privacy Regulations, Intellectual Property and Competition Law in an Internet of Things World. The Issue of Access*, cit., 1. See also: T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit.; P. MANZINI, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act*, cit., 30.

market. This is because large economic players have no incentive to provide access to their data. This emerges from the ITA Software case, where the obligation imposed on Google to grant access to its data was subject to a maximum time limit of five years, so Google did not hesitate to deny access to the infrastructure after this period had expired.⁵⁹

A step towards an *ex-ante* regulation has been taken with the proposal for a regulation on digital markets, which we will discuss in further detail below (section 4). When referring to digital platforms, the European Commission recognises that their market dominance mostly stems from the use of data collected.⁶⁰ Although more than 10,000 online platforms operate in the European digital economy - mostly small and medium-sized enterprises – “a small number of large online platforms capture the biggest share of the overall value generated”.⁶¹ Thanks to the exploitation of the network effects inherent in their ecosystems and their essential role in today’s digital economy, they act as intermediaries for most transactions between the end users and the business ones.⁶² Besides, digital platforms also use the data generated by end users and business users to offer services in the market in competition with their business users.⁶³ This has a negative impact on both the contestability of the basic platform services and the contestability of the end services offered through the platform.

The proposal therefore aims at counteracting such systemic effects by imposing a set of obligations to counteract the unfair practices of gatekeepers against which the current competition rules are ineffective. In doing so, it opts for an *ex-ante* approach that overcomes

⁵⁹ On this matter, please refer to note 44.

⁶⁰ Digital Markets Act, COM/2020/842 final, recital nos. 2 and 3.

⁶¹ Digital Markets Act, COM/2020/842 final, 1.

⁶² Digital Markets Act, COM/2020/842 final, 1; I. GRAEF, S. YULIANA WAHYUNINGTYAS, P. VALCKE, *Assessing data access issues in online platforms*, cit., 375; G. GIANNONE CODIGLIONE, *Libertà d’impresa, concorrenza e neutralità della rete nel mercato transnazionale dei dati personali*, cit., 909.

⁶³ Digital Markets Act, COM/2020/842 final, recital n. 43. Consider, for instance, the Amazon case, which was followed by the sanctioning provision of the Italian Competition and Market Authority issued on December 9, 2021. For more information: <<https://www.agcm.it/media/comunicati-stampa/2021/12/A528-chiusura>>. See also: Case T-612/17, *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission* [2021].

the difficulties arising from the *ex-post* imposition of opening obligations based solely on Article 102 TFEU and the essential facilities doctrine.⁶⁴

Whilst the analysis of the provisions of the Digital Markets Act will be discussed in section 4, the following one focus on non-competition issues, taking into account that data acquire relevance also outside the market. Ultimately, this article seeks to systematise access requests both for commercial reasons and for reasons of general interest by arguing for the existence of a general principle of openness in EU law.

3. BEYOND COMPETITION: ACCESS TO DATA FOR GENERAL INTEREST PURPOSES

The creation of a *de facto* (quasi) monopoly over information, in the absence of sufficient and effective regulation of data held by private economic operators, leads not only to a competitive disadvantage in the market for small and medium-sized enterprises, but also to obvious difficulties in accessing information for the achievement of general interest purposes.⁶⁵

The techniques of Big Data analysis have entered the economic and social sciences, studies and research of which cannot be done without data-based experiments.⁶⁶ The ability of data science to analyse and relate a considerable amount of heterogeneous information leads to unveiling a connection between different phenomena, according to descriptive or predictive patterns, and makes it possible to obtain new interpretations of reality to act

⁶⁴ Digital Markets Act, COM/2020/842 final, recital n. 5. Despite the commendable effort, the approach adopted by the Commission has been criticised. On this point, please refer to: P. MANZINI, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act*, cit., 30.

⁶⁵ R. YOTOVA, B.M. KNOPPERS, *The right to benefit from science and its implications for genomic data sharing*, in *European Journal of International Law*, 31/2020, 665.

⁶⁶ I. RAPISARDA, *Ricerca scientifica e circolazione dei dati personali. Verso il definitivo superamento del paradigma privatistico?*, in *Europa e diritto privato*, 2/2021, 301.

upon.⁶⁷ Big data analysis' techniques can identify connections between data that would otherwise be imperceptible, guiding human action to make production more efficient and directing it towards environmental and social sustainability.⁶⁸

Only by ensuring adequate access to large, secure, and reusable datasets, it will be possible to achieve a growing capacity for reality analysis and increasing accuracy in science.⁶⁹ Data analysis makes it possible to anticipate relevant trends, by facilitating the emergence of patterns that are not visible to the “*naked eye*”⁷⁰ and, consequently, to guide appropriate public policies as well as individuals, who are thus enabled to fully realise their freedom of self-determination by knowing the reality within which they operate.

Whilst the big giants initially opened up their data to researchers from outside the company, a turnaround was not long to come, triggered by a more conscious awareness of the economic and competitive value created by exclusive access to data.⁷¹

⁶⁷ R. CAVALLO PERIN, *Ragionando come se la digitalizzazione fosse data*, in *Dir. amm.*, 2/2020, 306; Gruppo Esperti MISE sull'Intelligenza Artificiale ‘*Proposte per una strategia italiana per l'Intelligenza Artificiale*’, 10th May 2019, available at: https://www.mise.gov.it/images/stories/documenti/Proposte_per_una_Strategia_italiana_AI.pdf.

⁶⁸ R. CAVALLO PERIN, *Ragionando come se la digitalizzazione fosse data*, cit., 306, but also: ID. (eds.) *L'amministrazione pubblica con i big data*, cit., 11; ID., *Agricoltura (dir. amm.)*, in *Enciclopedia del Diritto*, Giuffrè, Milano, 2022.

⁶⁹ T.L. HARRIS, J.M. WYNDHAM, *Data Rights and Responsibilities: a Human Rights Perspective on Data Sharing*, cit., 334-337. See also: A. BRUNS, *After the “APIcalypse”: social media platforms and their fight against critical scholarly research*, in *Information Communication and Society*, 22(11)/2019, 1544; T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit.

⁷⁰ R. CAVALLO PERIN, *Agricoltura (dir. amm.)*, cit. See also: M. FALCONE, *Le potenzialità conoscitive dei dati amministrativi nell'era della “rivoluzione dei dati”: il caso delle politiche di eradicazione dell'epatite C*, in *Istituzioni del Federalismo*, 1/2017, 1; G. CARULLO, *Gestione, fruizione e diffusione dei dati dell'amministrazione digitale e funzione amministrativa*, Giappichelli, Torino, 2018.

⁷¹ A. BRUNS, *After the “APIcalypse”: social media platforms and their fight against critical scholarly research*, cit., 1544, who recalls the statement: “*Thanks for getting so many people interested in Twitter. Now get lost*”. For a different opinion, which identifies a sort of continuity between the period before and after Cambridge Analytica: R. TROMBLE, *Where Have All the Data Gone? A Critical Reflection on Academic Digital Research in the Post-API Age*, in *Social Media + Society*, 1/2021, 7.

This is certainly true in the case of the Cambridge Analytica scandal.⁷² The restrictions imposed by the major digital platforms on access to their data, in the name of protecting the right to privacy by closing their APIs, have significantly hampered scientific research. This “*APIcalypse*”⁷³ has been subject to considerable criticism, leading to the drafting of manifestos and documents aimed at raising awareness on this issue in public opinion and amongst the proprietary platforms themselves.⁷⁴ It seems, that there is currently no adequate access to data for valuable scientific research, given that the data to which access is granted are very limited and suitable for basic research and not for a more elaborate one. Furthermore, some research projects cannot bear the costs requested.⁷⁵

As a result, researchers are called upon to find new ways of accessing data, by either resorting to collection methods that are not legally permitted (e.g. scraping)⁷⁶ or bowing to research programs supported by the platforms themselves, in order to balance the needs of researchers with the preservation of the company's competitive position. Facebook, for instance, has launched the so-called “Social Science One”, which seeks to provide an intermediate path between independent research and research within the company that is

⁷² A. BRUNS, *After the “APIcalypse”: social media platforms and their fight against critical scholarly research*, cit., 1544; L. LIONELLO, *La creazione del mercato europeo dei dati: sfide e prospettive*, cit., 675.

⁷³ Term used by A. BRUNS, *After the “APIcalypse”: social media platforms and their fight against critical scholarly research*, cit., 1544.

⁷⁴ For a meaningful analysis, in two opposing perspectives, please refer to: A. BRUNS, *After the “APIcalypse”: social media platforms and their fight against critical scholarly research*, cit., 1544; R. TROMBLE, *Where Have All the Data Gone? A Critical Reflection on Academic Digital Research in the Post-API Age*, cit., 1. It is significant that almost all public authorities and the 80% of research institution, that took part to the consultations that preceded the draft by the European Commission of the Data Act, consider that action on business-to-government data sharing is needed, even by means of a compulsory license for specific public interests: European Commission, Proposal for a regulation of the European Parliament and of the Council on harmonized rules on fair access to and use of data (Data Act), COM/2022/68 final, 10.

⁷⁵ A. BRUNS, *After the “APIcalypse”: social media platforms and their fight against critical scholarly research*, cit., 1544; A. MANTELETO, *Big data: i rischi della concentrazione del potere informativo digitale e gli strumenti di controllo*, cit., 135.

⁷⁶ M.W. MONTEROSSO, *Estrazione e (ri)utilizzo di informazioni digitali all'interno della rete internet. Il fenomeno del c.d. web scraping*, in *Diritto dell'informazione e dell'informatica*, 2/2020, 327.

subject to confidentiality.⁷⁷ While pointing out that academic independence creates no value unless it has access to sufficient information, access to data is limited to cases where the research does not conflict with the interests of the platform - thus bringing one of the fundamental principles of research freedom back into the center of the discussion.⁷⁸ Such an approach is likely to exclude the possibility of investigating issues such as abuse, hate speech or misinformation, which would only cast a shadow over certain aspects of online platforms.⁷⁹

⁷⁷ A. BRUNS, *After the “APIcalypse”: social media platforms and their fight against critical scholarly research*, cit., 1544. In the total absence of discipline, it is the platforms that identify the conditions of access to data and have control over their use done by researchers: R. TROMBLE, *Where Have All the Data Gone? A Critical Reflection on Academic Digital Research in the Post-API Age*, cit., 1. Reporting here the opinion expressed by Prof. Roberto Cavallo Perin during the lesson “*Il metodo Barile e gli sviluppi successivi nello studio del diritto*” (held at the University of Turin on 9th of February 2022), through these initiatives large platforms trespass unexercised areas of sovereignty, themselves balancing the right to private economic initiative and the right to freedom of science.

⁷⁸ On freedom of science, see among others: F. BONIFACIO, *La ricerca scientifica*, in AA.VV. *Atti del congresso celebrativo del centenario delle leggi di unificazione. L’istruzione*, Neri Pozza, Vicenza, 1967, 278; G. CORSO, M. MAZZAMUTO, *La libertà della scienza*, in G. CORSO, A. LA SPINA (eds.) *Il Consiglio Nazionale delle Ricerche- CNR Struttura e funzioni*, Il Mulino, Bologna, 1994, 169; B. SAUL, D. KINLEY, J. MOWBRAY, *Article 15: Cultural Rights* in AA.VV. *The international covenant on economic, social and cultural rights. Commentary, cases and materials*, OUP, Oxford/New York, 2014, 1175; D. SAYERS, *Article 13*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A commentary*, Hart, Oxford and Portland, 2014, 379; A. BOGGIO, C. PR ROMANO, *Freedom of Research and the Right to Science: From Theory to Advocacy*, in S. GIORDANO, J. HARRIS, L. PICCIRILLO (eds.), *The Freedom of Scientific Research: An Anthology*, Manchester University Press, Manchester, 2018, 162; Committee on Economic, Social and Cultural Rights, United Nations, General comment no. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), 30th April 2020, E/C.12/GC/25, available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQdxONLLJiul8wRmVtR5Kxx73i0Uz0k13FeZiqChAWHKFuBqp%2B4RaxfUzqSAfyZYAR%2Fq7sqC7AHRa48PPRRALHB>.

⁷⁹ Here, we reported the comments expressed by A. BRUNS, *After the “APIcalypse”: social media platforms and their fight against critical scholarly research*, cit., 1544 in relation to this paper: G. KING, N. PERSILY, *A New Model for Industry-Academic Partnerships*, in *Political Science and Politics*, 53(4)/2019, 703.

The European Union seeks an answer to these questions, as it seems possible to find in its regulatory framework a general principle of openness of data.⁸⁰ Yet, the European Union does not only focus on the need to ensure full competition in markets that are comparable to a monopoly. Given the ever-increasing amount of data generated by individuals, it is currently necessary to put the interests of individuals first when defining methods for the collection and use of data, so that they fully comply with the values and principles that inform the European Union. In this context, it is of the utmost importance to provide citizens with appropriate tools to make informed decisions, even based on information that can be obtained from non-personal data, which should be available to everyone, regardless of whether they are public or private entities, small or large companies, start-ups or giants.⁸¹

Part of the EU Data Strategy is therefore specifically dedicated to “data for the public good”. In particular, the Commission emphasises that data can be useful to manage emergencies,⁸² to improve people's living conditions and to improve public services. However, the document focuses on data generated by the public sector and discusses opportunities for researchers and businesses to use them. It mentions only in passing that data from the private sector can also give a significant contribution when used as public goods.⁸³ It is no coincidence that the use of aggregated and anonymised data from social media for the analysis of the epidemic trends is taken as an example.

The notion of data for the public good is not exclusive to the EU Strategy under scrutiny. Back in 2017, the Commission stated the need to provide public authorities with access to data when it is in the “general interest”. The Commission therefore acknowledges that access to data can significantly improve the functioning of the public sector, recognising

⁸⁰ R. CAVALLO PERIN, *Il contributo italiano alla libertà di scienza nel sistema delle libertà costituzionali*, in *Dir. Amm.*, 3/2021, 587. Such a statement can be easily argued in the light of most of the Constitution of EU member States, of the Charter of Fundamental Rights of the European Union and of the European Convention on Human Rights, which protect the right to information, self-determination, and to science.

⁸¹ Communication A *European Strategy for Data* COM/2020/66 final.

⁸² On the role played by data in the Covid-19 emergency, please refer to note 3.

⁸³ Communication A *European Strategy for Data* COM/2020/66 final, 6.

that access is a key tool for scientific research in areas such as medicine, social and environmental sciences.⁸⁴

At the international level, the OECD has also repeatedly highlighted the need to ensure access to data for scientific research purposes, as this access is clearly in the general interest. By referring to data as “commons”, the OECD intends to call for non-discriminatory access to certain categories of data, without necessarily implying unlimited and free access for all stakeholders. On the contrary, the defining element of a “commons” is that “*non-discriminatory access is to be given, i.e. any member of a certain group (e.g. users of an industrial data platform) can use the data for purposes defined by the party making the data accessible*”.⁸⁵

Returning to EU law, one of the pillars on which the Strategy is based is to facilitate decisions about what data can be used for scientific research purposes, by which individuals, and how.⁸⁶ All this is without questioning the necessary compliance with the Data Protection Regulation.

⁸⁴ Communication *Building a European Data Economy* COM/2017/9 final; Commission Staff Working Document *on the free flow of data and emerging issues of the European data economy*, 10th January 2017, SWD(2017) 2 final.

⁸⁵ Commission Staff Working Document SWD(2017) 2 final, 37; OECD *Maximising the Economic and Social Value of Data*, cit. The debate on “commons” is wide and can only be quickly addressed here. Moreover, it seems that most authors on this matter often refer to a general form of access – which is however wider than the one obtained by only referring to the essential facilities doctrine, as outlined above (section 2) – without referring to the doctrine of “common goods” as developed in the work of E. OSTROM, *Governing the Commons. The Evolution of Institutions for Collective Action*, Cambridge University Press, Cambridge, 2015, who pinpoint a form of asset management by a community which does not require a single public managing authority. For example, common goods are related to public goods in S. LIETO, “Beni comuni”, *diritti fondamentali e Stato sociale. La Corte di Cassazione oltre la prospettiva della proprietà codicistica*, cit.; P. MADDALENA, *I beni comuni nel codice civile, nella tradizione romanistica e nella Costituzione della Repubblica italiana*, cit. Generally speaking, on commons as a model for value allocation, see: N. PURTOVA, *Health Data for Common Good: Defining the Boundaries and Social Dilemmas of Data Commons*, cit.; J.J. ZYGMUNTOWSKI, L. ZOBOLI, P.F. NEMITZ, *Embedding European values in data governance: a case for public data commons*, cit.; B.M. FRISCHMANN, *Infrastructure – The Social Value of Shared Resources*, cit.

⁸⁶ Communication *A European Strategy for Data*, COM/2020/66 final.

The strategy also aims to achieve these goals by creating common European data spaces in strategic sectors and areas of general interest and establishing a European cloud for open science.

Common data spaces are high-quality and interoperable pools of data, which the Union is committed to achieving by identifying appropriate sharing tools and clear governance frameworks.⁸⁷ The Commission intends to provide funding to support Member State authorities in establishing such data spaces, both at sectoral and cross-sectoral level, in order to overcome legal and technical barriers to their sharing. The common spaces that the Commission intends to establish include, among others, those related to public administration, agriculture, financial, and health data.

For the development of this strategy, the Commission refers to the French legislation,⁸⁸ which identifies certain categories of data - e.g. on energy and procurement - as data of public interest. These data should be accessible for statistical and research purposes: thereby French law impose, under certain conditions, openness obligations on private operators holding such data.

Another contribution to the broader accessibility of data in the general interest is the establishment of the European Open Science Cloud (EOSC),⁸⁹ through which the Union makes data from its research programs available, according to the principle “as open as possible, as closed as necessary”. The goal of this initiative is to make it easier for researchers to find access, share and reuse data and services. The cloud will be linked to sectoral data

⁸⁷ The very same definition highlights that common data spaces are not really pools of data, but actually “architectural models and technical standards implementing legal rules and arrangements between parties that foster data sharing”: Data Act, COM/2022/68 final, article 28, par. 6. The provision of common European data spaces is moreover without prejudice to other Union legal acts governing rights and obligations on data access and use: Data Act, COM/2022/68 final, article 40.

⁸⁸ A. ROBIN, *Valorisation de la recherche scientifique, propriété intellectuelle, innovation*, in *Cahiers Droit, Sciences & Technologies*, n. 7/2017, 205; Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, JO République Française n°0235 of 7 Octobre 2016.

⁸⁹ European Open Science Cloud, <https://ec.europa.eu/research/openscience/index.cfm?pg=open-science-cloud>; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Cloud Initiative – Building a competitive data and knowledge economy in Europe*, COM(2016)178 final.

spaces and will ultimately represent a data pool for science, research, and innovation. This initiative, which is infrastructural in nature and in no way constitutes a data repository or archive, is also intended to support the development of open science paradigms.⁹⁰ At the international level, a similar initiative can be found in the Global Open Science Cloud.⁹¹

4. THE DIGITAL SERVICES ACT PACKAGE: TOWARD A NEW REGULATION OF DIGITAL SERVICES

The Digital Services Act Package - that is, as already said, the set of proposals for regulations issued by the Commission to regulate data, markets and digital services⁹² - stands out in this legal and economic framework. This reform package further develops the lines already announced by the Commission on several occasions⁹³ and is in line with the framework outlined so far. A specific set of burdens or obligations is imposed on private economic operators of the digital sector aiming at fostering competition in digital markets – providing mandatory sharing of data between economic operators (B2B) – and granting access by public authorities for general interest purposes (B2G). Even though such provisions are different in scope and content, the aim of this paragraph will first be to highlight how the package

⁹⁰ European Commission, Directorate-General for Research and Innovation, “*Horizon Europe, open science : early knowledge and data sharing, and open collaboration*”, (2021) Publications Office, available at: <https://data.europa.eu/doi/10.2777/79699>; International Science Council, “*Open Science for the 21st Century*”, draft ISC Working Paper, 4th June 2020, available at: https://en.unesco.org/sites/default/files/isc_paper_for_unesco_open_science_consultation_2020.pdf; UNESCO, “*Recommendation on Open Science*”, (2021) Paris, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000379949.locale=en>.

⁹¹ More info at: <https://codata.org/initiatives/decadal-programme2/global-open-science-cloud/>.

⁹² In this regard, please refer to notes 22 – 24.

⁹³ Among others, without claiming to be exhaustive: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM/2015/0192 final; Communication *Building a European Data Economy*, COM/2017/9 final; Commission Staff, *Working Document, SWD(2017) 2 final*; Communication *A European Strategy for Data*, COM/2020/66 final.

confirms the emergence of a principle of necessary openness of data – even if data are held by private economic operators. Second, it will come to light that an underlying reference by the Commission to a specific legal instrument – i.e. the discipline of services of general interest (art. 106(2) TFEU) – is able to transcend the specific obligations provided by the Digital Services Act Package.

The legal basis of three proposals lies in Article 114 TFEU, thereby seeking to create a single European market for digital data and services. The high degree of fragmentation of national regulations prevents the full potential of the digital sector from being realised and results in significant compliance burden for businesses, putting European small and medium-sized enterprises at a competitive disadvantage in the market compared to other giants.⁹⁴

As already noted, these three proposals that constitute the “Digital Services Act Package” are directed to create a general set of rules for digital data, services and markets. This is without prejudice to the applicability of other legislation, such as the Public Sector Information Directive⁹⁵ and the General Data Protection Regulation,⁹⁶ as special rules.

Moving to the Data Governance Act, this proposal addresses several issues, including the reuse of public sector data burdened by third-party rights,⁹⁷ consent to use data for altruistic purposes, and the sharing of data among economic operators for remuneration. This paragraph will address the latter two issues.

As regards the data exchange between economic operators (B2B), the proposal aims to facilitate the exchange of data, rather than granting, modifying, or

⁹⁴ Digital Services Act, COM/2020/825, 6.

⁹⁵ Directive (EU) n. 2019/1024.

⁹⁶ Regulation (EU) n. 2016/679.

⁹⁷ Interesting, though falling outside the scope of this article, is the provision of a ban on exclusive agreements relating to the reuse of data held by public bodies, unless such exclusive rights are necessary for the supply of a service or product of general interest (art. 4, Data Governance Act, COM/2020/767/final). The formulation of this provision seems to recall art. 106(1) TFEU.

suppressing substantial rights regarding access to and use of data,⁹⁸ elements that should be the subject of a future subsequent law on data.⁹⁹ By recognizing the economic importance of guaranteeing a wide flow of data, the Data Governance Act, therefore, grants the right to the saleability of the said data in exchange for payment.¹⁰⁰ However, it does not address the qualification of the right on the data in the form of a right of use or ownership or even of a *sui generis* property right,¹⁰¹ and leaves out the identification of the owner, which is a difficult issue to solve. Consequently, it is clear how in the Data Governance Act data are no longer considered an instrument for the exercise of economic activity. Instead, they are an

⁹⁸ Data Governance Act, COM/2020/767 final, 1. For a comment see: L. ZOBOLI, *Fueling the European Digital Economy: A Regulatory Assessment of B2B Data Sharing*, cit., 663.

⁹⁹ The proposal for a Data Act (COM/2022/68 final), already announced in *A European Strategy for Data* (COM/2020/66 final), has finally been published on February 23, 2022. Having only the chance to make a quick reference to it, we highlight that the Data Act clarifies who can create value from data and under which conditions and partially reforms the Database Directive (n. 96/9/EC) clarifying its scope. For more info see: https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en.

¹⁰⁰ On the tradability of data, see among others: A. DE FRANCESCHI, M. LEHMANN, *Data As Tradable Commodity and New Measures for Their Protection*, cit., 51; G. GIANNONE CODIGLIONE, *Libertà d'impresa, concorrenza e neutralità della rete nel mercato transnazionale dei dati personali*, cit., 909; V. ZENO-ZENCOVICH, *Dati, grandi dati, dati granulari e la nuova epistemologia del giurista*, cit., 1; L. LIONELLO, *La creazione del mercato europeo dei dati: sfide e prospettive*, cit., 675.

¹⁰¹ On the qualification of the right on data: H. ZECH, *Information as Property*, in *Journal of Intellectual Property*, cit., 192; H. ZECH, *A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data*, cit., 460; T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit., 1; V. ZENO-ZENCOVICH, *Dati, grandi dati, dati granulari e la nuova epistemologia del giurista*, in *Rivista di diritto dei media*, cit., 1; M. LILLÀ MONTAGNANI, *IP and data (ownership) in the new European strategy on data*, cit., 156; OECD *Maximising the Economic and Social Value of Data*, cit. Even the recent Data Act (COM/2022/68 final) does not have any reflection on this issue, as it does not recognize nor create any legal basis for the data holder to hold, have access to or process data. On the contrary, it takes as a starting point the control that the data holder enjoys, *de facto* or *de jure*, over data: Data act, COM/2022/68 final, recital 5.

object of the entrepreneurial activity itself,¹⁰² and a different form of capital than the added value generated by marketing goods or services on the market.

To facilitate the exchange of data between companies, the role of intermediaries is regulated. They are required to comply with the principle of neutrality, meaning that they are not allowed to use the data exchanged on their platform, or to compete on the market with the companies using their intermediation services.¹⁰³ The provider of the data sharing service must also ensure that the continuity of the service is guaranteed and that the procedure for accessing the service is fair, transparent, and non-discriminatory also from prices standpoint.¹⁰⁴

Finally, the Data Governance Act recognises and regulates the organisations for the altruism of data, that is, non-profit legal entities established to pursue a general interest.¹⁰⁵ These organizations must be characterised by their independence from all profit entities and carry out the activities related to data altruism through a legally independent structure, separated from the other activities of the same organisation. Data altruism is based on the voluntary sharing of data by people or legal entities that provide their personal or non-personal data to be processed for purposes of general interest, and who may also specify for which purposes they wish to have such data processed. The organisation shall ensure that the data are not used for purposes other than those of general interest for which they were granted. Activities of general interest that such organisations may pursue for data altruism include health care, combating climate change, improving mobility, facilitating the production of official statistics or improving the delivery of services, and supporting scientific research, even if it is privately funded. The goal of these provisions is to

¹⁰² F. GIANNONE CODIGLIONE, *Libertà d'impresa, concorrenza e neutralità della rete nel mercato transazionale dei dati personali*, cit., 909; H. ZECH, *A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data*, cit., 460.

¹⁰³ Data Governance Act, COM/2020/767 final, recital n. 26.

¹⁰⁴ Data Governance Act, COM/2020/767 final, art. 11.

¹⁰⁵ Data Governance Act, COM/2020/767 final, Chapter IV and Recital n. 35 and 36.

contribute “to the emergence of pools of data made available on the basis of data altruism that have a sufficient size in order to enable data analytics and machine learning, including across borders in the Union”.¹⁰⁶

As emerges from this analysis, it is clear that the Data Governance Act is characterised by a set of different provisions, which address the main issues related to data, i.e. their saleability and their ability to generate value outside the market. However, it cannot solve the issues raised in section 2 and 3 on its own. Indeed, the Data Governance Act’s recognition of the right to trade data for a fee is placed side by side with a set of provisions, in the other proposals, which impose specific obligations of general applicability or limited to certain economic operators, whose size enables them to act as oligopolistic or natural monopolists. Moreover, if the Data Governance Act bases the sharing of data on an altruistic principle or economic convenience, the remaining proposals establish specific obligations of openness – which we are going to analyse now – aimed at avoiding the adoption by such economic operators of a selfish behaviour in contrast with the general interest.

First, the Digital Markets Act¹⁰⁷ imposes openness obligations on companies that provide basic intermediary and platform services and fall within the definition of gatekeeper. Basic platform services include online intermediation services, search engines, online social networking and video sharing platforms, number-independent interpersonal electronic communication services, cloud services and advertising services. In order to apply to them the obligations that we will now analyse, they must have a number of characteristics that allow them to be considered gatekeepers, i.e. they must have a significant impact on the internal market, provide one or more

¹⁰⁶ Data Governance Act, COM/2020/767 final, recital n. 35.

¹⁰⁷ P. MANZINI, *Equità e contendibilità nei mercati digitali: la proposta di Digital Market Act*, cit., 30; L. LIONELLO, *La creazione del mercato europeo dei dati: sfide e prospettive*, cit., 675.

important customer access points and have an established and lasting position in their activity.¹⁰⁸

The obligations imposed include a prohibition on the use, in competition with commercial users, of non-publicly available data generated by the activities of the said commercial users,¹⁰⁹ as well as an obligation to provide third-party providers of online search engines, upon their request and on fair and reasonable terms, with access to ranking, search, click and view data related to searches generated by the gatekeeper's end users, subject to possible anonymisation.¹¹⁰ While the first prohibition aims to neutralise the negative effects of the verticalisation of the company providing both intermediation and end services in competition with the commercial users of the platform, the second obligation aims to ensure greater contestability of the same intermediation platform service. Gatekeepers are also required to provide, to business users or third parties authorised by the latter, with free of charge, effective and continuous real-time access to aggregated and non-aggregated data generated in the course of using the platform.¹¹¹

These obligations can be updated by the Commission following or under a market investigation in case of the emergence of new unfair practices, which could jeopardise the contestability of the services in question.

¹⁰⁸ Digital Markets Act, COM/2020/842 final, art. 3. The qualification as a gatekeeper is not immediately applicable, requiring a decision by the Commission on the matter, and is based on flexible quantitative criteria, which can be updated by the Commission. Given the definition now reported, it should be noted that the European Commission has received a request from Washington to review the obligations deriving from the Digital Markets Act (COM/2020/842 final), on the assumption that the proposed regulation expressly targets American biggest companies: M. BROADBENT, *'Implications of the Digital Markets Act for Transatlantic Cooperation'*, Center for Strategic and International Studies, 15th September 2021; S. STOLTON, *'US pushes to change EU's digital gatekeeper rules'*, in *Politico*, 31st January 2022, available at <https://www.politico.eu/article/us-government-in-bid-to-change-eu-digital-markets-act/>.

¹⁰⁹ Digital Markets Act, COM/2020/842 final, art. 6 lett. a).

¹¹⁰ Digital Markets Act, COM/2020/842 final, recital n. 56 and article 6 lett. J). See also art. 6 let. g) and i).

¹¹¹ Digital Markets Act, COM/2020/842 final, art. 6 let. f).

Finally, the provisions of the Digital Services Act are also part of this framework. It contains not only a set of transparency and accountability obligations for companies providing online intermediation services, but also identifies several additional obligations for very large online platforms.

Such additional obligations concern only hosting service providers – i.e. platforms such as social networks or online marketplaces – that offer services to a number of users in the European Union equal to 10% of the relevant population.¹¹² In particular, these platforms are required to provide researchers specifically authorised by the national authority responsible for monitoring the implementation of the proposed regulation¹¹³ with access to their data, in order to conduct research on the development and severity of online systemic risks, in an effort to reduce information asymmetries and create a resilient risk mitigation system.¹¹⁴ In any case, this sort of requests for access to data should be proportionate and adequately protect the rights and legitimate interests of the platform and any other data subjects, including recipients of the service. Access may be granted through the use of specific APIs or online databases. It is for the Commission to determine, using delegated acts, the technical conditions for the transfer of data and the purposes for which such data may be used. The platform to which the access request is addressed has the right to submit a review of the said request, stating the reasons why the platform believes to be unable to grant access to the data.

¹¹² Digital Services Act, COM/2020/825 final, art. 25.

¹¹³ The evaluation of the validity of the scientific research that is intended to be conducted by accessing the data held by the platforms would thus return to the sphere of control of legitimated authorities according to the forms of the legal system: R. TROMBLE, *Where Have All the Data Gone? A Critical Reflection on Academic Digital Research in the Post-API Age*, cit., 1.

¹¹⁴ Digital Services Act, COM/2020/825 final, art. 31 and recital n. 64.

4. TOWARDS A NEW PERSPECTIVE

It emerges from the previous analysis, that – although the Commission's primary purpose is to encourage voluntary data sharing – it does not exclude the possibility of binding measures to regulate such sharing¹¹⁵ or to provide for mandatory access in a few specific cases where there is legitimate general interest.¹¹⁶ In this regard, it is possible to pinpoint a willingness to leave data sharing to spontaneous market regulation and individual economic initiative, unless specific obligations are provided for to ensure general interest.

In the light of the legal instrument used by the Commission to regulate digital markets – i.e. burdens and obligations imposed on free economic activities – and of the market structure – as analysed so far (section 2) – there is clear similarity between the development of digital markets and the development of so-called network services.¹¹⁷ The doctrine of essential infrastructures has been developed with respect to traditional networks (railroads, energy, and telecommunications) to ensure access to the networked infrastructure and to promote the establishment of competition in the market for end services. Even though the fact that data – unlike

¹¹⁵ Commission *A European Strategy for Data*, COM/2020/66 final; L. ZOBOLI, *Fueling the European Digital Economy: A Regulatory Assessment of B2B Data Sharing*, cit., 663. It seems that the Commission has adopted a hybrid approach, taking into consideration both the model of data collaboratives and of data cooperatives, as described in J.J. ZYGMUNTOWSKI, L. ZOBOLI, P.F. NEMITZ, *Embedding European values in data governance: a case for public data commons*, cit., giving secondary and limited importance the model of public data commons.

¹¹⁶ M. LILLÀ MONTAGNANI, *IP and data (ownership) in the new European strategy on data*, cit., 156.

¹¹⁷ Such comparison, although referred to public sector data, can be found in G. CARULLO, *Gestione, fruizione e diffusione dei dati dell'amministrazione digitale e funzione amministrativa*, cit. On network services see among others: E. FERRARI, *I servizi a rete in Europa*, cit.; F. CINTIOLI, *Servizi pubblici e concorrenza. Servizi di interesse economico generale, promozione e tutela della concorrenza*, in *Dir. Un. Eur.*, 3/2006, 453; G.F. CARTEL, *Servizio universale*, in *Enciclopedia del Diritto*, Giuffrè, Milano, 2010, 1057; E. SZYSZCZAK, 'Article 36', in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights. A commentary*, Hart, Oxford and Portland, 2014, 969; F. TRIMARCHI BANFI, *Lezioni di diritto pubblico dell'economia*, cit. It is anyhow to highlight that traditional network services cannot be completely assimilated to digital services, as pointed out in F. CINTIOLI, *Le reti come beni pubblici e la gestione dei servizi*, cit., and in section 2 of this paper.

the said infrastructures, which duplication is excluded - are non-rival goods which reproducibility is theoretically unlimited,¹¹⁸ it has been highlighted that, in the current economic system, they are an abundant resource, though distributed according to power relations that exclude access to third parties and determine inefficient use.¹¹⁹ Data can therefore also be seen as infrastructures, to which access is necessary for the realisation of public interest.

Just like the regulation of network services,¹²⁰ there are prohibitions on verticalisation for the digital services market - with the consequent prohibition on using data collected through the platform to develop end services in the market that compete with commercial users of the same platform – as well as obligations on continuity and accessibility of the service.

These service obligations are based not only on secondary EU law but also on the Treaty on the Functioning of the European Union, which provides for and legitimises the imposition of service obligations or charges on companies entrusted with the delivery of services of general economic interest (SGEI) or having the character of a fiscal monopoly. Such economic operators are subject to the rules contained in the Treaties, and in particular to the rules on competition, in so far as the application of such rules does not obstruct the accomplishment, in law or in fact, of the particular tasks assigned to them (Article 106(2) TFEU).

¹¹⁸ V. ZENO-ZENCOVICH, *Dati, grandi dati, dati granulari e la nuova epistemologia del giurista*, in *Rivista di diritto dei media*, cit., 1. On the impossibility to reproduce the physical network see: E. FERRARI, *I servizi a rete in Europa*, cit.; F. CINTIOLI, *Le reti come beni pubblici e la gestione dei servizi*, cit., 293; F. TRIMARCHI BANFI, *Lezioni di diritto pubblico dell'economia*, cit.; F. DUCCI, *Natural Monopolies in Digital Platform Markets*, cit., 10.

¹¹⁹ Commission *A European Strategy for Data* COM/2020/66 final.

¹²⁰ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321/36-214; Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ L 343/32-77; Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJ L 158/54-124.

This rule can probably be the beacon for the interpretation of the proposals for regulation drafted by the European Commission, which generally legitimise the imposition of obligations related to quality, accessibility and continuity of service, provided that there is an act of entrustment¹²¹ and a general interest.¹²²

To conclude, it is possible to make some final observations arising from the little space that is given to general interests, other than the one related to foster competition on digital markets, in these regulatory proposals. It is particularly worth focusing on research activity, which is one of the activities of general interest that justify voluntary¹²³ or mandatory¹²⁴ data sharing. This is basically the beginning of the implementation of those declarations of principles that have already been discussed and that have been shaping European policies in the digital domain for a long time.

It is striking that the strong resonance that the restrictions on access to data by large private sector actors have had among researchers has not led to widespread participation in the consultations prior to the publication of these proposals for

¹²¹ E.C.J., Case C-10/71 *Ministère public luxembourgeois v Madeleine Muller, Veuve J.P. Hein and others* [1971] ECLI:EU:C:1971:85; E.C.J., Case C-7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) v Commission of the European Communities* [1983] ECLI:EU:C:1983:52; E.C.J., Case C-159/94 *Commission of the European Communities v French Republic* [1997] ECLI:EU:C:1997:501.

¹²² E.C.J., Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161; E.C.J., Case C-320/91 *Criminal proceedings against Corbeau* [1993] ECLI:EU:C:1993:198; E.C.J., Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECLI:EU:C:2001:577; E.C.J., Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Others v European Commission* [2017] ECLI:EU:C:2017:999.

¹²³ Data Governance Act, COM/2020/767 final, art. 5.

¹²⁴ Digital Services Act, COM/2020/825 final, art. 31.

regulation.¹²⁵ Moreover, mandatory access to data of online platforms is limited to specific research purposes, defined by delegated acts of the Commission, and in any case related to the development and severity of online systemic risks.¹²⁶ This provision goes in the opposite direction to that of platforms, which allow access to data for research purposes that are largely within the platform itself and within boundaries that do not conflict with the interests of the platform.¹²⁷

Although the Commission's intentions are laudable, this raises the question of whether, in cases where research goes beyond these purposes, there can be anyway an obligation to open up the data according to a general pattern, or we must necessarily rely on the altruism of platforms or end users.¹²⁸ An answer could be found in the discipline of services of general interest.

Indeed, although the regulation of access to the infrastructure in network services – in which we shall now include digital networks and data – aims to promote competition in end services, the establishment of such obligations is ultimately in the interest of the end user, who is thus facilitated and guaranteed the exercise of his fundamental rights - think, for example, of the right to mobility, in the case of rail transport, and of the right to know in case of data. Obligations provided for in the Digital Services Act Package direct not only at the establishment of competition in

¹²⁵ Indeed, the academic communities and public authorities participated in the preliminary consultations for the drafting of the Digital Services Act (COM/2020/825 final) only to a limited extent, respectively for 1,2% and 2,2%: Digital Services Act, COM/2020/825 final, 9.

¹²⁶ Digital Services Act, COM/2020/825 final, art. 31.

¹²⁷ The reference goes once more to the Social Science One, for which please refer to: A. BRUNS, *After the "APocalypse": social media platforms and their fight against critical scholarly research*, cit., 1544.

¹²⁸ Data Governance Act, COM/2020/767 final, articles 15 - 22.

the market,¹²⁹ but also at the fulfilment of other general interests, by giving access to certain data to public authorities and research entities.¹³⁰

In conclusion, considering that data take on a meaning that goes beyond the context in which they were collected and processed,¹³¹ Article 106(2) of the TFEU would legitimise access to third parties even if they are not competitors in the market or even if they are non-economic actors, regardless of whether they are private or public entities,¹³² acquiring a general meaning that goes beyond specific legislation, whether general or sectoral. This provision does not aim to allow indiscriminate access to an indeterminate group of people for indeterminate purposes.¹³³

In an ecosystem where data have become a fundamental element for understanding contemporary society, for the free exercise of the individual's right to self-determination, and the efficient development of public policies, the recognition of SGEI service obligations on certain economic operators allows the injection of data into an overarching flow, capable of gathering as much information as possible,

¹²⁹ On the matter, please refer to the jurisprudence cited in note 33. On competition, as the main purpose pursued by the legislation on network services, please refer to: F. TRIMARCHI BANFI, *Lezioni di diritto pubblico dell'economia*, cit.

¹³⁰ Digital Services Act, COM/2020/825 final, article 31; Data Governance Act, COM/2020/767 final, recital n. 35; Regulation (EU) n. 2016/679, *General Data Protection Regulation*, recital 50, 159 and article 5.

¹³¹ R. CAVALLO PERIN (eds), *L'amministrazione pubblica con i big data*, cit., 11. See also: A. GALIANO, A. LEOGRANDE, S.F. MASSARI, A. MASSARO, *I dati non personali: la natura e il valore*, cit., 61; D.U. GALETTA, *Public Administration in the Era of Database*, cit., 171 -181.

¹³² I. GRAEF, S. YULIANA WAHYUNINGTYAS, P. VALCKE, *Assessing data access issues in online platforms*, cit., 375; T. RAMGE, V. MAYER-SCHÖNBERGER, *Fuori i dati. Rompere i monopoli sulle informazioni per rilanciare il progresso*, cit., 1.

¹³³ OECD, *Maximising the Economic and Social Value of Data*, cit. Access would be allowed in the presence of an adequate assessment of the validity of the research to be conducted and of the interest underlying it, excluding platforms from this judgment: R. TROMBLE, *Where Have All the Data Gone? A Critical Reflection on Academic Digital Research in the Post-API Age*, cit., 1; Digital Services Act, COM/2020/825 final, art. 31 and recital n. 64.

thus favouring the dynamics of knowledge and the analysis of phenomena in the most detailed and comprehensive way possible.¹³⁴

Abstract. *The article investigates two specific aspects of the Digital Services Act Package proposed by the European Commission. More precisely, it aims to underline the existence in the current and proposed regulatory framework of a principle of openness of data, which can be considered fundamental for the fulfilment of general interest, even if collected by private economic operators.*

First, the attention will be focused on the obligation to open up certain data collected by digital platforms to competitors in the same market (art. 6, Digital Markets Act), identifying in such provision a significant recognition of the relevant jurisprudence and an effective instrument to overcome the problems posed with an ex-post recourse to the instruments of competition law. Such analysis will therefore underline a notable similarity between the evolution of the data market discipline and digital markets, in general, with the evolution of network services. Secondly, the aforementioned proposal of regulation will be put in relation to the Data Governance Act and the Digital Services Act, to identify the existence of a general principle of necessary sharing and opening of data aimed not only at the creation of perfect competition on the market but also at the fulfilment of a general interest.

If this interest can be considered to exist and if the similarity with the evolution of network services can be considered true, such statements could pave the way for the identification of a series of burdens or obligations on the data collectors to open up data to the general public under fair and non-discriminatory conditions, using existing legal instruments at EU level (Article 106(2) TFEU), considering that the general interest of access to data is not fully reached in the competitive market. It is thus intended to open toward future research perspectives, which are becoming increasingly important and urgent in the so-called “knowledge society”.

¹³⁴ A. GALIANO, A. LEOGRANDE, S.F. MASSARI, A. MASSARO, *I dati non personali: la natura e il valore*, cit., 61.