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The future of refusals to deal and margin squeezes in the face of sector-specific regulation*

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ABSTRACT

The relationship between refusals to deal and margin squeezes in EU competition law is complex and controversial. Although the underlying competition concerns are often similar, the legal standards to hold the two practices abusive under Article 102 TFEU are different – unlike the situation in US antitrust law. The chapter submits that the distinction between refusals to deal and margin squeezes is increasingly difficult to make in relation to newer practices, such as self-preferencing and preferential access to data. Instead of letting the applicable legal test under Article 102 TFEU depend on whether the conduct qualifies as an outright or constructive refusal to deal, the chapter suggests using the existence of a regulatory duty as the main determining factor for whether the strict *Bronner* criteria apply. To provide a more nuanced approach towards the assessment of indispensability, the chapter proposes to tailor its application to the market situation at stake.

KEYWORDS

Indispensability; essential facilities doctrine; abuse of dominance; self-preferencing; sector-specific regulation; Digital Markets Act

I. INTRODUCTION

The concepts of refusal to deal and margin squeeze have played an important role in competition enforcement in the 1990s and 2000s. Various cases against these types of behaviour have taken place on both sides of the Atlantic in this period.[1] While refusal to deal and margin squeeze cases were traditionally targeting physical infrastructures like bridges and ports as well as old economy industries like telecoms, energy and postal services, attention has now shifted towards questions about whether digital platforms and data can be subject to refusal to deal and margin squeeze claims. Even though this is

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[1] See, in particular, the landmark US *Trinko* and EU *Microsoft* case: *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP* 540 US 398 (2004) and Case T-201/04 *Microsoft Corp. v Commission of the European Communities* EU:T:2007:289.

indeed a frequently discussed topic in scholarship,[2] the predominant focus of the applicable legal standard in recent EU competition cases regarding digital platforms lies elsewhere, namely on theories of harm such as discrimination and self-preferencing.[3] This raises questions about how these newer theories of harm relate to the existing concepts of refusal to deal and margin squeeze, especially now that the EU Courts have clarified the relationship between these concepts in judgments involving access to telecoms and railway infrastructures.[4]

The distinction between outright and constructive refusals to deal lies at the heart of the relationship between the concepts of refusals to deal and margin squeezes. An outright refusal to deal occurs when a dominant firm does not grant access to the requested input at all. In case of a constructive refusal to deal, the dominant firm provides access to the requested input, but does so under conditions that, in fact, amount to a refusal to grant access. The extent of access offered by dominant firms in constructive refusal to deal cases does not allow for effective competition. Margin squeezes are the main example of constructive refusals to deal, where a dominant firm's conduct in practice leads to a refusal to deal and excludes competitors from the market because it leaves an insufficient margin between the prices charged in the upstream and downstream markets. Despite the fact that the two types of behaviour have an equivalent effect, the legal standards to hold margin squeezes and refusals to deal abusive under Article 102 TFEU are different – unlike the situation in US antitrust law where margin squeezes do not form a cause of antitrust harm independent of refusals to deal.[5]

In accordance with the case law, an outright refusal to deal is abusive under Article 102 TFEU only in exceptional circumstances, namely if it: (1) relates to an indispensable input; (2) excludes effective competition on a downstream market; (3) prevents the emergence of a new product (only if the input is protected by intellectual property law or trade secrets); and (4) cannot be objectively justified.[6] However, these conditions, often referred to as the *Bronner* criteria – after the case from which they originate – do not apply to margin squeezes and other constructive refusals to deal.[7] This means that margin squeezes can amount to an abuse of dominance even if the input is not indispensable and the dominant firm is not subject to a duty to deal. EU competition law and US antitrust law diverge on this issue, as Section 2 of the Sherman Act requires an antitrust duty to deal as a condition for establishing

[2] See, for instance, Giuseppe Colangelo and Mariateresa Maggiolino, 'Big data as misleading facilities' (2017) 13 European Competition Journal 249; Marixenia Davilla, 'Is Big Data a Different Kind of Animal? The Treatment of Big Data Under the EU Competition Rules' (2017) 8 Journal of European Competition Law and Practice 370; Thomas Hoppner, 'Duty to Treat Downstream Rivals Equally: (Merely) a Natural Remedy to Google's Monopoly Leveraging Abuse' (2017) 1 European Competition and Regulatory Law Review 208; Édouard Bruc, 'Data as an essential facility in European law: how to define the "target" market and divert the data pipeline?' (2019) 15 European Competition Journal 177; Nikolas Guggenberger, 'Essential platforms' (2021) 24 Stanford Technology Law Review 237.

[3] *Google Search (Shopping)* (Case AT.39740) Commission Decision [2018] OJ C 9/11; European Commission, 'Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices' (Press release, 10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 10 May 2021; European Commission, 'Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook' (Press release, 4 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848> accessed 4 June 2021.

[4] Case T-814/17 *Lietuvos geležinkeliai AB v European Commission (Lithuanian Railways)* ECLI:EU:T:2020:545; Case C 165/19P *Slovak Telekom, a.s. v European Commission* ECLI:EU:C:2021:239.

[5] See, for instance, Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2011:83 and *Pacific Bell Telephone Co. v. linkLine Communications, Inc. (linkLine)* 555 US 438 (2009).

[6] 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* ECLI:EU:C:1998:569; Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* ECLI:EU:C:2004:257; *Microsoft* (n 1).

[7] As made clear by the CoJ in *TeliaSonera* (n 5).

liability for a margin squeeze.[8] Discussions about the relationship between refusals to deal and margin squeezes are becoming more prominent as newer theories of harm relating to self-preferencing have been created in EU competition law, which could be interpreted as constituting constructive refusals to deal.

Against this background, this chapter explores what legal standards should apply to variations of refusals to deal in future EU competition enforcement. Insights are drawn from the literature, decisional practice, and case law to establish what legal conditions are capable of addressing the relevant competition concerns. References to US antitrust law are included by way of comparison. The chapter makes two findings.

A first finding is that the distinction made in the case law between outright and constructive refusals to deal is not a workable and reliable way to determine whether the *Bronner* criteria should be applied, as the distinction often may be a matter of degree rather than black-or-white. Instead, the chapter argues that the existence of a regulatory duty under sector-specific regulation is a better indicator for deciding whether the *Bronner* criteria constitute the legal test for the assessment under Article 102 TFEU. With the entry into force of the Digital Markets Act (DMA), this indicator will also become of relevance for assessing the behaviour of gatekeeping digital platforms. The DMA complements the existing EU competition framework by regulatory duties mandating access to data and essential platform services such as app stores.[9] Another question is whether the right to data portability of the General Data Protection Regulation (GDPR)[10] can constitute such a sector-specific regulatory duty when a competition case relates to restrictions of the portability of personal data. Sector-specific data access regimes also exist in the payment and energy sectors.[11] Under the approach proposed in this chapter, their existence will have the effect that there is no need to apply the *Bronner* criteria to assess the abusive nature of refusals to give access to data under Article 102 TFEU. The complementary relationship between sector-specific regulation and competition enforcement is a feature of the EU system and differs from the situation in the US, where sector-specific regulation is considered to be a substitute for rather than complement to US antitrust enforcement.

A second finding is that a nuanced approach is necessary to assess situations where the *Bronner* criteria are applicable. As the most debated condition, the indispensability requirement should not be construed as carrying such a high threshold that it can rarely be met in practice, nor should it be interpreted in a way that facilitates access to inputs that are not indispensable but merely 'convenient' for rivals to compete.[12] The *Bronner* criteria have already been interpreted differently throughout the years depending on the factual circumstances at stake. This illustrates that the standards used for holding an input indispensable for competition can be tailored to the relevant market situation. To revitalize antitrust liability for refusals to deal in the US, a similar approach can be taken.

[8] *linkLine* (n 5).

[9] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] COM(2020) 842 final, art. 6(h), (i), (j) and (k) regarding, respectively, data portability for business users and end-users, continuous and real-time access for business users to data generated in the context of the use of platform services, access for third-party search engine providers to ranking, query, click and view data, and FRAND conditions for business users to access app stores.

[10] Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016] OJ L 119/1, art. 20.

[11] Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market (PSD2) [2015] OJ L 337/35, art. 66 and 67; Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity (Electricity Directive) [2019] OJ L 158/125, art. 23(1).

[12] The notion of 'convenient facilities' was used to criticize the lowering of the standards for holding refusals to deal abusive in the *Microsoft* case. See Derek Ridyard, 'Compulsory access under EC competition law - a new doctrine of "convenient facilities" and the case for price regulation' (2004) 25 European Competition Law Review 669.

Before elaborating on these two findings, Section II compares the case law in the EU and the US regarding the relationship between refusals to deal and margin squeezes. Section III explores the position of self-preferencing theories of harm based on an analysis of the *Google Shopping* case. Section IV discusses the relevance of the existence of a regulatory duty to determine whether the *Bronner* criteria apply as the legal test under Article 102 TFEU. Section V explores how the indispensability requirement can be interpreted in line with the market situation at stake in refusal to deal cases. Section VI concludes.

II. THE RELATIONSHIP BETWEEN REFUSALS TO DEAL AND MARGIN SQUEEZES: AN EU-US COMPARISON

A. The EU perspective

A dominant firm can engage in a margin squeeze either by setting a very high price for competitors to access the input in the upstream market or by setting a very low price for the service provided to consumers in the downstream market.[13] In *Deutsche Telekom*, the Court of Justice (CoJ) made clear that a margin squeeze can constitute an abuse of dominance in itself, irrespective of whether the wholesale or retail prices set by the dominant firm are abusive because of their excessive or predatory character.[14] In other words, to hold a margin squeeze abusive under Article 102 TFEU it is not necessary for the dominant firm's wholesale price as applied to competitors to be excessive or for its retail price targeted at consumers to be predatory. The spread between the wholesale and retail prices can be abusive in itself because of its exclusionary effect, absent any concerns regarding excessive and predatory pricing.

Regarding the legal test, the CoJ was confronted in *TeliaSonera* with the question whether a margin squeeze can be abusive in the absence of the existence of a duty to supply under the *Bronner* criteria. TeliaSonera had argued before the Court that a dominant firm should be free to set its terms of trade, unless they are so disadvantageous that they qualify as a refusal to supply under the conditions laid down in *Bronner*, requiring in particular that the input to which access is sought is indispensable.[15] The Court responded by explaining that TeliaSonera's interpretation was based on a misunderstanding of the *Bronner* judgment. According to the Court, it cannot be inferred from *Bronner* that its conditions for establishing whether a refusal to deal is abusive must also be used to assess the abusive character of conduct consisting in the supply of goods or services on conditions that are disadvantageous.[16] This implies that an outright refusal to deal is subject to a stricter legal test than a constructive refusal to deal in the form of a margin squeeze. The Court explicitly stated that the latter conduct can in itself form 'an independent form of abuse distinct from that of refusal to supply'.[17] Another interpretation, as put forward by TeliaSonera, would in the Court's view 'unduly reduce the effectiveness of Article 102 TFEU' as every conduct relating to the terms of trade set by a dominant firm would otherwise have to meet the *Bronner* criteria in order to be regarded as abusive.[18]

The approach of the CoJ in *TeliaSonera* to treat outright and constructive refusals to deal differently can be criticized on the grounds that this provides incentives for dominant firms not to give access to non-

[13] Richard Whish and David Bailey, *Competition Law* (Oxford University Press 2018) 771-772.
[14] Case C-280/08P *Deutsche Telekom AG v European Commission* ECLI:EU:C:2010:603, para 183.
[15] *TeliaSonera* (n 5) para 54.
[16] Ibid para 55.
[17] Ibid para 56.
[18] Ibid para 58. For a critical appraisal of this argument see, Niamh Dunne, 'Dispensing with Indispensability' (2020) 16 Journal of Competition Law and Economics 74, 96-97.

indispensable inputs at all.[19] Once a dominant firm does grant such access, it namely runs the risk of being held liable for imposing abusive access conditions even if the input is not indispensable and thus no duty to deal would otherwise exist under Article 102 TFEU. On the one hand, such disincentives for access resulting from the CoJ's reasoning seem to go against the purpose of the competition rules to stimulate openness of markets and follow-on innovation. On the other hand, the CoJ's reasoning can be regarded as a form of 'estoppel abuse', where a voluntary decision of a dominant firm to supply implies that it must do so on terms at which competitors can effectively compete.[20]

B. Differences between the EU and US

The approach of the CoJ in *Deutsche Telekom* and *TeliaSonera* differs from the US approach on two accounts, because the latter requires an antitrust duty to deal as a condition for establishing liability for a margin squeeze and rules out the application of US antitrust law if a sector-specific regime already regulates the same conduct.[21] In *Trinko*, the US Supreme Court took a restrictive approach towards refusals to deal. In particular, it held that the circumstances giving rise to antitrust liability in its 1985 *Aspen Skiing* judgment – the leading US case establishing antitrust liability for a refusal to deal – are 'at or near the outer boundary' of the scope of Section 2 of the Sherman Act.[22] According to the Supreme Court in *Trinko*, *Aspen Skiing* constitutes a limited exception to the principle of freedom to contract, which only applies in situations where a monopolist terminates a voluntary and profitable prior course of dealing.[23] The scenario at stake in *Aspen Skiing* concerned a monopolist unwilling to renew a joint ski ticket that it had voluntarily started to offer with a competitor a number of years earlier, to the extent that the monopolist was foregoing short-term profits by refusing to continue providing the joint ski ticket.[24] The facts in the *Trinko* case differed, as it was the 1996 Telecommunications Act that obliged Verizon as the local incumbent to share its telephone network with rivals. Because Verizon did not voluntarily engage in a course of dealing with its rivals, the Supreme Court found that Verizon's prior conduct could shed no light upon whether the refusal to deal was 'prompted not by competitive zeal but by anticompetitive malice'.[25]

The Supreme Court confirmed this restrictive approach towards antitrust liability for refusals to deal in *linkLine*, which involved a margin squeeze resulting from the combination of high wholesale prices for internet service providers in the upstream market with low retail prices for consumers in the downstream market set by incumbent telephone companies. For a margin squeeze to violate Section 2 of the Sherman Act, the Supreme Court held that a monopolist must either refuse to deal under circumstances creating an antitrust duty to deal or engage in predatory pricing.[26] In the view of the Supreme Court, it was clear from *Trinko* that 'if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially

[19] See also the reasoning by the Advocate General in *TeliaSonera* who argues that margin squeeze cases are analogous to refusal-to-deal cases so that the same underlying rationale should apply. Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* ECLI:EU:C:2010:483, Opinion of Advocate General Mazák, para 23.
[20] Kevin Coates, 'The Estoppel Abuse' (21st Century Competition: Reflections on Modern Antitrust, 28 October 2013) < http://www.twentyfirstcenturycompetition.com/2013/10/the-estoppel-abuse/> accessed 10 May 2021.
[21] For a comparison between these aspects of EU competition and US antitrust law, see Damien Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court's Judgment in *Trinko* in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?' (2004) 41 Common Market Law Review 1519.
[22] *Trinko* (n 1) para 409.
[23] Ibid para 409.
[24] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*. 472 US 585 (1985).
[25] *Trinko* (n 1) para 409.
[26] *linkLine* (n 5) para 448.

advantageous'.[27] In other words, no violation of Section 2 of the Sherman Act can be established for a margin squeeze in the absence of an antitrust duty to deal. Unlike the situation in the EU where the CoJ held that margin squeezes constitute an independent form of abuse for which the *Bronner* criteria do not apply, US antitrust law uses the same legal standards to assess liability for refusals to deal and margin squeezes. As such, a duty to deal can only be imposed under current US antitrust law if: (1) the monopolist entered into a pre-existing voluntary course of dealing; and (2) the monopolist is willing to sacrifice short-term profits in order to achieve an anticompetitive end.[28]

Based on the facts at stake in the case, the Supreme Court concluded that the margin squeeze in *linkLine* did not violate Section 2 of the Sherman Act because the internet service providers had neither successfully identified an antitrust duty to deal nor established a predatory pricing claim.[29] According to the Supreme Court, no antitrust duty to deal existed in *linkLine* for a similar reason as in *Trinko*, namely because the duty of the incumbent telephone companies to provide wholesale access to the internet service providers stemmed from regulations of the Federal Communications Commission and not from the Sherman Act.[30] The US has thus taken the approach of ruling out any room for antitrust remedies once a sector-specific regime applies, while the CoJ made clear in *Deutsche Telekom* that EU competition law complements sector-specific regulation.[31]

Deutsche Telekom had attempted to justify its margin squeeze on the ground that it was subject to regulation imposed by the German telecoms authority obliging it to provide competitors with local access to its network. The wholesale prices Deutsche Telekom could charge to rivals were fixed by the authority and the retail prices for consumers were subject to a price cap. Nevertheless, the CoJ concluded that the margin squeeze could be attributed to Deutsche Telekom because the applicable regulation offered enough scope for Deutsche Telekom to limit or stop the margin squeeze by increasing its retail prices to end-users.[32] The fact that a sector is regulated, therefore, does not imply that it is immune from parallel competition intervention in the EU. According to the Court in *Deutsche Telekom*, in situations where sector-specific regulation leaves room for autonomous conduct by market players, the restriction of competition can still be attributed to them and Articles 101 and 102 TFEU apply in parallel to the regulatory framework.[33] In this regard, the EU approach diverges from the situation in the US where the existence of sector-specific regulation is considered to preclude parallel application of the US antitrust rules. As argued by the US Supreme Court in *Trinko*, the reasoning behind this choice is that additional antitrust intervention is considered to be costly while the additional benefit to competition provided by antitrust enforcement tends to be small '[w]here there exists a regulatory structure designed to deter and remedy anticompetitive harm'.[34] This divergence between the EU and US will likely not disappear in the future, as the EU legislator is and has been complementing the existing competition framework with additional sector-specific regulation, such as in the form of the DMA, the Data Act, the Payment Services Directive 2 (PSD2) and the Electricity Directive – as further discussed in Section IV below.

[27] Ibid para 450.
[28] See, for example, *Novell, Inc. v. Microsoft Corp.* 731 F3d 1064 (10th Cir. 2013), paras 1074-1075, *cert. denied*, 134 S. Ct. 1947 (2014).
[29] *linkLine* (n 5) para 457.
[30] Ibid para 450.
[31] *Deutsche Telekom* (n 14) para 80.
[32] Ibid para 183.
[33] Ibid para 80.
[34] *Trinko* (n 1) para 412.

III. THE POSITION OF SELF-PREFERENCING THEORIES OF HARM

A. The legal reasoning in the *Google Shopping* case

The applicability of the *Bronner* criteria, and in particular the indispensability requirement, plays a key role in current debates about the legal test for holding self-preferencing abusive under Article 102 TFEU.[35] Self-preferencing can be regarded as a constructive refusal to deal, as it concerns the conditions of access a dominant firm provides to downstream rivals. In its 2017 *Google Shopping* decision, the European Commission ('Commission') did not apply the indispensability requirement to hold Google's self-preferencing in its general search results abusive.[36] As such, the Commission's legal reasoning raises questions about the position of self-preferencing as a self-standing theory of harm next to outright and constructive refusals to deal.

In the case, Google was held liable for giving more prominent placement to its own comparison shopping service to the detriment of rival comparison shopping services. The Commission found that the more favourable positioning of Google Shopping in the general search results constituted an abuse of dominance, because it took traffic away from competing comparison shopping services and was thereby capable of having anticompetitive effects in the markets for comparison shopping services and general search services.[37]

In terms of the legal test, the Commission seems to refer to the notion of 'leveraging' by arguing that Article 102 TFEU does not only prohibit practices by a dominant undertaking tending to strengthen its dominance, but also covers conduct by which a dominant firm tends to extend its position 'to a neighbouring but separate market by distorting competition'.[38] According to the Commission, it is not novel to find an abuse for conduct consisting in the use of a dominant position in one market to extend that dominant position to one or more adjacent markets. In the words of the Commission, such conduct constitutes a 'well-established, independent, form of abuse falling outside the scope of competition on the merits'.[39] For this reason, the Commission did not apply the indispensability requirement and the other criteria laid down in *Bronner*.

The General Court endorsed the approach of the Commission in its 2021 judgment by arguing that the lack of an express refusal to supply, consisting of a request or wish to be granted access and a consequential refusal, precludes practices from being described as a refusal to supply and analysed in accordance with the *Bronner* criteria.[40] Even though such practices may result into an implicit refusal of access, they constitute an independent infringement of Article 102 TFEU 'in view of their constituent elements which deviate, by their very nature, from competition on the merits'.[41] According to the General Court, Google's practices are an independent form of leveraging abuse and can thereby be distinguished from the conduct at issue in *Bronner* because the practices involve 'active' behaviour in the form of differential treatment in how Google promotes its own and degrades rival comparison shopping services instead of a 'passive' refusal of access to Google's general results pages. For these reasons, the

[35] Pablo Ibáñez Colomo, 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (2020) 43 World Competition 417; Pinar Akman, 'The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law' (2017) Journal of Law, Technology and Policy 301.
[36] *Shopping* (n 3) para 651. Note that the Commission decision is under appeal.
[37] Ibid para 341.
[38] Ibid para 334.
[39] Ibid para 649.
[40] Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v European Commission* ECLI:EU:T:2021:763, para 232-233.
[41] Ibid para 233.

Commission was indeed not required to establish that the *Bronner* criteria were met in the view of the General Court.[42]

Ibáñez Colomo distinguishes between reactive and proactive remedies to determine whether indispensability is required as part of the legal test.[43] In his view, the indispensability requirement should be applied in cases involving proactive remedies, namely structural remedies as well as behavioural remedies requiring a positive obligation and constant monitoring such as an access obligation. Indispensability would serve as a mechanism to limit competition intervention in these cases where the design, implementation and monitoring of remedies is complex. Such complexities are not present where reactive remedies are imposed, which consist of a one-off negative obligation to cease the conduct, so that there is no need in his view to use the indispensability requirement as a limiting principle in cases where reactive remedies suffice.[44] However, the distinction between proactive and reactive remedies is not always clear-cut so that it may not be capable of serving as a useful mechanism to determine whether the indispensability requirement needs to be applied.[45] This can be illustrated through the *Google Shopping* case.

While the Commission argued in its decision that Google's self-preferencing could be ended through a one-off cease-and-desist order to treat rival comparison shopping services no less favourably than its own comparison shopping service,[46] the design and implementation of the remedy of equal treatment was in fact an intense process and required proactive measures.[47] Nevertheless, Ibáñez Colomo has argued that the nature of the remedy can still be the guiding principle for determining whether indispensability is required by focusing on the substance of the competition intervention and remedy instead of on its form, as promulgated by the competition authority.[48] This would mean that *Google Shopping* qualifies as a case involving a proactive remedy in which the indispensability requirement would need to be applied, despite the fact that the Commission presented the remedy as a reactive cease-and-desist order. Considering that such a distinction between the substance and form of remedies is subject to interpretation and may sometimes only become clear at the stage of implementation of a competition decision (as illustrated by the *Google Shopping* case), it is submitted here that it is too uncertain to serve as the mechanism for deciding whether the indispensability requirement applies.

The General Court indeed argued in its judgment that the applicability of the *Bronner* criteria should not depend on the measures ordered by the Commission to end an infringement.[49] In the words of the General Court, there 'can be no automatic link between the criteria for the legal classification of the abuse and the corrective measures enabling it to be remedied'.[50] According to the General Court, there are elements in Google's behaviour that are not directly linked to access to Google's boxes on its general results page and do play a major role in the exclusionary effect, namely the degradation of competing comparison shopping services by means of adjustment algorithms and the promotion of Google's own services in the search results. For these reasons, the General Court expressed the view that the fact that 'one of the ways of ending the abusive conduct is to allow competitors to appear in the boxes displayed at the top of the Google results page' does not mean that 'the conditions for identifying the abuse must be

[42] Ibid para 240.
[43] Ibáñez Colomo (n 35) 536.
[44] Ibid 536.
[45] Dunne (n 18) 111 who also argues that there is no support in the case law and underlying policy concerns of refusals to deal to let the nature of the remedy instead of the characteristics of the violation determine whether the indispensability requirement has to be met.
[46] *Shopping* (n 3) paras 699-700.
[47] Dunne (n 18) 111.
[48] Ibáñez Colomo (n 35) 544-545.
[49] *Google* (n 40) para 246.
[50] Ibid para 244.

defined having regard to that aspect alone'.[51] A different approach for determining whether indispensability should be part of the legal test is proposed in Section IV below.

The room to hold self-preferencing liable under Section 2 of the Sherman Act is quite limited under the current state of affairs, due to the US Supreme Court's restrictive interpretation of the scope of antitrust liability for margin squeezes and refusals to deal. However, self-preferencing may become of relevance in the antitrust lawsuits started against Google at the end of 2020. For instance, one of the concerns raised in the antitrust lawsuit filed in December 2020 by the state of Texas together with other states, relates to alleged preferential treatment by Google in the form of routing publisher inventory to its own advertising exchange and blocking competition from other exchanges on the same footing.[52] In addition, the US House Judiciary Committee, Antitrust Subcommittee's October 2020 report about the state of competition in digital markets ('Antitrust Subcommittee's Report'), called upon the US Congress to 'consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm'[53] and to 'consider establishing nondiscrimination rules to ensure fair competition and to promote innovation online'.[54] As such, inspiration may be drawn from the EU approach towards self-preferencing to revitalize antitrust liability for refusals to deal in the US within and beyond digital markets.

B. *Google Shopping* as a constructive refusal to deal?

Despite the fact that the Commission did not apply the indispensability requirement in its *Google Shopping* decision, it did not refer to any constructive refusal to deal or margin squeeze cases to support this choice.[55] Since the CoJ itself established that these practices do not require indispensability, the Commission could have used cases like *Deutsche Telekom* or *TeliaSonera* as relevant precedents. An analogy can indeed be drawn between self-preferencing by digital platforms and margin squeezes in the telecoms cases.[56] Margin squeezes can lead to the exclusion from the market of downstream rivals due to the existence of an insufficient margin between the dominant firm's upstream and downstream prices. Self-preferencing may similarly foreclose downstream competitors through the control the dominant platform holds over the conditions of access to the upstream market. More prominent placement of a dominant platform's own downstream service in a ranking (such as the search ranking in *Google Shopping*) may harm downstream rivals to the extent they cannot effectively compete anymore with the vertically integrated dominant platform, because they receive less attention from consumers.[57] Self-preferencing can also take the shape of a dominant platform's preferential access to data about transactions conducted by downstream competitors.[58] This is the concern expressed by the Commission in

[51] Ibid para 245.
[52] Case 4:20-cv-00957-SDJ, Google complaint led by the state of Texas (16 December 2020), paras 118-124 <https://www.justice.gov/opa/press-release/file/1328941/download> accessed 10 May 2021.
[53] US House, Judiciary Committee's Antitrust Subcommittee, Investigation of Competition in Digital Market, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary (October 2020), 397-398 <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519> accessed 10 May 2021.
[54] Ibid 382.
[55] In the context of the abusive nature of 'leveraging', see *Shopping* (n 3) para 334 and footnote 349.
[56] For an in-depth analysis of how the margin squeeze concept is relevant for vertically integrated online platforms, see Friso Bostoen, 'Online platforms and vertical integration: the return of margin squeeze?' (2018) 6 Journal of Antitrust Enforcement 355.
[57] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448, 478.
[58] Vladya M K Reverdin, 'Abuse of Dominance in Digital Markets: Can Amazon's Collection and Use of Third-Party Sellers' Data Constitute an Abuse of a Dominant Position Under the Legal Standards Developed by the European Courts for Article 102 TFEU?' (2021) 12 Journal of European Competition Law and Practice 181.

its ongoing *Amazon* and *Facebook* investigations.[59] If a dominant platform holds preferential access to data providing information on, for instance, which products are successful or what could be upcoming trends among consumers, it may outcompete downstream retailers that cannot adapt their offerings to such insights to the same extent as the dominant platform. The key difference is that margin squeezes involve price-related conduct, while self-preferencing by digital platforms concerns non-price conduct.

It is interesting to note in this regard that after the Commission's publication of the *Google Shopping* decision, the EU Courts have clarified that the reasoning regarding the legal test set out in *TeliaSonera* applies not only to price-related terms but also to other terms of trade involving discriminatory conduct. In its December 2018 judgment in *Slovak Telekom*, the General Court pointed out that the CoJ in *TeliaSonera* did not refer to margin squeeze specifically 'but rather to the supply of "services or selling goods on conditions which are disadvantageous or on which there might be no purchaser" and to "terms of trade" fixed by the dominant undertaking'.[60] On these grounds, the General Court interpreted the wording of the CoJ in *TeliaSonera* as suggesting that the exclusionary practices referred to in the case did not solely concern a margin squeeze 'but also other business practices capable of producing unlawful exclusionary effects for current or potential competitors, like those classified by the Commission as an implicit refusal to supply access to the applicant's local loop'.[61]

On appeal, the CoJ confirmed in *Slovak Telekom* that the General Court was right in how it had interpreted the *TeliaSonera* judgment. The CoJ clarified in *Slovak Telekom* that its statements in *TeliaSonera* referred not only to margin squeeze as a particular form of abuse 'when it assessed the practices to which the conditions of the judgment in *Bronner* did not apply'.[62] In other words, conduct of a dominant firm relating to non-price related terms of access also does not have to meet the indispensability requirement of *Bronner* in order to be regarded as abusive. The CoJ explicitly stated in *Slovak Telekom* that the conditions laid down in *Bronner* do not apply 'where a dominant undertaking gives access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions'.[63] According to the CoJ, such practices do not require the imposition of a duty on the dominant firm to give access to its infrastructure as a result of which a competition intervention will be 'less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved that infrastructure for the needs of its own business'.[64]

As such, it is the distinction between outright and constructive refusals to deal that determines in the Court's view whether the indispensability requirement needs to be met or not. Transposing this reasoning to *Google Shopping* would mean that the Commission was correct in its choice not to apply the indispensability requirement to determine whether Google's self-preferencing was abusive. After all, Google did list rival comparison shopping services in its search results but in a way that did not allow them to effectively compete. Instead of claiming that leveraging constitutes an independent form of abuse, the Commission could thus have based its legal test on the reasoning of the CoJ in *TeliaSonera* regarding margin squeezes – assuming that the markets for general search and comparison shopping services can be regarded as vertically integrated.[65] A basis for such an approach can be found in the General Court's judgment. In support of its claim that Google's self-preferencing formed an independent infringement of Article 102 TFEU distinct from that of refusal to supply, the General Court referred to the treatment of

[59] *Amazon* (n 3); *Facebook* (n 3).
[60] Case T-851/14 *Slovak Telekom, a.s. v European Commission* ECLI:EU:T:2018:929, para 126.
[61] Ibid para 126.
[62] *Slovak Telekom* (n 4) para 53.
[63] Ibid para 50.
[64] Ibid para 51.
[65] Disagreeing with this assumption and the relevance of margin squeeze, see Akman (n 35) 323-325.

margin squeezing in *TeliaSonera* as an example of a case where indispensability was not applied even though it raised issues of access to a service.[66]

A further clarification along these lines by the CoJ on appeal in *Google Shopping* would be welcome to establish to what extent self-preferencing can indeed be regarded to fall within the existing box of constructive refusals to deal. Such a clarification would not only enhance the understanding of the scope for competition intervention against self-preferencing behaviour of digital platforms under Article 102 TFEU, but would also illustrate the future relationship between outright and constructive refusals more generally in the context of vertically integrated dominant firms that are widespread in other sectors too, like those for telecoms, postal, energy and railway services.

With the pressure rising in the US to strengthen antitrust enforcement, self-preferencing is also identified on that side of the Atlantic as a possibly anticompetitive practice under US antitrust law.[67] Regarding the legal standard applicable to self-preferencing, the Antitrust Subcommittee's Report recommended the US Congress to 'consider whether making a design change that excludes competitors or otherwise undermines competition should be a violation of Section 2, regardless of whether the design change can be justified as an improvement for consumers'.[68] This approach proposed by the US House Antitrust Committee would in fact go beyond the reasoning of the Commission in *Google Shopping*, where emphasis was placed on how Google's self-preferencing created harm to consumers in the form of less choice and innovation in the market for online search. As such, the approach of the Commission arguably strikes a better balance between the interests of competitors and consumers by identifying self-preferencing behaviour that excludes competitors to the detriment of consumers.

IV. THE RELEVANCE OF THE EXISTENCE OF A REGULATORY DUTY FOR THE LEGAL TEST UNDER ARTICLE 102 TFEU

A. Rationale for the existence of sector-specific regulation as a relevant indicator

Even though the CoJ has clarified in *Slovak Telekom* that the indispensability requirement only applies to outright refusals to deal and not to constructive refusals to deal, a more normative point is whether this is a workable and logical distinction from a practical and policy perspective. In practice, the line between outright and constructive refusals to deal is not black and white. Whether access is given to an input may be a matter of degree.[69] As noted by Dunne, in the context of its refusal to give access to interoperability information Microsoft argued before the General Court that 'interoperability occurs along a continuum' and that 'it is not an absolute standard'.[70] According to Microsoft, the minimum level of interoperability required for effective competition 'is not difficult to achieve'.[71] As such, Microsoft's behaviour could also have been interpreted as a constructive instead of an outright refusal to deal because it was the extent of interoperability provided by Microsoft that was considered insufficient to enable effective competition.[72] Similarly, the reason why the self-preferencing in *Google Shopping* raised competition problems was arguably because it resulted in rivals being displayed so low in the search results that the effect was the same as if they had not been listed at all.[73]

[66] *Google* (n 40) para 235 and 241.
[67] Antitrust Subcommittee (n 57) 382.
[68] Ibid 398.
[69] Dunne (n 18) 98.
[70] *Microsoft* (n 1) para 119, as noted by Dunne (n 18) 98 and footnote 161.
[71] *Microsoft* (n 1) para 120.
[72] Ibid para 421.
[73] Ibáñez Colomo (n 35) 542.

Beyond these issues of practical interpretation, there are also policy reasons why it is not logical to use the distinction between outright and constructive refusals to deal to determine whether the indispensability requirement is applicable. First, this choice leads to the situation that the room to hold outright refusals to deal abusive is more limited because the stricter *Bronner* criteria apply (including the indispensability requirement), even though this is a more serious type of abuse than constructive refusals to deal.[74] As already discussed above, this provides dominant firms with incentives not to open up non-indispensable inputs at all. A possible consequence is that welcome forms of complementary innovations building on these non-indispensable inputs are not arising to the detriment of competition and consumers. Second, as stated by the General Court in *Slovak Telekom,* the seriousness of a refusal to deal should not solely depend on its form. Beyond the outright or constructive nature or form of the refusal, other factors are also of relevance.[75]

One of these other factors considered in *Slovak Telekom* is the regulatory context in which the refusal to deal takes place. It is submitted here that this is a more reliable and suitable factor to determine whether the indispensability requirement needs to be applied for assessing the abusive nature of a refusal to deal, whether outright or constructive. While the CoJ made clear in *Deutsche Telekom* that EU competition law applies in parallel to sector-specific regulation, it has been acknowledged in *Lithuanian Railways* (by the General Court) and *Slovak Telekom* (by the General Court and less explicitly by the CoJ) that the existence of a regulatory duty does influence the legal test for holding a refusal to deal abusive under Article 102 TFEU.

The General Court held in *Slovak Telekom* that the applicable telecom legislation requiring Slovak Telekom as an operator with significant market power to provide unbundled access to its local loop constituted a relevant factor in the assessment of the abusive nature of its conduct. According to the General Court, such a regulatory duty defines the legal framework applicable to the case and 'contributes to the determination of the competitive conditions under which a telecommunication undertaking carries on its business in the relevant markets'.[76] The existence of a regulatory duty distinguishes the *Slovak Telekom* case from the *Bronner* case in the view of the General Court, where no regulatory obligation was at stake.[77] Because the regulatory framework already acknowledged the need for access to Slovak Telekom's local loop to enable effective competition in the Slovak market for high-speed internet services, the General Court argued that it was not necessary to demonstrate that such access was indispensable in line with the *Bronner* criteria.[78]

In *Lithuanian Railways*, the General Court similarly found that the indispensability requirement did not apply because sector-specific regulation already imposed a duty to deal on Lithuanian Railways.[79] The General Court explained that the purpose of the exceptional circumstances laid down in *Bronner* is to ensure that the imposition of a duty to deal on a dominant firm 'does not ultimately impede competition by reducing that undertaking's initial incentive to build such infrastructure'.[80] Where sector-specific regulation already imposes a duty to deal, such a requirement to protect the incentive of the dominant firm to invest in the creation of infrastructures is not present.[81] In the words of the General Court: 'Where there is a legal duty to supply, the necessary balancing of the economic incentives, the protection of which justifies the application of the exceptional circumstances developed in [*Bronner*], has already been carried

[74] As put forward by Slovak Telekom in the appeal before the General Court, see *Slovak Telekom* (n 64) para 130.
[75] Ibid para 133.
[76] Ibid para 117.
[77] Ibid paras 118-120.
[78] Ibid para 121.
[79] *Lithuanian Railways* (n 4) para 92.
[80] Ibid para 90.
[81] Ibid para 91.

out by the legislature at the point when such a duty was imposed'.[82] Considering the underlying rationale of the *Bronner* criteria to find a balance between the interest in protecting short-term downstream competition and the interest in preserving the long-term incentives of dominant firms to invest in innovation,[83] it is indeed logical not to require another balancing of whether access is indispensable for holding a refusal to deal abusive under Article 102 TFEU when a regulatory duty to deal already exists. While the analysis for establishing indispensability will not precisely overlap with the legislator's considerations for imposing a regulatory duty to deal, the fact that a regulatory duty to deal applies would make a separate analysis of whether access is indeed also required under competition law unnecessary.[84]

In this regard, the current US approach is much more radical by precluding antitrust intervention where sector-specific regulation already exists.[85] In a way, more attention for the existence of a regulatory duty to determine the applicable legal standard under Article 102 TFEU can bring EU competition law closer to US antitrust law. After all, the idea behind both approaches is that competition or antitrust enforcement should not redo the balancing already done by the legislator. However, the fundamental difference remains where the EU system relies on a complementary relationship between competition law and sector-specific regulation and the US system instead looks at antitrust law and sector-specific regulation as substitutes.

B. Relevance of regulatory duties in the future

While the language of the General Court in *Slovak Telekom* and *Lithuanian Railways* was clear and outspoken on the relevance of the existence of a regulatory duty to deal, the CoJ was much more cautious in its judgment in *Slovak Telekom*. The CoJ acknowledged that a regulatory obligation can be relevant for assessing abusive conduct by referring to its judgment in *Deutsche Telekom*.[86] However, after discussing the regulatory context, the CoJ continued by pointing at the fact that Slovak Telekom's practices 'did not constitute refusal of access to the appellant's local loop but related to the conditions for such access' as the reason why the *Bronner* criteria did not apply to the case.[87] Even though the CoJ thus agreed with the General Court that no indispensability was required,[88] it seems that the CoJ based this finding on the qualification of Slovak Telekom's behaviour as a constructive refusal to deal rather than on the fact that a regulatory obligation existed.

However, the distinction between outright and constructive refusals to deal is often difficult to make. *Google Shopping* has already illustrated this and the same may be true for the ongoing *Amazon* and *Facebook* investigations regarding preferential access to data. The concern in these cases is that Amazon and Facebook have access to data about the activities of all retailers and advertisers, respectively, while the individual retailers and advertisers cannot see the full aggregate data.[89] On the one hand, such behaviour can be qualified as a constructive refusal to deal because the retailers and advertisers do get access to part of the data. On the other hand, this conduct can also be seen as an outright refusal to give access to the full aggregate data required to understand the overall market trends. Depending on one's

[82] Ibid para 92.
[83] See 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* ECLI:EU:C:1998:264, Opinion of Advocate General Jacobs, para 57 as repeated in a slightly different wording in *Slovak Telekom* (n 4) para 47-49.
[84] Dunne (n 18) 86-87. However, arguing that the existence of a regulatory duty to deal is not determinant based on a reading of the *TeliaSonera* judgment, see Ibáñez Colomo (n 35) 540 and 542.
[85] *linkLine* (n 5).
[86] *Slovak Telekom* (n 4) para 57.
[87] Ibid para 59.
[88] Ibid para 60.
[89] *Amazon* (n 3); *Facebook* (n 3).

interpretation, the legal standard will differ. For this reason, the existence of a precisely formulated regulatory duty seems a more objective and stable indicator to determine whether the indispensability requirement applies or not – even though other contextual factors not considered here may matter too.

With the entry into force of the DMA, certain gatekeeping platforms will be in a similar situation as the telecoms operators in *TeliaSonera* and *Slovak Telekom* where Article 102 TFEU complements the regulatory duties to provide access to search data (Art. 6(1)(j) DMA) and access to app stores (Art. 6(1)(k) DMA). This means that the *Bronner* criteria would not apply for assessing refusals to deal under Article 102 TFEU for which a regulatory duty already exists, because the legislator has already engaged in the necessary balancing of interests. Regarding the regulation of access to data in various industries including more traditional ones beyond digital platforms, several regimes already exist. As a horizontal framework, the GDPR provides data subjects with a general right to transfer personal data to another data controller irrespective of the sector or the purpose of the transfer.[90] The PSD2 lays down an 'access-to-account rule' enabling third party providers to access a customer's payment account information on the customer's request in order to provide payment initiation or account information services.[91] The Electricity Directive requires Member States to specify rules on access by eligible parties to metering and consumption data of the final customer.[92] Additional rights to access and share data in the context of the Internet of Things are introduced in the Data Act.[93]

The rise of sector-specific duties to share data will reduce the need for EU competition law to intervene to open up datasets. However, where relevant, Article 102 TFEU can be invoked to complement the sector-specific frameworks. A question in this regard is to what extent the data access mandated under Article 102 TFEU can extend beyond the data access regulated in the sector-specific frameworks without applying the *Bronner* criteria. For instance, the scope of the GDPR's right to data portability is limited to personal data 'provided by the data subject'.[94] The Article 29 Working Party (now the European Data Protection Board) has interpreted this term expansively as not only covering personal data knowingly and actively shared by data subjects (such as one's contact details) but also personal data collected by observing the behaviour of data subjects and their use of a service or device (such as one's interactions on a social network). However, inferred or derived personal data is not included, while this data may carry competitive value, too, and could thus form the basis for an access request.[95] As inferred or derived personal data falls outside the scope of the regulatory duty in the GDPR, the *Bronner* criteria will still need to be applied to impose a duty on a dominant firm to share such data under Article 102 TFEU. A similar situation would occur in the payment sector for requests by third parties to access payment data held by banks beyond the purposes of providing payment initiation and account information services as regulated by the PSD2.

Considering the restrictive interpretation by the US Supreme Court of antitrust liability for refusals to deal and margin squeezes, the role of sector-specific regulation may become even more important than in the EU. Regarding self-preferencing practices, the US Antitrust Subcommittee's Report already recommended the US Congress to adopt non-discrimination rules requiring 'dominant platforms to offer equal terms for equal service' applicable to price as well as to terms of access. Reference was made in this regard to previous experiences in relation to the net neutrality rules in the form of the – later

[90] GDPR (n 10) art. 20.
[91] PSD2 (n 11) art. 66 and 67. For a discussion, see Oscar Borgogno and Giuseppe Colangelo, 'Data, Innovation and Competition in Finance: The Case of the Access to Account Rule' (2020) 31 European Business Law Review 573.
[92] Electricity Directive (n 11) art. 23(1).
[93] Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act) [2022] COM(2022) 68 final, art. 4 and 5.)
[94] GDPR (n 10) art. 20(1).
[95] Article 29 Working Party, 'Guidelines on the right to data portability' (2017) 16/EN WP 242 rev.01, 9-11.

repealed – 2015 Open Internet Order of the Federal Communications Commission, non-discrimination requirements for railroads designated as common carriers and for cable operators, as well as non-discrimination duties imposed as a complement to divestitures in antitrust enforcement such as in AT&T's 1982 divestiture of Bell that was combined with an equal access obligation.[96]

V. INTERPRETING THE INDISPENSABILITY REQUIREMENT

A. The standards of indispensability

Where the *Bronner* criteria do apply to establish liability under Article 102 TFEU, a nuanced approach is necessary. The paradox here is that the *Bronner* criteria may be the least likely to be met in situations where they do apply, considering the high standards required to proof indispensability.[97] However, the mere fact that the *Bronner* criteria are applicable should not prejudice the outcome of the competition analysis. Their mere applicability does not imply that the refusal to deal at stake is unlikely to be abusive under Article 102 TFEU. In this sense, the *Bronner* criteria should be read as a set of conditions balancing the interests at stake where the legislator has not already done so.

The indispensability requirement is arguably the most debated among the *Bronner* criteria. It seeks to determine whether actual or potential substitutes for the input exist. Actual substitutes are readily available alternatives, for instance inputs sourced from other market players. Potential substitutes involve alternatives that the access seeker would itself be able to produce. The standards for applying indispensability have varied across cases. Regarding the availability of actual substitutes, the CoJ remarked in *Bronner* that access to Mediaprint's nationwide newspaper home-delivery scheme was not indispensable because alternatives were available to Bronner for distributing its daily newspapers, such as delivery by post and sales in shops, even though these alternatives were less advantageous.[98] In relation to the existence of potential substitutes, the Court referred to the need to establish whether 'there are no technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult' for another publisher of daily newspapers to set up its own nationwide home-delivery scheme alone or together with others.[99] The Court also made clear that the small circulation of the daily newspapers could not constitute a reason for arguing that the creation of an alternative scheme is not economically viable.[100] For access to be regarded as indispensable, it would be necessary in the Court's view to establish that it is not economically viable to set up a second home-delivery scheme with a circulation comparable to that of Mediaprint.[101]

As was later confirmed by the CoJ in *IMS Health*, in order to accept the existence of economic obstacles, it must be established that duplication of the requested input 'is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service'.[102] While this is a strict standard, the presence of switching costs and dependencies of users on an existing input can be factors leading to a conclusion that access is indispensable. In *IMS Health*, the Court referred to 'exceptional organisational and financial efforts' that potential users would have to make in order to work with an alternative input.[103] Because of the extent of participation by pharmaceutical companies in the development of the copyrighted brick structure of IMS, the CoJ held that it was for the

[96] Antitrust Subcommittee (n 57) 382-383.
[97] Dunne (n 18) 114.
[98] *Bronner* (n 6) para 43.
[99] Ibid para 44.
[100] Ibid para 45.
[101] Ibid para 46.
[102] *IMS Health* (n 6) para 28.
[103] Ibid para 29.

national court to determine whether a supplier of an alternative structure would 'be obliged to offer terms which are such as to rule out any economic viability of business on a scale comparable to that of [IMS]'.[104]

B. Tailoring the standards of indispensability to the market situation at stake

As the imposition of a duty to deal requires balancing the interest in protecting competition in the short term with the interest in protecting incentives to invest in innovation in the long term,[105] the standards for qualifying a refusal to deal as abusive may vary depending on the circumstances of the case. While the General Court relied on the same legal test as used in earlier cases like *Bronner* and *IMS Health*,[106] it applied lower standards in the *Microsoft* judgment including for the indispensability requirement. Regarding the indispensability of access to Microsoft's interoperability information, the General Court namely explained that competitors needed to be able to interoperate with the Windows operating system on an equal footing,[107] whereas the CoJ had stated in *Bronner* that access is not indispensable if alternatives are available even though they are less advantageous. As Microsoft held a quasi-monopoly position in the market for client PC operating systems protected by significant network effects, the General Court may have tailored the application of the legal test to the market situation in the case.[108] In this regard, calls have also been made to lower the standards for imposing a duty to deal in data-driven markets where data is generated as a by-product of providing a service and incentives to produce such data would not be affected by duties to share data.[109]

Such tailoring of the applicable standards seems logical as the various interests and incentives involved will have a different weight depending on the market situation. As argued elsewhere, the presence of external market failures could be a key indicator to be taken into account.[110] The need for competition intervention is arguably stronger in these cases as the self-correcting mechanism of the market will not work as effectively due to the market situation grown around the dominance of the incumbent. The presence of strong network effects, switching costs, and entry barriers may be an indication that external failures are present. The key issue would be to determine whether market characteristics enable an incumbent to artificially extend its dominance in time. In this regard, external market failures will be particularly likely to occur in the context of standardisation or in cases where network effects and lock-in prevent rivals from successfully introducing alternative products due to the fact that consumers are not interested in switching to a new system.[111] This is arguably what happened in *IMS Health* and *Microsoft*, as a result of which lower standards for the fulfilment of the *Bronner* criteria are desirable to open up the respective markets protected by external market failures. In this regard, the standards used for holding an input indispensable for competition can also be tailored to the relevant market situation. Although one may argue that this creates concerns regarding legal certainty, the status quo is hardly more predictable for dominant firms.

For instance, *Google Shopping* would probably require a more flexible interpretation of indispensability as compared to the *Bronner* case, considering the strong position held by Google in the

[104] Ibid para 29.
[105] See *Bronner* (n 87) para 57.
[106] *Microsoft* (n 1) paras 331-333.
[107] Ibid para 421.
[108] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) 53 La Revue juridique Thémis de l'Université de Montréal 33, 55.
[109] For a discussion, see Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (2019) Expert report for Commissioner Vestager, 105-106.
[110] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016) 191.
[111] Ibid 191-192.

search engine market exceeding 90 per cent in most Member States and protected by high barriers to entry in the form of network effects, the lack of multi-homing by consumers and the scope of data held by Google.[112] The General Court indeed noted in its judgment that Google's general results page 'has characteristics akin to those of an essential facility' because there is no actual or potential substitute to replace the traffic comparison shopping services would otherwise gain through Google's general results pages.[113] According to the General Court, the Commission considered Google's traffic as indispensable 'by finding that the traffic generated by Google's general search pages was not 'effectively replaceable' and that other sources of traffic were not 'economically viable''.[114] Such tailoring of the indispensability requirement and the other *Bronner* criteria does not imply that Article 102 TFEU is interpreted in a way that facilitates access to inputs that are not indispensable but merely 'convenient' for rivals to compete.[115] Depending on the market situation, the interests involved will have to be weighed differently and this needs to be reflected in the standards applied for the fulfilment of the *Bronner* criteria.

Similarly, the standards applicable under US antitrust law to establish liability for refusals to deal could be tailored to the market situation at stake in order to revitalize antitrust enforcement in a way that reflects the market reality. While the notion of indispensability does not play a role in the legal test under Section 2 of the Sherman Act, the interpretation of the requirement of whether a monopolist is willing to sacrifice short-term profits in order to achieve an anticompetitive end may differ depending on the market situation. Where economic characteristics protect the position of a monopolist to the extent allowing it to artificially extend its monopoly, there is arguably also a stronger need for US antitrust law to intervene.

VI. CONCLUSION

Instead of using the distinction between outright and constructive refusals to deal for determining whether the strict *Bronner* criteria apply, the chapter submitted that the existence of a regulatory duty forms a more reliable and objective indicator for determining the legal test. The imposition of a duty to deal requires finding a balance between the interest in protecting competition in the short run and the interest in protecting innovation incentives in the long run. When a regulatory duty to provide access exists under a sector-specific framework, this balancing is already done by the legislator so that there is no need for an additional balancing under Article 102 TFEU by applying the *Bronner* criteria.

As regulatory access duties are being developed for gatekeeping platforms in the DMA and for data in various sectors such as payment and energy, the chapter argues that these developments should be taken into account when assessing refusals to deal in these sectors under Article 102 TFEU. Even though more regulatory duties will likely be designed targeting concerns of access to digital platforms and access to data in various markets – including those beyond digital markets – in the near future, there is still a role for Article 102 TFEU to apply in parallel and complement the ex ante regulation by ex post competition enforcement – as is the case in telecoms. The fact that the indispensability requirement applies should not imply that the refusal to deal is unlikely to be abusive under Article 102 TFEU. The standards for the fulfilment of the *Bronner* criteria can be tailored to the market situation at stake, so that the weight of the different interests can be adjusted in order to address the underlying competition concerns.

Convergence with the US approach seems unlikely, considering that US antitrust law, contrary to EU competition law, requires an antitrust duty to deal as a condition for establishing liability for a margin squeeze and rules out the application of US antitrust law if a sector-specific regime already regulates the same conduct. However, the pressure to strengthen the enforcement of the US antitrust rules is rising to

[112] *Shopping* (n 3) paras 271-330.
[113] *Google* (n 40) paras 224-226.
[114] Ibid para 227.
[115] See Ridyard (n 12).

the extent it may bring their interpretation closer to the more interventionist approach of EU competition law. To develop a legal test for self-preferencing and constructive refusals to deal more broadly, the US could draw inspiration from how the EU has been trying to balance the different interests at stake within the context of the enforcement of the EU competition rules as well as the design of sector-specific regulation in digital markets and beyond.