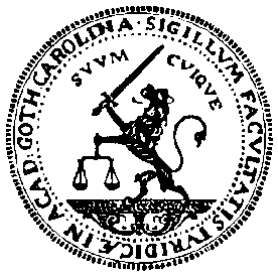

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A Mapping of the Elements and Scope of the Legal Test in *Bronner*

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Summary

This paper examines under what circumstances a dominant undertaking may be under a duty to deal with competitors within the meaning of Article 102 TFEU. The paper first provides some contextual background around Article 102 TFEU and the elements of an abuse of a dominant position. It thereafter reviews the influential case of *Bronner* in which the legal test for determining when a refusal to deal constitutes an abuse of dominance was established. It finds that a refusal by a dominant undertaking to deal with competitors can only constitute an abuse of dominance within the meaning of Article 102 TFEU if the refusal concerns an input or service that is indispensable for the ability to compete on a downstream market and the refusal of the input or service is likely to eliminate all effective competition on that downstream market and there is no objective justification for the refusal.

However, after reviewing the case law, the paper also finds that there are limitations to the scope of the legal test. In some situations which could be described as a constructive refusal to deal, the refusal may be considered abusive even without meeting the conditions of the legal test in *Bronner*. Finally, the paper reviews the case of *Google Shopping*, in which Google and the Commission have different views regarding the scope of the legal test in *Bronner*. The Commission claims that the legal test in *Bronner* is irrelevant because of the nature of the remedy imposed on Google. Since it is the Commission that decides the nature of the remedy in a decision, such an interpretation of the case law would essentially give the Commission and not the Court, the power to decide if the legal test in *Bronner* should apply to the circumstances of a case or not. The paper concludes by arguing against such an interpretation of the case law.

Sammanfattning

Denna uppsats undersöker under vilka omständigheter ett dominerande företag kan ha en skyldighet att ingå avtal med konkurrenter i den betydelse som avses i artikel 102 FEUF. Först presenteras en kontextuell bakgrund kring artikel 102 FEUF och rekvisiten för när ett förfarande utgör missbruk av en dominerande ställning. Därefter granskas det inflytelserika rättsfallet *Bronner* där rekvisiten för att avgöra när en vägran att ingå avtal med konkurrenter utgör ett missbruk av dominans fastställdes. Uppsatsen finner att ett dominerande företags vägran att ingå avtal med konkurrenter endast kan utgöra missbruk av dominans i den mening som avses i artikel 102 FEUF om vägran avser en produkt eller tjänst som är nödvändig för förmågan att konkurrera på en nedströmsmarknad och vägran av att tillhandahålla produkten eller tjänsten kommer att leda till att all effektiv konkurrens på denna nedströmsmarknad elimineras och att det saknas en objektiv anledning som kan rättfärdiga denna vägran.

Efter en granskning av rättspraxis finner emellertid uppsatsen att det finns begränsningar för räckvidden av testet fastlagt i *Bronner*. I vissa situationer som kan beskrivas som en konstruktiv vägran att ingå avtal kan vägran betraktas som rättsstridig även utan att uppfylla rekvisiten för testet i *Bronner*. Slutligen granskar uppsatsen rättsfallet *Google Shopping*, där Google och kommissionen har olika uppfattningar om räckvidden av testet i Bronner. Kommissionen hävdar att testet i *Bronner* är irrelevant på grund av hur den påföljd som ålagts Google i rättsfallet är utformad. Eftersom det är kommissionen som avgör påföljdens innehåll i ett kommissionsbeslut skulle en sådan tolkning av rättspraxis i princip ge kommissionen istället för domstolen befogenheten att avgöra om det rättsliga testet i *Bronner* skulle vara tillämpligt på omständigheterna i ett rättsfall eller inte. Uppsatsen avslutar med att argumentera emot en sådan tolkning av rättspraxis.

Preface

To my fiancée Elina and my daughters Alexandra and Isabella.

Without you, this paper would probably have been written at a much faster pace and with far less distractions. However, without you it would not have been written at all. My deepest gratitude goes to you, for all your love and support during these extraordinary times.

Höllviken, January 2021.

Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EU	European Union
GC	General Court
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

As a general rule, all undertakings, dominant or not, are free to choose with whom they want to do business and enter into contracts with.[1] All undertakings also have a right to dispose of their property in any way they see fit. More, the right to property and the freedom to conduct a business are fundamental rights, enshrined in the Charter of Fundamental Rights of the European Union.[2] There is, however, in exceptional circumstances, a possibility that a refusal by a dominant undertaking to deal with a third party amounts to an abuse of dominance within the meaning of Article 102. This is quite naturally considered as controversial because it stands in such stark contrast to the above mentioned principles and rights. This is also the reason as to why a duty to deal is only obliged in exceptional circumstances.[3] The CJEU have established a legal test for determining when a refusal to deal constitutes an abuse of dominance within the meaning of Article 102 TFEU.[4] The purpose of this test is to limit the scope of the duty to deal to situations in which the refused input, service or facility is deemed *indispensable* for the requesting party's ability to conduct its business on a downstream market.[5] However, it is not entirely clear from the case law under what circumstances the legal test applies. There are different interpretations of the case law regarding this matter, as is evident from the ongoing case of *Google Shopping* which is getting addressed in detail in section 5.[6]

[1] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 56.
[2] Article 16 and 17 CFREU.
[3] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 603.
[4] This was done in the case of *Bronner* and the legal test is reviewed in detail in section 4.
[5] The rationale behind the test is addressed in section 3.3 below.
[6] AT.39740 *Google Search (Shopping)*, section 7.4 of the decision.

1.2 Purpose and Problem

The purpose of this paper is twofold. First, it is to examine the elements of the legal test established in *Bronner* for determining when a refusal to deal constitutes an abuse of dominance within the meaning of Article 102 TFEU. This is done in order to find out the circumstances under which incursions on a dominant undertakings freedom to contract and right to property are justified. Second, the paper aims to examine under what circumstances the legal test in *Bronner* is not applicable. In order to answer the research questions, the following questions will be assessed.

- What are the elements of the legal test in *Bronner?*
- In what scenarios do the legal test in *Bronner* apply and in what scenarios does it not?
- What impact on the scope of the legal test in *Bronner* does the contested decision in *Google Shopping* have?

1.3 Method and Material

The method that has been used when writing this paper is the legal dogmatic method.[7] This method has been used because the paper tries to establish the contents of the law as it currently stands. Since the subject of the paper relates exclusively to EU competition law, the method has been highly influenced by that. In writing the paper I have relied to a large extent on a case law by the Court of Justice and the General Court. I have also relied upon literature in the form of leading textbooks on the subject of EU Competition Law.

1.4 Disposition

In this introduction, a brief background of the subject of the paper is presented as well as its purpose and the research questions of the paper.

[7] Kleineman Jan, *Rättsdogmatisk metod*, Nääv och Zamboni (red.), *Juridisk Metodlära* (2nd edition 2018), p. 21.

More, the section presents the method that is being applied and the materials which are being relied upon.

In the second section, a general overview of Article 102 TFEU is presented. The section addresses the purpose of Article 102 TFEU. It also provides a brief description of the concept of a dominant position as well as the concept of abuse.

The third section presents a description of the leading case of *Bronner* and the legal test established therein. It also addresses the motive behind the legal test and the rights and duties that underpin that motive.

Section four provides a deep-dive into the specific elements of the legal test established in *Bronner*. It also provides a description of the preconditions that precedes the application of the legal test.

The fifth section presents a description of the Commission's decision in *Google Shopping*. A brief description is presented on how the relevant market and the position of dominance was established in the case. It also presents a description of *Google's* allegedly abusive conduct, Google's objections to that finding and the Commission's response to those objections. Finally, it also presents a brief description of the remedy in the decision.

Section six presents an assessment of the Commission's decision in *Google Shopping* with regards to the arguments presented by the Commission as to why the legal test in *Bronner* should not apply to the circumstances of the case.

Finally, in section seven, the paper presents its conclusions in a brief format.

2 Abuse of Dominance

2.1 Article 102 TFEU

Article 102 TFEU concerns unilateral abusive conduct committed by dominant undertakings. The Article states that:

> *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*
>
> *Such abuse may, in particular, consist in:*
>
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
>
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them a competitive disadvantage;*
>
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

Unfortunately, Article 102 does not provide any guidance as to when the examples listed in the Article actually constitutes abuse, or when an undertaking is considered to hold a dominant position. Instead, guidance to these questions may be found in the case law laid down by the Court of Justice[8]. In the following sections, a brief description about the concepts of a dominant position and the abuse of dominance is presented.

[8] From here on, the "CJEU" or the "Court".

2.2 The Purpose of Article 102 TFEU

The concept of abuse of dominance is difficult to define without considering the purpose of Article 102 TFEU. In short, and in a (over)simplified manner, the purpose of Article 102 TFEU can be described as to protect competition and not competitors, to promote economic efficiency, and to protect the interests of consumers.[9]

A reading of the Guidance Paper[10] suggests that this is also the view held by the Commission with regards to their enforcement priorities regarding Article 102 TFEU. In the Guidance paper, the Commission states that it will focus its efforts on conduct which is harmful to consumers, and that consumers benefit from an effective competitive process in the form of lower prices, higher quality, more choices and increased innovation.[11] Therefore, in order to protect consumers, the focus of the Commission's enforcement activities is to safeguard the competitive process on the market.[12] However, protecting the competitive process does not equal protecting competitors.[13]

One may also find clues in the case law as to what the purposes of Article 102 TFEU are. In *Continental Can*[14], the CJEU confirmed that one purpose with Article 102 TFEU is to protect the interest of consumers, and that consumers may be harmed indirectly by conduct which is distorting the competitive process.[15] In *Intel*[16], the Court confirmed that the purpose of Article 102 TFEU is not to protect less efficient competitors and that "competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so

[9] Whish & Bailey, *Competition Law* (9th edition, 2018), p. 202
[10] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/2 (From here on, the 'Guidance Paper').
[11] The Guidance Paper, para. 5.
[12] The Guidance Paper, para. 6.
[13] The Guidance Paper, para. 6.
[14] C-6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215
[15] C-6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, para. 26.
[16] C-413/14 P *Intel v Commission* EU:C:2017:632.

less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation".[17] For the purpose of this paper, it is sufficient to summarise the purposes of Article 102 TFEU as the protection of consumer welfare, economic efficiency and undistorted competition.

2.3 Dominant Position

The concept of a dominant position is a legal term which determines when Article 102 TFEU becomes applicable to the unilateral actions of an undertaking.[18] In other words, Article 102 TFEU is only applicable to the actions of dominant undertakings, and conversely, irrelevant regarding the actions of undertakings that are not considered dominant in a particular market.

A dominant position is defined by the CJEU as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[19] It is important to note that an undertaking is not prohibited from holding a dominant position; it is only the abuse of such a position that is incompatible with EU competition law. Dominant undertakings do, however, have "a special responsibility not to allow its conduct to impair genuine undistorted competition in the internal market".[20] Regarding the purpose of this paper, it is not necessary to further examine the meaning of a dominant undertaking.

2.4 The Concept of Abuse

Article 102 TFEU do not define what an abuse is. It merely presents a list of examples on what may constitute an abuse. And as highlighted by the CJEU

[17] C-413/14 P *Intel v Commission* EU:C:2017:632, para. 133–134.
[18] Whish & Bailey, *Competition Law*, 9th edition, 2018, p. 187.
[19] Case 27/76 *United Brands v Commission*, EU:C:1978:22, para. 65.
[20] Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* EU:C:1983:313, para. 57.

the list of examples is not exhaustive.[21] Thus, Article 102 TFEU provide little clarity as to what specifically constitutes an abuse.

Different kinds of abusive behaviour are usually categorised as either 'exploitative' or 'exclusionary'.[22] Exploitative abuses refers to behaviour where a dominant undertaking takes advantage of its customers in a way that would not have been possible for a non-dominant undertaking, for example by charging excessive prices.[23] Exclusionary abuse refers to behaviour where the actions of a dominant undertaking is limiting its competitors' ability to compete, which in turn harms the competitive process, and thus, the welfare of consumers.[24] Exclusionary conduct is considered the most prevalent and important category of abuses.[25] This view is supported by the fact that the Commission's Guidance paper only concerns exclusionary abuses.[26]

However not all conduct which has an exclusionary effect on competitors is abusive. In *Post Danmark I*, the CJEU held that the foreclosure of competition is merely a natural consequence of *competition on the merits* if a dominant undertaking is excluding competitors simply because they are less efficient regarding price, quality, choice or innovation.[27] In other words, only 'anti-competitive' foreclosure is considered abusive.[28]

[21] C-6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* EU:C:1973:22, para. 26.
[22] For example in Jones, Sufrin, & Dunne, *EU Competition Law*: *Text, Cases, And Materials* (7th edition, 2019), page 361; Whish & Bailey, *Competition Law* (9th edition, 2018), p. 207–208; O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 262.
[23] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 262–263.
[24] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 263. See also Jones, Sufrin, & Dunne, *EU Competition Law*: *Text, Cases, And Materials* (7th edition, 2019), page 361.
[25] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 263.
[26] The Guidance Paper, para. 2.
[27] C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, para. 22.
[28] The Guidance Paper, para. 19.

The notion of 'competition on the merits' was established in the case of *Hoffmann-La Roche*[29], wherein the CJEU stated that "the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a results of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to *methods different from those which condition normal competition* in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[30]

Moreover, in the Guidance Paper, the Commission makes clear that dominant undertakings are allowed to compete on the merits and that the focus of the Commission's enforcement activity is to hinder dominant undertakings from excluding their competitors through conduct other than competition on the merits.[31] Thus, a reading of the Guidance Paper suggests that actions committed by dominant undertakings which forecloses competitors on other grounds than competition on the merits is likely to constitute an abuse of a dominant position within the meaning of Article 102.

Furthermore, in *Intel*, the CJEU held, in Grand Chamber, that "Article 102 prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using *methods other than those that are part of competition on the merits*."[32]

In consideration of the above mentioned, it is safe to assume that the concept of abuse can be described as conduct other than that of competition on the merits. Unfortunately, the meaning of 'competition on the merits' is

[29] C-85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36.
[30] C-85/76 *Hoffmann-La Roche v Commission* EU:C:1979:36, para. 91. (Emphasis added).
[31] The Guidance Paper, para. 6.
[32] C-413/14 P *Intel v Commission* EU:C:2017:632, para. 136. (Emphasis added).

not clearly defined and therefore open to interpretation. In some cases, it might be obvious that a certain behaviour does not constitute competition on the merits, such as the scenario in *Lithuanian Railways*,[33] where a railway operator physically removed rail tracks in order to foreclose a competitor.[34] In other cases, it is more difficult to ascertain whether a certain conduct constitutes competition on the merits or not.[35] Ultimately, one must turn to the case law in order to better understand the types of conduct that are considered as abuse of dominance within the meaning of Article 102. The specific type of abuse reviewed in this paper, namely 'refusal to deal', is examined in greater detail in the section below.

[33] T-814/17 *Lietuvos gelezinkeliai v Commission* EU:T:2020:545
[34] T-814/17 *Lietuvos gelezinkeliai v Commission* EU:T:2020:545, para. 42.
[35] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 266.

3 Duty to Deal and the *Bronner* Case

3.1 Rights and Duties

In order to understand the category of abuse that is referred to as 'refusal to deal', it is necessary to keep in mind a few fundamental rights and principles. First, as a general rule, all undertakings, dominant or not, are free to choose with whom they want to do business and enter into contracts with.[36] All undertakings also have a right to dispose of their property in any way they see fit. More, the right to property and the freedom to conduct a business are fundamental rights, enshrined in the Charter of Fundamental Rights of the European Union.[37] Further, according to the TFEU, the EU shall act in accordance with the principles of an open market economy with free competition[38] in which the freedom of contract is generally considered a crucial component.[39] Finally, "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".[40] In short, there is substantial protection of property rights and the freedom to choose one's trading partners in the primary laws of the EU.

However, despite the rights and principles mentioned above, dominant undertakings may, in certain situations, be under a duty to deal with third parties. This duty is quite naturally considered as controversial because it stands in such stark contrast to the mentioned principles and rights. This is also the reason as to why a duty to deal is only obliged in exceptional circumstances.[41] Further, as stated by the Commission in their Guidance

[36] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 56.
[37] Article 16 and 17 CFREU.
[38] Article 119 and 120 TFEU.
[39] See for example Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 53.
[40] Article 345 TFEU.
[41] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 603.

Paper, careful consideration is necessary "where the application of Article 82 would lead to the imposition of an obligation to supply on the dominant undertaking."[42] The Commission's position is in line with that of AG Jacobs in his opinion in *Bronner*[43], wherein he stated that any "incursions on those rights require careful justifications".[44]

The necessity for careful consideration before obligating a dominant undertaking to deal with a third party has led the CJEU to establish a legal test for determining when a refusal to deal constitutes an abuse of dominance within the meaning of Article 102 TFEU.[45] The purpose of this test is to limit the scope of the duty to deal to situations in which the refused input, service or facility is deemed *indispensable* for the requesting party's ability to conduct its business on a downstream market.[46] However, it is not entirely clear from the case law under what circumstances the legal test applies. There are different interpretations of the case law regarding this matter, as is evident from the ongoing case of *Google Shopping* which is getting addressed in detail in section 5.[47]

3.2 The *Bronner* Case

In *Bronner*[48], the issue revolved around the circumstances under which a duty to deal might arise, or, conversely, when a refusal to deal amounts to an abuse of dominance within the meaning of Article 102 TFEU. Oscar Bronner, a firm which published the daily newspaper 'Der Standard', was refused access to the nationwide home-delivery distribution network for daily newspapers belonging to one of its competitors, Mediaprint.[49] Due to the small circulation of 'Der Standard', Oscar Bronner claimed that it was not economically viable for them to operate a nation-wide home-delivery

[42] The Guidance Paper, para. 75.
[43] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner v Mediaprint*, EU:C:1998:264.
[44] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 56.
[45] This was done in the case of *Bronner* and the legal test is reviewed in detail in section 4.
[46] Regarding the rationale behind the test, see section 3.3 below.
[47] AT.39740 *Google Search (Shopping)*, section 7.4.
[48] Case C-7/97 *Oscar Bronner v Mediaprint*, EU:C:1998:569.
[49] Case C-7/97 *Oscar Bronner v Mediaprint*, EU:C:1998:569, para. 8.

distribution network on their own. Mediaprint, however, was dominant on the market for daily newspapers in Austria and their home-delivery distribution system was the only one with a nationwide reach. Oscar Bronner claimed that access to Mediaprint's distribution system was indispensable for the ability to compete on the market for daily newspapers and therefore Mediaprint was under a duty to give its competitors access to the distribution system on market terms. Thus, the question in front of the Court was whether the refusal by Mediaprint to give Oscar Bronner access to its home-delivery distribution system constituted an abuse of dominance within the meaning of Article 102 TFEU.

In answering that question, the Court made reference to its previous judgments in *Commercial Solvents*[50] and *CBEM*[51], and acknowledged that, in those cases, a refusal to supply a downstream competitor with goods or services "which were indispensable to carrying on the rival's business" did constitute an abuse, but only when the refusals in question were "likely to eliminate all competition on the part of that undertaking."[52]

The Court thereafter referenced its ruling in *Magill*[53] which concerned a refusal to license an intellectual property right. In the ruling, the Court acknowledged that a refusal to license an intellectual property right "cannot not in itself constitute an abuse of a dominant position, but that the exercise of an exclusive right may, in exceptional circumstances, involve an abuse."[54] In *Magill*[55], these exceptional circumstances were i) the refusal of a license which was indispensable for carrying on the requesting party's business, ii) the refusal prevented the appearance of a new product on the market for which there was a potential consumer demand, iii) the refusal

[50] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18, para. 25.
[51] C-311/84 *CBEM v CLT and IPB*, EU:C:1985:394, para. 26.
[52] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 38.
[53] Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill)*, EU:C:1995:98.
[54] Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint, EU:C:1998:569, para. 39.
[55] Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill)*, EU:C:1995:98.

was without objective justification and iv) it was likely to exclude all competition in the relevant secondary market.[56]

In *Bronner*, the Court based its legal test for determining when a refusal to give access constitutes an abuse of dominance on the exceptional circumstances laid down in *Magill*[57]. But with one important difference, the condition regarding the prevention of the appearance a new product was omitted.[58]

Regarding the indispensability of the home-delivery distribution system, the Court concluded that there are alternative ways of reaching consumers, such as selling in shops or by post.[59] The fact that these options may be less advantageous than the home-delivery distribution system does not change the assessment of indispensability.[60] The Court also pointed to the fact there are no technical, legal or economic obstacles that makes it impossible for publishers of newspapers to, alone or in group, duplicate the existing home-delivery distribution system.[61] In order to consider the access to the dominant undertaking's distribution system as indispensable, it must be established that it would not be "economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme".[62] Since these conditions was not fulfilled, the delivery system was not considered indispensable and the refusal to deal was not considered an abuse of dominance.[63]

[56] Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill),* EU:C:1995:98, para. 53–56.
[57] Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill),* EU:C:1995:98.
[58] Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint, EU:C:1998:569, para. 41.
[59] Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint, EU:C:1998:569, para. 43.
[60] Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint, EU:C:1998:569, para. 43.
[61] Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint, EU:C:1998:569, para. 44.
[62] Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint, EU:C:1998:569, para. 46
[63] Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint, EU:C:1998:569, para. 47.

3.3 The Motive behind the Legal Test in *Bronner*

The overarching purpose of the legal test established in *Bronner* is to balance the potential exclusionary effects on competitors arising from refusals to deal by dominant undertakings against the fundamental rights to property and the freedom of contract.[64] This is evident from AG Jacobs Opinion in *Bronner*, where he states that "incursions on those rights require careful justification".[65] Another reason for the necessity to be careful when placing dominant undertakings under a duty to deal with rivals is the potential negative effect it may have on their incentives to invest and innovate.[66] If a duty on a dominant undertaking to share the benefits of its investments with third parties were granted too easily the incentives for the dominant undertaking to invest would be greatly diminished.[67] This also applies to competitors since it would have a detrimental impact on the their incentives to invest if they could, on request, get access to inputs or facilities which only exist as a results of investments made by dominant undertakings.[68]

Thus, while a duty to deal may in some situations appear as pro-competitive, at least in the short-term, the negative impact on the incentives to invest for both dominant and non-dominant undertakings suggest that an unconstrained duty to deal for dominant undertakings would be anti-competitive in the long-term.[69] Moreover, the purpose of Article 102 is to prevent distortion of competition and to protect the interest of consumers

[64] Article 16 and 17 CFREU. See also Whish & Bailey, *Competition Law* (9th edition, 2018), p. 715–716.
[65] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 56. Para. 75 of the Guidance Paper suggest that this is also the position of the Commission.
[66] Jones, Sufrin, & Dunne, *EU Competition Law*: *Text, Cases, And Materials* (7th edition, 2019), p. 490.
[67] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 57.
[68] This is usually referred to as the problem of 'free-riding'. See for example the Guidance Paper, para. 75.
[69] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 57. (IBID)

and not the interest of particular competitors.[70] The duty to deal should therefore only apply in situations where the "dominant undertaking has a genuine stranglehold on the related market" and when the requested input or facility is truly indispensable.[71]

[70] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 58.
[71] Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 65.

4 About the Legal Test

The conditions for determining when a refusal to deal amounts to an abuse of dominance within the meaning of Article 102 TFEU was articulated by the Court in *Bronner*, as mentioned in the previous section.[72] These conditions, which are addressed in detail below, have been confirmed by the Court on numeral occasions in later judgments.[73] The legal test for when a refusal to deal constitutes an abuse has been held to consist of three conditions. First, the refused input must be indispensable to carrying on the requesting party's business. Second, the refusal would lead to the elimination of all effective competition on part of the requesting party in the relevant downstream market. Third, the lack of an objective justification for the refusal to deal. These conditions are addressed in section 4.2. However, there are a number of preconditions that need to be met in order for the legal test to be applicable. These preconditions are being reviewed section 4.1.

4.1 Preconditions for the Applicability of the Legal Test

4.1.1 Dominance

The first and most obvious precondition for an abusive refusal to deal, as well as for any other abuse of dominance, is the existence of an undertaking holding a dominant position on a particular market. This condition does, however, highlight the significance of how the relevant market is being defined.[74] A narrowly defined market will inevitably increase the likelihood for finding a dominant undertaking within that market and, conversely, a broadly defined market will decrease the likelihood for finding a dominant

[72] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 41. In the Guidance Paper, the Commission reiterates the same point but uses the term 'objectively necessary' instead of 'indispensable', para. 83.
[73] See for example T-301/04 *Clearstream v Commission* EU:T:2009:317, para. 147. T-814/17 *Lietuvos gelezinkeliai v Commission* EU:T:2020:545, para. 89.
[74] Whish & Bailey, *Competition Law* (9th edition, 2018), p. 716.

undertaking within it. This is not specific for instances of refusal to deal but applies to all types of abuse of dominance.

4.1.2 Vertical Integration

Refusal to deal cases concerns two separate but related markets and a vertically integrated dominant undertaking.[75] The typical situation involves a dominant undertaking that is operating on an upstream market and where its output on that market is an indispensable input for the activities of one or more undertakings on a downstream market.[76]

The case of *Commercial Solvents*[77] may serve as an illustrative example. Commercial Solvents was a dominant undertaking in the upstream market for the production of a chemical, aminobutanol. Commercial Solvents supplied aminobutanol, which was a necessary raw material for the manufacture of ethambutol which in turn was sold as a tuberculosis medicine, to an undertaking named Zoja. Commercial Solvents eventually decided to enter the downstream market of manufacturing ethambutol and in connection with that, it refused to supply Zoja with aminobutanol. The conduct was considered an abuse of dominance since the input, aminobutanol, was considered indispensable for the ability to compete on the market for ethambutol and by refusing to supply, all competition on the part of Zoja was eliminated.[78]

In *IMS Health*[79], the Court confirmed that it is "determinative that two different stages of production may be identified and that they are interconnected, inasmuch as the upstream product is indispensable for the

[75] Whish & Bailey, *Competition Law* (9th edition, 2018), p. 715.
[76] This is also the only type of refusal to deal which the Guidance Paper is concerned with, see para. 76.
[77] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18.
[78] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18. para. 24–25.
[79] C-481/01 *IMS Health GmbH & Co v NDC Health GmbH & Co KG*, EU:C:2002:223.

supply of the downstream product".[80] However, the Court also held that it is sufficient to identify a potential or even hypothetical market for purposes of finding an abusive refusal to supply.[81]

4.1.3 Refusal

Another seemingly obvious precondition for the finding of an abusive refusal to deal is the existence of a refusal. According to the Guidance Paper, a refusal can be both explicit and 'constructive'.[82] A constructive refusal to deal may consist of an unjustified delay or a degradation of supplies or by demanding unreasonable conditions in exchange for the supply.[83] It may also consist of a so-called 'margin squeeze' which entails the pricing of an input at a level high enough to ensure that an equally efficient competitor cannot operate profitably on the downstream market for which the input is necessary.[84] However, in the case of a margin squeeze, the Court has held that the legal test in *Bronner* is not necessary for the finding an abuse of dominance.[85] It has further been argued that the recent judgment by the General Court in *Slovak Telekom*[86] would suggest that whenever a refusal is 'constructive' in nature, it renders the legal test in *Bronner* irrelevant for the finding of an abuse of dominance.[87] This question is further addressed in section 4.3 below.

[80] C-481/01 *IMS Health GmbH & Co v NDC Health GmbH & Co KG,* EU:C:2002:223, para. 45.
[81] C-481/01 *IMS Health GmbH & Co v NDC Health GmbH & Co KG,* EU:C:2002:223, para. 44.
[82] The Guidance Paper, para. 79.
[83] The Guidance Paper, para. 79.
[84] The Guidance Paper, para. 80.
[85] Case C-295/12 *Telefónica and Telefónica de España v Commission,* EU:C:2014:2062, para. 75.
[86] T-851/14 *Slovak Telekom v Commission,* EU:T:2018:929.
[87] Jones, Sufrin, & Dunne, *EU Competition Law*: *Text, Cases, And Materials* (7th edition, 2019), p. 495–496.

4.2 The Conditions of the Legal Test

4.2.1 The Indispensability Requirement

The indispensability requirement established in *Bronner* is the first element of the legal test for determining when a refusal to deal constitutes an abuse of dominance within the meaning of Article 102 TFEU. According to the Court, a refusal to deal constitutes an abuse of dominance only when the refused service or input is indispensable for the requesting party's ability to conduct its business on the downstream market where the input is needed.[88]

An input or service is considered indispensable under the following conditions. First, when there are no alternative inputs or services available, no matter if they are less favourable. [89] For example, in the case of *Bronner*, the home-delivery distribution system was not considered indispensable for the sale of newspapers since alternative solutions to reach customers existed, although not as favourable, such as the sale in kiosks or delivery by post. Second, where there are physical, legal or economic obstacles hindering the requesting party from creating alternatives to the necessary input or service, independently or in cooperation with others.[90] An example of a legal obstacle is an intellectual property right such as a copyright, which was the case in *Magill*. The lack of feasibility to create an additional facility within a certain geographical region may constitute a physical obstacle for creating an alternative solution to an indispensable facility, for example a port which was the case in *Sealink/B&I – Holyhead*.[91]

[88] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 41. See also Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill)*, EU:C:1995:98, para. 53. T-504/93 *Tiercé Ladbroke v Commission*, EU:T:1997:84, para. 131.
[89] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 43. C-481/01 *IMS Health GmbH & Co v NDC Health GmbH & Co KG*, EU:C:2002:223, para. 28. See also the Guidance Paper, para. 83.
[90] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 44. C-481/01 *IMS Health GmbH & Co v NDC Health GmbH & Co KG*, EU:C:2002:223, para. 28. See also the Guidance Paper, para. 83.
[91] IV34/.174 – Commission decision of 11 June 1992, *Sealink/B&I – Holyhead*.

Regarding economic obstacles, the question is if the necessary investments required for creating an alternative solution to the requested input or service makes it uneconomic for an equally efficient competitor to enter the market.[92] In *Bronner*, the Court held that it was not enough to constitute an economic obstacle that the circulation of the requesting party's newspaper was too small to make a nationwide home-delivery system economically viable.[93] Instead, the Court held that the threshold for economic viability lies at a scale of production comparable to that of the undertaking in control of the existing input or service.[94] In other words, it is an objective assessment of the economic viability of creating an alternative solution, not a subjective one.

Another factor to consider when assessing obstacles to the creation of alternative solutions is time. Even if there are no physical, legal or economic obstacles to creating alternative solutions to an essential input, the time it would take to create one may determine whether or not a refused input is indispensable within the meaning of Article 102 TFEU.[95]

Finally, if an undertaking which have been refused access to a certain input or service, manages to enter and stay active on the market for which the input was allegedly indispensable, then the input or service was most likely not indispensable for the ability to compete on that market.[96] This obviously correlates with the next element of the legal test, namely the elimination of competition as a condition for deeming a refusal abusive, which is examined below.

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[92] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 640.
[93] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 45.
[94] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 46. C-481/01 *IMS Health GmbH & Co v NDC Health GmbH & Co KG*, EU:C:2002:223, para. 28.
[95] T-374/94 *European Night Services and Others v Commission*, EU:T:1998:198, para. 209.
[96] T-52/00 *Coe Clerici Logistics SpA v Commission*, EU:T:2003:168, para. 25. See also O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 641.

4.2.2 The Elimination of Competition

The second condition for determining if a refusal to deal constitutes an abuse of dominance is whether the refusal leads to the elimination of competition on the market for which the input is necessary. However, there are different expressions of this condition in the case law. In *Commercial Solvents*[97], the first case concerning a refusal to supply, the Court stated that a refusal to supply which entailed a risk of eliminating all competition *on part of the requesting customer* constituted an abuse of dominance within the meaning of Article 102 TFEU.[98] The same expression was also used by the Court in the later judgments of *CBEM*[99] and *Bronner*[100]. To require that competition is eliminated *on part of the requesting party* suggest that in order for a refusal to deal to constitute an abuse it is sufficient that a single competitor cannot compete without the requested input. This implies that an inefficient competitor could demand access to the inputs or services of a dominant undertaking simply because that particular competitor could not compete otherwise, despite the possible existence of other competitors capable of competing without such access.[101] Such an interpretation of the case law would mean that it is competitors that are to be protected rather than the competitive process which is not coherent with the aims of Article 102 TFEU in general nor with recent case law.[102]

The Court held a different position in *Magill*[103] wherein the Court interpreted previous case law as requiring the exclusion of all competition on the downstream market and thus omitting the part of 'on part of the

[97] Joined Cases 6 and 7/73 *Commercial Solvents v Commission*, EU:C:1974:18.
[98] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18, para. 25. (Emphasis added).
[99] C-311/84 *CBEM v CLT and IPB*, EU:C:1985:394, para. 26.
[100] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 41.
[101] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 647.
[102] C-413/14 *Intel v Commission*, para. 133–134. Support for this position is also found in the Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:264, para. 51.
[103] Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill)*, EU:C:1995:98.

requesting party'.[104] In *IMS Health*[105], the Court confirmed its position in *Magill.*[106] It would, however, be unreasonable to demand that all competition on the downstream market were eliminated before a refusal to deal could be considered as an abuse of dominance. For example, a dominant undertaking could tolerate the existence of a small competitor on the market in order to avoid being within the scope of the legal test.[107]

However, the General Court has in later judgments formulated the condition regarding the elimination of competition differently. In *Microsoft*, the Court of First Instance[108] held that it was not necessary that *all competition* on the market would be eliminated by the refusal to deal. Instead, the necessary condition was held to be that the refusal is likely to eliminate *all effective competition* on the downstream market.[109] The presence of competitors with a marginal presence on the market does not amount to the existence of an *effective competition.*[110] This position has been reiterated by the General Court in the later judgments of *Clearstream*[111] and *CEAHR*[112]. Moreover, according to the Guidance Paper, the Commission's position appears to be in line with that of the General Court in *Microsoft.*[113]

Accordingly, a reading of the case law as the law stands suggests that a refusal to deal must be likely to eliminate all effective competition on the relevant market in order for the refusal to constitute an abuse of dominance within the meaning of Article 102 TFEU.[114]

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[104] Joined Cases C-241/91 P and C-242/91 *RTE and ITP v Commission*, EU:C:1995:98 ('*Magill*'), para. 56.
[105] C-481/01 *IMS Health GmbH & Co v NDC Health GmbH & Co KG*, EU:C:2002:223.
[106] C-481/01 *IMS Health GmbH & Co v NDC Health GmbH & Co KG*, EU:C:2002:223, para. 38. It is worth noting that both *Magill* and *IMS Health* concerned IP rights.
[107] O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 647.
[108] Now referred to as 'the General Court'.
[109] T-201/04 *Microsoft v Commission* EU:T:2007:289, para. 563.
[110] T-201/04 *Microsoft v Commission* EU:T:2007:289, para. 563.
[111] T-301/04 *Clearstream v Commission* EU:T:2009:317, para. 148.
[112] T-712/14 *CEAHR v Commission* EU:T:2017:748, para. 91.
[113] The Guidance Paper, para. 81–85.
[114] See O'Donoghue & Padilla, *The Law and Economics of Article 102 TFEU* (3rd edition, 2020), p. 647. Whish & Bailey, *Competition Law* (9th edition, 2018), p. 723. Jones, Sufrin, & Dunne, *EU Competition Law*: *Text, Cases, And Materials* (7th edition, 2019), p. 499.

4.2.3 No Objective Justification

The possibility for undertakings to justify an otherwise abusive conduct by providing an objective justification is well-established in the case law and is not confined to instances of refusal to deal.[115] All types of conduct which may be considered abusive under Article 102 can potentially be justified by showing that the conduct in question is either objectively necessary[116] or that the conduct is resulting in countervailing efficiencies which compensates for the possibly anti-competitive effects of the conduct.[117] According to the Guidance Paper, a conduct may only be considered objectively necessary "on the basis of factors external to the dominant undertaking" and provides reasons of health and safety as a potential example of such factors.[118] In *Post Danmark I*, the Court established four conditions for when a conduct may be objectively justified due to efficiencies, i) the dominant undertaking needs to show that the likely efficiency gains outweigh any likely negative effects on competition and consumer welfare, ii) the efficiency gains are the result of the conduct in question, iii) the conduct is necessary for those gains, iv) the conduct will not eliminate effective competition, by removing all or most existing sources of actual or potential competition.[119]

It is for the dominant undertaking to raise a plea of objective justification and to support its plea with arguments and evidence.[120] The Commission must then show whether the evidence and arguments put forward by the undertaking is sufficient for an objective justification of the conduct in question.[121] This *modus operandi* has been criticized for, in effect, placing the burden of proof on the dominant undertaking to prove that their conduct is not abusive by showing that the anti-competitive effects of their allegedly

[115] C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, para. 40 and the referenced case-law.
[116] C-311/84 *CBEM v CLT and IPB*, EU:C:1985:394, para. 27.
[117] C-95/04 *British Airways v Commission*, EU:C:2007:166, para. 86.
[118] The Guidance Paper, para. 29.
[119] C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, para. 42. Compare the Guidance Paper, para. 30 and 89–90.
[120] T-201/04 *Microsoft v Commission* EU:T:2007:289, para. 1144.
[121] The Guidance Paper, para. 31.

abusive conduct is being outweighed by pro-competitive efficiencies.[122] Instead, it has been argued that this burden should be borne by the Commission at the stage of assessing whether or not the conduct is considered abusive in the first place.[123]

Regarding instances of refusal to deal, the legal test for determining when a refusal to deal constitutes an abuse of dominance requires that the refusal is likely to eliminate all effective competition, as we saw above.[124] Hence, if a refusal is not likely to eliminate all effective competition then the refusal is not abusive. Accordingly, the decisive factors in refusal to deal cases is whether the refused input is indispensable and if so, if the refusal is likely to eliminate all effective competition. If the answer is no to either of these questions, there cannot be an abusive refusal to deal. But if the answer is yes to both questions, and if the claim that the refusal is likely to eliminate all effective competition holds true, then any plea for an objective justification on the ground of efficiencies is meaningless due to the fourth condition of the test in *Post Danmark I*, mentioned above. To put it simply, when a refusal to deal is likely to eliminate all effective competition, there can be no objective justification based on efficiencies.

On the contrary, there may be other grounds for an objective justification. For example, a refusal to deal may be justified when the customer is a bad debtor or when the supply has become scarce and some customers therefore are being denied supplies. [125]

4.3 Limitations in Scope of the Legal Test

The legal test set out in *Bronner* does not apply to all situations involving a refusal to deal. This is evident from the case law concerning margin

[122] Akman, *The Concept of Abuse in EU Competition Law* (2012), p. 280–281.
[123] Akman, *The Concept of Abuse in EU Competition Law* (2012), p. 280–281.
[124] See sections 4.1–2.
[125] Whish & Bailey, *Competition Law* (9th edition, 2018), p. 714

squeeze.[126] A margin squeeze shares the same basic setting as a constructive refusal to deal and may very well be considered as one.[127] In an over-simplified manner, a margin squeeze can be described as a constructive refusal to deal which takes the form of asking a price high enough to ensure that any prospective buyer is deterred from accepting it. This phenomenon is most commonly seen in regulated markets where incumbent dominant undertakings are under a regulatory duty to deal with competitors and are therefore hindered from explicitly refusing to deal with rivals, such as in the sector of telecommunications in the EU.

According to the CJEU, a margin squeeze is an independent form of abuse, distinct from that of refusal to supply.[128] This means, *inter alia*, that the legal test established in *Bronner* for refusals to supply does not need to be met in order to establish abuse of dominance in cases of margin squeeze.[129] In *TeliaSonera*, the Court held that the legal test in *Bronner* do not necessarily apply when ”assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser”.[130]

In *Slovak Telekom*, a case which involved both margin squeeze and conduct which may amount to a constructive refusal to supply, the Commission interpreted the CJEU’s statement in *TeliaSonera* as saying that the legal test in *Bronner* do not apply to constructive refusals to supply if the conduct involves supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser.[131] On appeal, the General Court held that the wording in *TeliaSonera suggested* that it did not

[126] For more information regarding the concept of margin squeeze, see Whish & Bailey, *Competition Law* (9th edition, 2018), p. 771.
[127] This is evident from the Commission’s position in the Guidance Paper (para. 80), where it treats margin squeezes as a form of refusal to deal in contrast to the position of the Court of Justice.
[128] C-280/08 *Deutsche Telekom v Commission*, EU:C:2010:603, para. 183. C-52/09, *Konkurrensverket v TeliaSonera*, EU:C:2011:83, para. 31.
[129] C-52/09, *Konkurrensverket v TeliaSonera*, EU:C:2011:83, para. 55.
[130] C-52/09, *Konkurrensverket v TeliaSonera*, EU:C:2011:83, para. 55.
[131] AT.39523 *Slovak Telekom*, para. 365-366.

solely take aim at margin squeezes but also other types of abuses, which suggests that conduct other than margin squeeze, such as constructive refusals to deal, may also be exempted from the strict legal test established in *Bronner*. [132]

The GC did, however, hold that the indispensability condition of the legal test in *Bronner* did not need to be met because of the regulatory framework that was in place which already placed a duty to deal upon Slovak Telekom.[133] Moreover, in his Opinion in *Slovak Telekom*, AG Saugmandsgaard argues that a distinction should be made between 'refusals to make available' and 'unfair contract terms' and that the legal test in *Bronner* only should apply to the former.[134] He further argues that the concept of 'implicit' refusals to deal should be rejected by the Court in relation to Article 102 TFEU.[135]

In summary, and in accordance with the case law mentioned above, it is clear that the legal test in *Bronner* is irrelevant when determining whether conduct which involves a margin squeeze constitute an abuse of dominance within the meaning of Article 102 TFEU. Further, the indispensability condition of the legal test in *Bronner* is most likely irrelevant in scenarios where a regulatory framework exists which imposes a duty to deal on the dominant market participants. Moreover, a generous reading of the GC's ruling in *Slovak Telekom* suggests that it is possible that the legal test in *Bronner* do not apply to 'constructive' or 'implicit' refusals to deal or to the imposition of unfair trading terms by dominant undertakings. The forthcoming ruling by the Court will hopefully bring clarity to these matters.

[132] T-851/14 *Slovak Telekom v Commission*, EU:T:2018:929, para. 126.
[133] T-851/14 *Slovak Telekom v Commission*, EU:T:2018:929, para. 121.
[134] Opinion of AG Saugmandsgaard ØE in Joined Cases C-152/19 and C-165/19 *Deutsche Telekom AG and Slovak Telekom a.s v Commission*, EU:C:2020:678, para. 95
[135] Ibid. para. 96.

5 Case Study – Google Shopping

In the *Google Shopping*[136] decision, Google was found guilty of abuse of dominance and therefore guilty of infringing Article 102 TFEU. According to the decision, Google abused its dominance in the market for general search services by displaying, positioning and ranking its comparison shopping service more favourably than competing comparison shopping services in its general search results pages.[137] This conduct lead to a decrease in the amount of traffic generated from Google's general search results pages to competing comparison shopping services, and, conversely, an increase in the amount of traffic generated towards Google's own comparison shopping service. [138] As a result, Google was fined approximately EUR 2.4 billion[139] and was ordered by the Commission to bring its abuse to an end by ensuring that it treat its own comparison shopping service and competing comparison shopping services equally regarding the display, positioning and ranking on its general search results pages.[140]

In the following sections the decision will get examined more closely, starting with; i) a brief description of the Commission's findings regarding the relevant markets and the position of dominance in section 5.1, ii) a description of Google's conduct and its allegedly anti-competitive effects in section 5.2, iii) a description of Google's arguments as to why its conduct should not be considered abusive and the Commission's response to those arguments is addressed in section 5.3, iv) finally, a brief description of the remedy is presented in section 5.4.

[136] AT.39740 *Google Search (Shopping)*, 27 June 2017. Hereafter referred to as '*Google Shopping'*. The Decision is under appeal to the General Court, Case T-612/17 *Google and Alphabet v Commission*.
[137] AT.39740 *Google Search (Shopping)*, section 7.2.
[138] AT.39740 *Google Search (Shopping)*, section 7.2.3, para. 452, 462.
[139] AT.39740 *Google Search (Shopping)*, para. 754.
[140] AT.39740 *Google Search (Shopping)*, paras. 697–699.

5.1 Relevant Market and Dominant Position

While recognizing the importance and relevance of how the relevant market and the position of dominance is being determined in a case concerning abuse of dominance, these factors will not be examined in detail here, since they are not the focus of this paper. However, a brief description of how the Commission reached its conclusions about the relevant markets and the position of dominance is presented below, in sections 5.1.1 and 5.1.2.

5.1.1 The Relevant Product Markets

In their investigation, the Commission found the relevant product markets to be the market for *general search services* and the related market for *comparison shopping services.*[141] The Commission concluded that there is a distinct market for providing general search services based on the following reasons.[142] First, it's an economic activity since the users of the service are, *de facto*, paying for it, albeit with data instead of money and this data is then used to improve the search engine so that it can show more relevant search results as well as more relevant advertisement.[143] Second, there is "limited demand side substitutability with other online services"[144], meaning that even though there are other options for exploring the internet, such as social media, content sites and specialised search services, these alternatives are not well-suited for replacing the general search services offered by firms like Google and Bing.[145] The market for comparison shopping services is considered by the Commission to be a distinct market because they too face limited substitutability and cannot easily be replaced by; i) specialised search services (for example for flights, restaurants and hotels), ii) online search advertising platforms, such as Google's search engine, iii) online retailers, such as Zalando or Walmart, iv) merchant platforms such as

[141] AT.39740 *Google Search (Shopping),* para. 154..
[142] AT.39740 *Google Search (Shopping),* para. 156.
[143] AT.39740 *Google Search (Shopping),* para. 158.
[144] AT.39740 *Google Search (Shopping),* section 5.2.1.2.
[145] AT.39740 *Google Search (Shopping),* para. 161–183.

Amazon Marketplace and, v) offline comparison shopping tools.[146] The fact that these two markets were considered to be distinct, albeit related, markets are of crucial importance for the Commission's decision, since the infringement of Article 102 TFEU is based upon the presumption that Google abused their dominance in one market to gain advantages in another.

5.1.2 Dominant position

Google was found by the Commission to hold a dominate position in the market for general search services. This was no surprise considering that Google, as of 2016, held a market share of above 90% in almost all of the national markets that were included in the investigation.[147] However, the Commission's conclusions regarding Google's dominance was not only based upon Google's market share but also upon other circumstances.[148] Those circumstances being the substantial barriers to entry in the relevant markets,[149] the low rates of so-called 'multihoming' in the market for search engines, which means that users don't tend to use more than one search engine when browsing the internet,[150] and the users' lack of countervailing buyer power towards Google.[151]

5.2 Google's conduct and its effects on competition

Google's conduct was considered abusive because "it constitutes a practice falling outside the scope of competition on the merits"[152], with the 'practice' being the way in which Google was applying the algorithms in their general search services, so that the traffic towards competing comparison shopping services was decreased, while at the same time the traffic from Google's general search results pages towards Google's own comparison shopping

[146] AT.39740 *Google Search (Shopping)*, para. 192. For more details, see paras. 193–250.
[147] AT.39740 *Google Search (Shopping)*, para. 271 and 280. For further details regarding the Commission's conclusions about Google's market share in the general search market, see paras. 273–284.
[148] AT.39740 *Google Search (Shopping)*, paras. 272.
[149] AT.39740 *Google Search (Shopping)*, paras. 285-305.
[150] AT.39740 *Google Search (Shopping)*, paras. 306-315.
[151] AT.39740 *Google Search (Shopping)*, paras. 316-318.
[152] AT.39740 *Google Search (Shopping)*, para. 341.

service was increased.[153] This conduct was, according to the Commission, "capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services and general search services.".[154]

5.2.1 The Conduct and its Effects

Google increased the traffic from its general search engine towards its own comparison shopping service at the expense of its rivalling comparison shopping services by *displaying*, *positioning* and *ranking* its own service more favourably in the result pages of its general search engine.[155]

The ranking of the comparison shopping services in the general search results was influenced by how the algorithms used in Google's general search engine were being applied.[156] The ranking of rivalling comparison shopping services was prone to get demoted in Google's general search results pages while its own comparison shopping service was not treated in the same way, even though they shared a lot of the characteristics that made the rivalling comparison shopping services prone to demotion.[157] As a consequence, Google's own comparison shopping service were positioned on top of the first page of Google's general search results while competing comparison shopping services were positioned, on average, on page four of the general search results.[158]

The implications of a high versus low ranking in Google's general search results on the amount of traffic generated can hardly be overstated, as shown by the Commission's analysis of user behaviour. The analysis established that the first three to five results on the first page of Google's general search results generate "significant traffic" and that the first ten results on the first page account for approximately 95% of the total amount of traffic

[153] AT.39740 *Google Search (Shopping)*, paras. 341, 462, 489.
[154] AT.39740 *Google Search (Shopping)*, para. 341.
[155] AT.39740 *Google Search (Shopping)*, section 7.2, para. 341, 344.
[156] AT.39740 *Google Search (Shopping)*, para. 344, 514.
[157] AT.39740 *Google Search (Shopping)*, paras. 344, 378–380, 514.
[158] AT.39740 *Google Search (Shopping)*, paras. 370, 379, 385.

generated.[159] In other words, if a firm is not found on the first page of the search results, it is unlikely to receive any significant amount of traffic.

Besides being treated differently regarding the *ranking* in Google's general search results, competing comparison shopping services were also being *displayed* and *positioned* differently compared to Google's own shopping service.[160] Google's own shopping service was prominently displayed in a box above the general search results (the classic blue links), often with pictures of the products that the end-users were searching for, whereas competing shopping services were limited to be visible in the general search results only.[161] The more graphic format, which was available only to Google's own shopping service, increased the 'click-through rates'[162] and thus generated more traffic.[163] Consequently, the rivalling comparison shopping services experienced a decrease in traffic from Google's search engine as a result of Google's changes to their algorithms and their differentiated way of displaying and positioning the comparison shopping services.[164] Simultaneously, Google's own shopping service experienced an increase in traffic for the same reasons.[165]

User traffic, according to the Commission, is of special importance for comparison shopping services' ability to compete.[166] The more traffic a comparison shopping service receives, the more likely it is that merchants wants to participate in the service, and with more merchants there is more product offerings, which in turn attracts more users to the service.[167] Traffic

[159] AT.39740 *Google Search (Shopping)*, paras. 454, 457.
[160] AT.39740 *Google Search (Shopping)*, para. 397.
[161] AT.39740 *Google Search (Shopping)*, paras. 344, 371, 397.
[162] Click-through rates is a term for describing the amount of clicks a certain link gets compared to the number of users exposed to it.
[163] AT.39740 *Google Search (Shopping)*, paras. 372, 374, 397–398. These findings were supported by eye-tracking studies and research, see paras. 375–377, 400–401.
[164] AT.39740 *Google Search (Shopping)*, paras. 462, 464.
[165] AT.39740 *Google Search (Shopping)*, para. 372–377, 489–490. For an overview of the amount of traffic generated towards Google Shopping as compared to rivalling comparison shopping services, see paras. 498–501.
[166] AT.39740 *Google Search (Shopping)*, para. 444.
[167] This is known as *indirect network effects*. See Niels G, Jenkins H & Kavanagh J, *Economics for Competition Lawyers* (2nd edition, 2016), p. 113–115.

generates, *inter alia*, revenue and user reviews. It also helps to improve the relevance of the services offered by comparison shopping services by 'feeding' their algorithms used for machine learning.[168] According to the Commission, the loss of traffic resulting from Google's conduct "cannot be effectively replaced by other sources currently available to comparison shopping services".[169] This could be interpreted as saying that Google's conduct, *de facto*, circumscribes the ability of rivalling shopping services to compete effectively with Google's own shopping service.

Accordingly, Google's conduct appears to be affecting competing comparison services where it hurts the most, namely in the amount of traffic generated. Google's own shopping service was getting ahead of its competitors in the market for comparison shopping services thanks to actions taken by Google in the market for general search services, which it dominates.

5.2.2 The Anti-Competitive Effects

According to the Commission, Google's conduct, as described above, "is capable of having, or likely to have, anti-competitive effects in the national markets for comparison shopping services".[170] Google's conduct could lead to the foreclosure of competing shopping services with "higher fees for merchant, higher prices for consumers and less innovation" as a potential result.[171] Moreover, the Commission suggests that Google's conduct would reduce competing comparison shopping services' incentives to invest in innovation since they, presumably, only would invest if they could reasonably except a fair return on the investment in the shape of traffic volume.[172] Also, if the competing comparison shopping services instead would rely on paid services such as ads in order to get more traffic, that would mean less money to spend on innovation.[173] If the competitors would

[168] AT.39740 *Google Search (Shopping)*, paras. 446–450.
[169] AT.39740 *Google Search (Shopping)*, paras. 539, 591.
[170] AT.39740 *Google Search (Shopping)*, para. 592.
[171] AT.39740 *Google Search (Shopping)*, para. 593.
[172] AT.39740 *Google Search (Shopping)*, para. 595.
[173] AT.39740 *Google Search (Shopping)*, para. 595.

stop innovating, the pressure on Google to innovate would decrease, and thus leave the market with less overall innovation.[174]

The Commission further suggests that Google's conduct might reduce the "ability of consumers to access the most relevant comparison shopping services."[175] Users generally click on the highest ranked results, believing that they are the most relevant for their search query, but since the results on Google's general search pages are being ranked differently depending on if it is Google's shopping service or a rivalling service that offers the queried product, users might not always get access to the most relevant results.[176] The Commission also takes issue with the fact that Google did not inform its users that search results from Google's comparison shopping service, which was shown on the first page of the general search results pages, was not based on the same ranking mechanisms as the other results on that page.[177] While the Commission acknowledged that Google had marked the results as sponsored, it claimed that only "the most knowledgeable users" would understand that they are ranked differently.[178]

In conclusion, the Commission claims that the success of Google's comparison shopping service is not based on the merits of the product itself, but instead is attributable to the way Google is using its dominant position in the general search market to steer traffic towards its comparison shopping service and away from its competitors. Thereby, Google's conduct "risks undermining the competitive structure of the national markets for comparison shopping services.".[179]

[174] AT.39740 *Google Search (Shopping)*, para. 596.
[175] AT.39740 *Google Search (Shopping)*, para. 597.
[176] AT.39740 *Google Search (Shopping)*, para. 598. Concerning ranking, see section 4.3.1.
[177] AT.39740 *Google Search (Shopping)*, para. 599.
[178] AT.39740 *Google Search (Shopping)*, para. 599.
[179] AT.39740 *Google Search (Shopping)*, para. 600.

5.3 Google's Objections to the Commission's finding of abuse and the Commisions Response

5.3.1 Google's objections

Google objected to the Commission's decision and argued that their conduct did not constitute an abuse of dominance. [180] Google objections consisted of three main arguments as to why their conduct should not be considered as an abuse of dominance.

First, Google argued that the Commission is imposing a duty on it to promote its competitors by giving rival comparison shopping services access to a large proportion of its general search results pages. Such an obligation is, according to Google, only be relevant when a dominate company is refusing to supply a product or service which is deemed indispensable for the ability to compete in a related market, as held by the CJEU in *Bronner*.[181] Google argues that it is possible to compete on the market for comparison shopping services without having access to a proportion of Google's general search results pages.[182] Therefore, having access to its general search results pages cannot be held to be indispensable. Thus, Google's conduct cannot be found to constitute an abuse of dominance.

Second, Google claims that "there is no precedent for characterising the Conduct as an abuse" and argues that even if Article 102 TFEU does not include an exhaustive list of abuses, any new type of abuses "must be consistent with the legal framework of Article 102 TFEU" and that "rules must be knowable in advance".[183] Third, Google argues that displaying products above the general search results is nothing but product design

[180] AT.39740 *Google Search (Shopping)*, para. 644.
[181] C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint*, EU:C:1998:569, para. 41.
[182] AT.39740 *Google Search (Shopping)*, para. 645.
[183] AT.39740 *Google Search (Shopping)*, para. 646.

improvements and merely competition on the merits which can only be considered abusive in "exceptional circumstances".[184]

5.3.2 The Commission's response to Google Objections

The Commission relied on the case law established in *Tetra Pak*[185] and *TeliaSonera*[186] when they rejected Google's arguments regarding a lack of precedent and claimed that it is a well-established principle that conduct where an undertaking is leveraging its dominance from one market into another can amount to abuse.[187] Google's argument about being obligated to promote competitors was also rejected by the Commission which stated that Google's conduct does not involve "a passive refusal" to give competitors access to a proportion of their general search pages, instead the abuse concerns Google's active behaviour in promoting its own comparison shopping service above its competitors, by applying different ranking and display mechanisms.[188]

Regarding Google's reference to *Bronner* and the criteria established therein for determining when a refusal to supply constitutes an abuse of dominance, the Commission referenced the Courts ruling in *Unilever Bestfoods*[189] and stated that the criteria in *Bronner* lacked relevance for situations where the remedy for abusive conduct did not contain an obligation for the abusive undertaking to "*transfer an asset or enter into agreements with persons with whom it has not chosen to contract".*[190] Since the decision obliges Google to *refrain* from treating its own comparison shopping service any differently than it does competitors, there is no duty for Google to actively do anything, and therefore the refusal to supply doctrine is irrelevant, according to the Commission.

[184] AT.39740 *Google Search (Shopping),* para. 647.
[185] C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436, para. 25.
[186] C-52/09, *Konkurrensverket v TeliaSonera*, EU:C:2011:83, para. 85.
[187] AT.39740 *Google Search (Shopping),* paras. 649.
[188] AT.39740 *Google Search (Shopping),* paras. 379, 650.
[189] C-552/03 *Unilever Bestfoods Ireland v Commission*, EU:C:2006:626.
[190] C-552/03 *Unilever Bestfoods Ireland v Commission*, EU:C:2006:626, para. 137.
AT.39740 *Google Search (Shopping),* para. 651.

Lastly, the Commission concludes that 'product design improvements' are to be assessed under the same legal standard as is used when determining if an undertaking has extended their dominance from one market into another.[191] The next section will assess whether there is any merit to Google's objection concerning the necessity to have the *Bronner* criteria fulfilled in order to establish an abuse and the subsequent response from the Commission.

5.4 The Remedy

The Commission ordered Google to stop the favourable display, positioning and ranking of its comparison shopping service and ordered that Google must treat rival comparison shopping services and its own comparison shopping service equally within its general search results pages.[192] The Commission left it open for Google to decide how they wished to comply with the decision.[193] However, no matter how Google wished to comply with the decision, the measure taken must ensure that it subjects Google's own comparison shopping service and competing comparison shopping services to the same underlying processes and methods for the positioning and display in Google's general search results pages.[194] Such processes and methods should include all elements that have an impact on the visibility, triggering, ranking or graphical format of a search result in Google's general search results pages.[195]

[191] AT.39740 *Google Search (Shopping)*, paras. 652.
[192] AT.39740 *Google Search (Shopping)*, paras. 697, 699.
[193] AT.39740 *Google Search (Shopping)*, paras. 698.
[194] AT.39740 *Google Search (Shopping)*, paras. 700.
[195] AT.39740 *Google Search (Shopping)*, paras. 700.

6 An Assessment of the Decision in *Google Shopping*

This section analyses the Commission's decision in *Google Shopping*. First, in section 6.1, the paper addresses the Commission's claim that the extension of a dominant position in one market into another would constitute a well-established, independent form of abuse. Second, the Commission's argument that the legal test in *Bronner* is irrelevant because of the nature of the remedy is examined and analysed.

The question whether the legal test in *Bronner* should apply in order for the conduct to constitute an abuse of dominance is of particular interest for this paper and will be addressed below.

6.1 Abuse by leveraging market power

In the decision, the Commission argues that it can constitute an abuse if an undertaking is extending its dominant position in one market into another adjacent market.[196] The Commission goes as far as stating that such conduct "constitutes a well-established, independent, form of abuse falling outside the scope of competition on the merits". The Commission makes reference to a number of cases for this statement, namely *CBEM, Irish Sugar, Microsoft, TeliaSonera* and *TetraPak*.[197] Although, all of these cases involved the leveraging of a dominant position from one market into another adjacent one, they also involved a specific and established form of abuse which caused the leveraging in question to constitute an abuse of dominance. The case of *CBEM*, which is one of the cases that the ruling in *Bronner* is based upon, involved the termination of access to a service which was considered *indispensable* for the ability to compete on a downstream market.[198] In *Irish Sugar*, the leveraging involved the use of

[196] AT.39740 *Google Search (Shopping)*, paras. 649.
[197] AT.39740 *Google Search (Shopping)*, paras. 334.
[198] C-311/84 *CBEM v CLT and IPB*, EU:C:1985:394, para. 26.

discriminatory price rebates.[199] The ruling in *TeliaSonera* concerned a margin squeeze.[200]In *Tetra Pak,* the judgment concerned predatory pricing.[201] In *Microsoft,* the ruling concerned two different types of abuse, a refusal to share interoperability information with competitors as well as a tying abuse concerning Windows Media Player.[202]

Accordingly, it is indeed a well-established form of abuse to leverage a dominant position in one market into another one. But that only tells half the story, since other distinct forms of abuse is present in all of the cases that the Commission made reference to. The applicable legal test for determining abuse in a leveraging scenario depends on what type of abuse it is. If, for example, the abuse concerns of a refusal to deal, then the legal test in *Bronner* would apply.

It is worth noting that even if a certain conduct does not fit within pre-existing categories of abuse it is not absolved from the possibility of being abusive because of the non-exhaustive nature of Article 102 TFEU.[203] However, I nonetheless find the Commission's position, that the extension of a dominant position constitutes a well-established, independent form of abuse, to lack clear support in the case law, especially in the case law that the Commission made reference to. To the contrary, I find that the cited case law provide support for Google's claim that there can be no finding of abuse unless the criteria in *Bronner* are met, if one considers the circumstances of the case.

6.2 The Significance of the Remedy

The Commission argues that the *Bronner* criteria are irrelevant because of the nature of the remedy in the decision.[204] The Commission found support

[199] T-228/97 *Irish Sugar v Commission*, EU:C:1999:246, para. 162.
[200] C-52/09, *Konkurrensverket v TeliaSonera*, EU:C:2011:83, para. 30.
[201] C-333/94 P, *Tetra Pak v Commission*, EU:C:1996:436, para. 44.
[202] T-201/04 *Microsoft v Commission* EU:T:2007:289, para. 1344.
[203] See section 2.4.
[204] As mentioned in section 5.3.2.

for this position in *Unilever Bestfoods*, in which the Court held that the criteria in *Bronner* does not apply when the remedy does not involve an obligation on the dominant undertaking to "transfer an asset or to enter into agreements with persons with whom it has not chosen to contract".[205] This position is problematic for two reasons. First, it is problematic on a general level that the remedy can be determinative for deciding what legal test to apply in order to determine if a conduct amounts to an abuse in the first place.[206] In a natural order, it should first be determined whether or not the conduct is abusive and first thereafter decide what remedy to apply in order to stop the infringement. However, if one accepts that the remedy can determine whether a certain legal test applies or not, there are still issues with this approach in the present case of *Google Shopping*.

According to the decision, the remedy is simply a cease-and-desist order, ordering Google to stop treating its own comparison shopping service favourably. However, in order to comply with the decision and treat competing rival services equally to its own, Google must either refrain from displaying and positioning its comparison shopping service on its general search results pages altogether or enter into agreements with rival comparison shopping services in order to receive a fair compensation for providing them with the prominent display and positioning of their services on Google's general search results pages.

In fact, Google's solution has been to divest Google Shopping from Google Search and to sell access to its 'Shopping Unit' through an auction-based mechanism.[207] This, of course, entails entering into agreements with persons in has not chosen to contract if one considers that Google would not have changed its conduct unless the Commission had obliged it to do so. Thus,

[205] C-552/03 *Unilever Bestfoods Ireland v Commission*, EU:C:2006:626, para. 137.
[206] See also Jones, Sufrin, & Dunne, *EU Competition Law*: *Text, Cases, And Materials* (7th edition, 2019), page 531–532.
[207] Bo Vesterdorf, Kyriakos Fountoukakos, An Appraisal of the Remedy in the Commission's *Google Search (Shopping)* Decision and a Guide to its Interpretation in Light of an Analytical Reading of the Case Law, *Journal of European Competition Law & Practice*, Volume 9, Issue 1, January 2018, Pages 3–18

the remedy imposed by the Commission can therefore be said to be forcing Google to change its business model and to enter into agreements with rivals. This should have made the legal test in *Bronner* applicable since the remedy involved an obligation on Google to enter into agreements with persons it has not chosen to contract, in line with the ruling in *Unilever Bestfoods* mentioned above.

7 Conclusion / Analysis

This paper finds that, as a general rule, a dominant undertaking may only come under a duty to deal if the conditions of the legal test established in *Bronner* are met. First of all, there must be an explicit or implicit or constructive refusal to deal with competitors on a downstream market. The input or service that are being denied rivals must also be indispensable for the ability to compete on that downstream market. Indispensable meaning that there are no actual or potential alternatives or substitutes to the input or service. If the input is not found to be indispensable, the conditions of the legal test are not fulfilled and there can be no duty to supply. However, even if the input is indeed indispensable, the refusal to provide the input or service must be capable of eliminating all effective competition on the downstream market. This condition is naturally strongly correlated with the indispensability requirement since it is only when an input is truly indispensable that the refusal of it could eliminate all effective competition. Furthermore, even if there would a refusal of an input or service that is indispensable and capable of eliminating all effective competition, a dominant undertaking could still choose to refuse to deal with rivals if there exists an objective justification for doing so, such as a lack of capacity to fulfil more orders.

However, as the paper have shown, there are scenarios which involve conduct akin to a refusal to deal which does not require the conditions of the legal test in *Bronner* to be met in order to constitute an abuse of dominance. Namely, instances of margin squeeze. So much is clear from the case law. It is, on the other hand, less clear if the legal test in *Bronner* applies when it comes to constructive refusals to deal which involve unfair trading terms, as discussed in relation to the case of Slovak Telekom and the opinion of AG Saugmandsgaard above.

Of greater significance, is the Commission's decision in *Google Shopping*. This case could, if upheld by the General Court, mean that the applicability of the legal test in *Bronner* is dependent on how the Commission is labelling their remedies to alleged infringements of Article 102 TFEU. As shown above, a remedy which is formulated as a negative obligation, that is, a duty to refrain from doing something, means that the legal test in *Bronner* becomes irrelevant. This would be the case even when the only way of refraining from the allegedly abusive conduct would be to engage with rivals and thus enter into agreements with them. The applicability of the legal test in *Bronner* would rely on the form or label of the remedy rather than what the remedy in substance is requiring from the undertaking in question. By imposing duties which *in form* does not require the dominant undertaking to do anything but which *in substance* requires the undertaking to deal with competitors would be to establish a mechanism through which the Commission could avoid the legal test in *Bronner,* simply by tinkering with how it is labelling the remedy. This would, in my opinion, be a very bad idea, since it would, in essence, be up to the Commission and not the Court to decide what legal test to apply for determining if a conduct constitutes an abuse of dominance or not. Nevertheless, it is with great excitement I am looking forward to the forthcoming judgments by the General Court in *Google Shopping* and by the Court of Justice in *Slovak Telekom*. These rulings will hopefully bring further clarity regarding the scope of the legal test in *Bronner*.

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