Indispensability and abuse of dominance: from *Commercial Solvents* to *Slovak Telekom* and *Google Shopping*

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Key points

- Evidence that an input or platform is indispensable is sometimes required to establish an abuse of a dominant position under Article 102 TFEU; the circumstances in which this condition is required are not clear.
- A systematic analysis of the case law suggest that indispensability is required where intervention (i) would be structural and/or (ii) would amount to prescribing the terms and conditions of access to an input or platform ('proactive intervention').
- The analysis of the case law is useful to shed light on the controversies around recent cases, such as *Google Shopping* and *Slovak Telekom*, and ongoing investigations by the European Commission.

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1. Introduction

In certain circumstances, Article 102 TFEU can only be triggered if an authority (or claimant) is able show that access to a given input (or platform) is indispensable for competition on a neighbouring market. The indispensability threshold is difficult to meet in practice. A claimant or authority would need to show that there are no 'alternative solutions' (even if less advantageous) to the said input (or platform), and that duplicating it would be 'impossible or unreasonably difficult'.[1] The circumstances in which indispensability is an element of the legal test, on the other hand, are not clear. Scenarios of exclusion in which this condition is required to establish an abuse – such as an outright refusal to start dealing with a would-be rival – are not always easy to distinguish from instances in which the Court of Justice (hereinafter, the 'Court' or the 'ECJ') held that it is not – such as a 'margin squeeze'. To complicate matters, there is a 'grey area' that does not fall neatly into pre-existing legal categories. One could reasonably conclude, in relation to 'grey area' conduct, that indispensability is an element of the test; one could come, equally reasonably, to the opposite conclusion.

The perceived confusion around the precise realm of indispensability under Article 102 TFEU raises two main questions. The first is whether there are reasons to claim, as some commentators do,[2] that the various strands of the case law cannot be reconciled with one another. From this perspective, indispensability should be required in all cases that share the basic setting underpinning outright refusal to deal cases, and in particular 'margin squeeze' scenarios. The second question is whether, contrary to the perceived inconsistency, it is possible to discern a logic in the

[1] Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, EU:C:2004:257, para 28.
[2] See for instance Damien Geradin, 'Refusal to Supply and Margin Squeeze: A Discussion of Why the "Telefonica Exceptions" are Wrong' (2011) TILEC Discussion Paper No. 2011-009, available at https://ssrn.com/abstract=1762687; Hendrik Auf'mkolk, 'The "Feedback Effect" of Applying EU Competition Law to Regulated Industries: Doctrinal Contamination in the Case of Margin Squeeze' (2012) 2 Journal of European Competition Law & Practice 149; and Annalies Azzopardi, 'No abuse is an island: the case of margin squeeze' (2017) 13 European Competition Journal 228.

case law. The interest of these two questions is both positive and normative. From a positive standpoint, they can shed light on the operation of the case law. From a normative perspective, they may hint at the sort of clarifications (and perhaps adjustments) that might be needed.

There is not a shortage of literature addressing refusal to deal and 'margin squeeze' behaviour, which emerged as a topic of major academic and practical interest in the EU (and the US) during the 1990s and the 2000s.[3] However, some developments over the past five years show that some fundamental points of law have not yet been meaningfully addressed. *Slovak Telekom*[4] and *Google Shopping*[5] are two cases that come to mind when pondering about these. The first case shows how difficult it may become, in practice, to draw meaningful boundaries between refusal to deal and 'margin squeeze' cases. In this sense, it reveals the limits of the premises on which prior case law (and commentary) were based. The second, in turn, is an illustration of the 'grey area' of practices mentioned above.

Against this background, the purpose of this paper is threefold. First, it seeks to identify the set of factual circumstances in which the indispensability condition is or may be relevant. This analysis shows that, by and large, the debate is confined to – and is meaningful in – instances in which access to an input or platform from a vertically-integrated firm is at stake. There are variations

[3] See, among the vast literature on the topic, Damien Geradin and Robert O'Donoghue, 'The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze Abuses in the Telecommunications Sector' (2005) GCLC Working Paper No. 04/05, available at https://ssrn.com/abstract=671804; Niamh Dunne, 'Margin squeeze: theory, practice, policy, part I' (2012) 33 European Competition Law Review 29 and 'Margin squeeze: theory, practice, policy, part II' (2012) 33 European Competition Law review 61; and Germain Gaudin and Despoina Mantzari, 'Margin Squeeze: An Above-Cost Predatory Pricing Approach' (2016) 16 Journal of Competition Law & Economics 151. In the US system, the liberalisation of network industries. See for instance Dennis W Carlton, 'A General Analysis of Exclusionary Conduct and Refusal to Deal – Why Aspen Skiing and Kodak Are Misguided' (2001) 68 Antitrust Law Journal 659; Robert Pitofsky, Donna Patterson and Jonathan Hooks, 'The Essential Facilities Doctrine Under United States Antitrust Law' (2002) 70 Antitrust Law Journal 443; Brett Frischmann and Mark A Lemley, 'Spillovers' (2006)) 107 Columbia Law Review 207; and J Gregory Sidak, 'Abolishing the Price Squeeze as a Theory of Antitrust Liability' (2008) 4 Journal of Competition Law & Economics 279.

[4] *Slovak Telekom* (Case AT.39523) Commission Decision of 15 October 2014; Case T-851/14 *Slovak Telekom, a.s. v Commission*, EU:T:2018:929; and Case C-165/19 P *Slovak Telekom, a.s. v Commission*, pending.

[5] *Google Search (Shopping)* (Case AT.39740) Commission Decision of 27 June 2017; and Case T-612/17, *Google Inc. and Alphabet Inc. v Commission*. For a discussion of the case, see, in particular, Carsten Koenig, 'Form, effects, or both? – The more economic approach and the European Commission's decision in Google Search' (2019) 44 European Law Review 680 and Matthew Cole, 'Does the EU Commission really hate the US? Understanding the Google decision through competition theory' (2019) 44 European Law Review 468.

around the basic setting (concerning, for instance, the specific way in which the exclusionary strategy is implemented, the timing of the practice, and the nature of the remedy involved). The identification of these different scenarios makes it possible to navigate the case law. In fact, the systematic mapping of the relevant precedents is the second objective of this piece. Third, and along the lines of what has been suggested, the paper seeks to establish whether there are reasons to claim, as sometimes suggested, that the interpretation of Article 102 TFEU needs to be refined or clarified.

Three conclusions can be drawn from this exercise. To begin with, it looks like the (proactive or reactive) nature of the remedy is the single most reliable factor to determine whether or not indispensability is an element of the legal test. The European Commission (hereinafter, the 'Commission') has acknowledged the relevance of this aspect of the case law in its most recent practice. It would seem that the indispensability condition is a meaningful and administrable filter introduced by the EU courts to confine to exceptional circumstances the instances in which intervention under Article 102 TFEU leads to (i) positive obligations regulating the terms and conditions of access to an input or platform by a rival and/or (ii) structural remedies. At the same time, the Commission decisions embrace an interpretation of the principle that would leave little or no room for indispensability in practice and that, insofar as it does, implies a departure from the relevant case law in some respects.

Second, it seems clear that the categories most commonly used structure the case law are neither meaningful nor operational. This is true, in particular, of the divide between refusals to deal, on the one hand, and 'margin squeeze' conduct, on the other. While superficially appealing, it becomes quickly apparent that this divide fails to capture the richness and complexity of scenarios in which questions about indispensability might arise. As the Commission explained in *Slovak Telekom*, there are some instances in which the abusive nature of a refusal to deal does not depend on a finding of indispensability. *Google Shopping*, in turn, reveals the limits of existing categories.

Finally, the analysis of the most recent administrative practice reveals that the case law may evolve in two directions. If the legal approach underpinning the Commission's recent decisions is followed and the EU courts depart from the case law, the indispensability condition will progressively become irrelevant in practice. Under this interpretation of Article 102 TFEU, indispensability would only be an element of the legal test, if at all, in the narrow factual context of *Bronner*, *Magill* and *IMS Health*. In fact, the authority has shown in the past years the means through which the implications of these precedents might be avoided. The case law, however, may prove to be resilient, in the sense that the EU courts may choose not to depart from it. If the principles underpinning the relevant precedents are eventually upheld, some aspects that have contributed to the perceived confusion around the appropriate scope for indispensability should ideally be addressed. This piece explains how the case law can be clarified to preserve existing principles.

2. Setting the scene: boundaries of the indispensability debate

2.1. *Basic setting: vertical integration and access to an input or platform*

The debate around indispensability and its relevance in the assessment of exclusionary strategies is confined to a very specific factual scenario. Because it relates to a small subset of potentially abusive conduct, it is a manageable controversy. To begin with, indispensability can only be expected to be relevant where the practice involves a dominant firm that is vertically-integrated. Second, the potentially abusive practice involves the two markets in which the said firm operates. Third, the essential concern is the extension of a dominant position from market A (where the abuse takes to market B (where the effects of the abuse are manifested). Fourth (and this is perhaps the factor that makes this subset of cases stand apart from other conduct), the behaviour relates to the terms and conditions under which the vertically-integrated firm deals with rivals.

Summing up, claims that indispensability should be an element of the legal test are only credible and relevant where there is vertical integration and the concern relates to the supply of an input (tangible or intangible) or to access to a platform (again, tangible or intangible). These two instances are depicted in Figure 1. The specific manifestation of the exclusionary concern may vary from one case to another. Suffice it to mention some examples. In some cases, as in *Magill*, the vertically-integrated firm refuses to give access to its intangible input (programme listings, protected in that case by copyright) and thus reserves for itself the relevant downstream market.[6] In other cases, as in 'margin squeeze' abuses, the firm gives access to the input, but does so on such terms and conditions that rivals lack the ability and/or incentive to remain on the downstream market.[7] Finally, there are complaints that relate to the fact that the affiliates of the dominant firm (for instance, a subsidiary, an owned and operated store or e-store, an ancillary service) have access to the input (or platform) on preferential terms and conditions. In essence, *Google Shopping* reflects this concern.[8] These examples show that it is possible to identify variations on the basic setting described above. The relevant factors include the (price-based or non-price based; constructive or outright) mechanisms through which exclusion is manifested; the timing of the practice (refusal to start dealing or termination of a course of dealing); the regulatory context (inter alia, whether there is an obligation to deal and/or whether the input or platform is protected by exclusive rights); and, finally, the nature of remedial action required to bring the infringement to an end. These variations on the basic setting are examined hereinafter in turn.

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[6] Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*, EU:C:1995:98 ('*Magill*').

[7] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para 32 ('[…] there would be such a margin squeeze if, inter alia, the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users').

[8] *Google Shopping* (n 5), para 341 ('[…] The Conduct is abusive because it constitutes a practice falling outside the scope of competition on the merits as it: (i) diverts traffic in the sense that it decreases traffic from Google's general search results pages to competing comparison shopping services and increases traffic from Google's general search results pages to Google's own comparison shopping service; […]'.

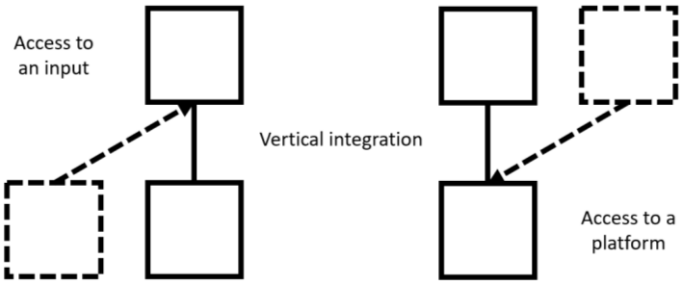

Figure 1: The boundaries of the indispensability debate

2.2. *Variations on the basic setting: a taxonomy*

2.2.1. Refusal to start dealing and termination of a course of dealing

A first way in which cases may be distinguished is based on whether the vertically-integrated firm refuses to start dealing with rivals or whether, after dealing with them, stops doing so. In the first scenario, the firm does not alter its pattern of conduct, whereas in the second it does. An issue that has often been discussed is whether the latter should be subject to a different legal test (which would not require evidence of indispensability).[9] In this sense, it has been argued, inter alia, that the firm's previous conduct is evidence that dealing is profitable and in its commercial interest, and thus that it cannot realistically argue that an obligation to resume its past course of action harms its incentives to invest and innovate.[10] One could also tentatively argue that the exclusionary intent of the dominant firm could be inferred from the disruption itself.[11]

[9] For a summary of the discussion, see Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd edn, Hart Publishing 2013) 574-578.
[10] See for instance Carl Shapiro, 'Exclusionary Conduct – Testimony Before the Antitrust Modernization Commission' (Testimony Before the Antitrust Modernization Commission, Washington DC, 29 September 2005), available at http://faculty.haas.berkeley.edu/Shapiro/amcexclusion.pdf.
[11] On the role of intent in the context of a refusal to deal, see OECD, 'Refusals to Deal' DAF/COMP(2007)46, available at https://www.oecd.org/daf/43644518.pdf.

2.2.2. Outright and constructive refusals to deal

A second dimension along which cases can be distinguished is based on whether access to an input or platform is denied by means of an outright refusal or through other conduct that has an equivalent object and/or effect (a constructive refusal). As suggested above, a 'margin squeeze' is the single most relevant example of conduct that amounts in practice to a refusal to deal. Other examples comprise behaviour such as degrading the conditions of access or denying the necessary information that rivals would need to make effective use of an input or platform.[12] It has often been discussed by commentators whether outright and constructive refusals should be treated in the same way (and in particular whether indispensability should be required in the case of the latter).

In particular, it has been argued that, while competition law may not force firms to deal with rivals (or may do so only in exceptional circumstances), the system may impose strict obligations on dominant players once they decide to do so. Competition law would apply, the argument goes, to the actual conditions of rivalry. These conditions are determined, inter alia, by the behaviour of the vertically-integrated firm. Thus, once the latter decides to enable the emergence of a market, it would no longer be able to deal with rivals on unfair terms and conditions. Whether or not it would have been able to refuse to start dealing with rivals would no longer be a relevant consideration.[13] A similar, estoppel-style argument has also been advanced.[14] Pursuant to this position, it should not be possible for a dominant firm to go against its own decision to deal with rivals.

[12] See in this sense *Slovak Telekom* (n 4).
[13] See for instance Submission of the Commission in Case C-52/09, on file with the author.
[14] Kevin Coates, 'The Estoppel Abuse' *21st Century Competition* (28 October 2013), available at http://www.twentyfirstcenturycompetition.com/2013/10/the-estoppel-abuse/.

2.2.3. Price-based and non-price-based refusals

A strategy having the object or effect of excluding rivals from a neighbouring market can be implemented by means of price and non-price mechanisms. A 'margin squeeze' is a prime example of the former, an outright refusal to start dealing an example of the latter. The idea that price-based mechanisms should be treated differently (in particular, that indispensability should not be an element of the legal test) has often been advanced. Arguments in this sense are linked to the idea that, in the context of a 'margin squeeze', the concern relates to the level of prices, and not necessarily (or not only) to the fact that prices have an effect equivalent to a refusal to deal. For instance, a 'margin squeeze' can also be seen as an expression of predatory pricing at the retail level. Thus, if it can be shown that below-cost prices on the downstream market are abusive, intervention would be justified.[15] Whether or not the input is indispensable would be irrelevant from this perspective – indispensability has never been a condition to take action against predatory pricing.

2.2.4. Decision to deal and regulatory obligation to deal

The question of whether evidence of indispensability is needed to establish an abuse often arises in factual scenarios where the vertically-integrated firm is subject to a regulatory obligation to deal. The legal point of contention, in this context, is whether instances in which the firm deals with rivals voluntarily, on the one hand, and instances in which they do so compelled by regulation, on the

[15] See for instance Daniel Petzold, 'It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law (2015) 6 Journal of European Competition law & Practice 346. This is a point also made by Justice Roberts in his Opinion in *Pacific Bell Telephone Co v linkLine Communications, Inc,* 555 US 438 (2009), and more generally an approach advocated in the US, see for example the Federal Trade Commission explanation that "a firm's refusal to deal with any other person or company is lawful so long as the refusal is not the product of an anticompetitive agreement with other firms or part of a predatory or exclusionary strategy to acquire or maintain a monopoly.", available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/refusal-supplyAlso in Europe some cases that amounted in essence to a 'margin squeeze' have been assessed as instances of predatory pricing. See in this sense *Wanadoo Interactive* (Case COMP/38.233) Commission Decision of 16 July 2003.

other, should be treated in the same way. It has often been argued that, in the latter case, the indispensability condition should not be required.[16] According to this view, where there is already a regulatory obligation in place, the terms and conditions of access can be subject to competition law scrutiny irrespective of whether the input or platform is indispensable. This is so, the argument goes, because the trade-off between the positive and negative implications of intervening would have already been considered under the regulatory regime in question.

2.2.5. The award of exclusive rights and/or the receipt of State aid

It has been argued – including by the Commission itself – that it would not be appropriate to require indispensability where the input or platform has been developed with the support of the State, in particular by means of the award of exclusive rights and/or State aid.[17] In such circumstances, the usual arguments in favour of confining intervention to exceptional circumstances would not be relevant. Where a firm has developed an input or platform with the support of the State, it cannot credibly argue that regulating the terms and conditions of access through competition law would impact investments and/or innovation. In such circumstances, the investment has either not been undertaken by the firm or it has not taken place in normal competitive conditions. What is more, State involvement could arguably justify the maximisation of ex post competition by means of access obligations.

[16] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 (hereinafter, the 'Guidance'), para 82. This is argument was also advanced in the context of *Slovak Telekom* (n 4) and previously in *Wanadoo España v Telefónica* (Case COMP/38.784) Commission Decision of 4 July 2007.
[17] Guidance (n 16), ibid.

2.2.6. Nature of the remedy

Even though the underlying factual setting may remain essentially unchanged, the remedies required to bring the infringement to an end may vary significantly from one case to the other. There is indeed a fundamental difference between, for instance, intervention that amounts to a positive obligation – such as a duty to license on regulated terms and conditions – and one that amounts to a simple duty to cease and desist a course of conduct (that is, a negative obligation). Competition law intervention by means of positive duties (an obligation to do something) gives rise to major challenges that are not present when action is negative in nature. The former may be difficult to design and may fail. Even when successful, monitoring its implementation may be complex and resource-consuming. If a remedy like a duty to license is imposed (directly or indirectly) on a firm, it becomes necessary to determine, at the very least, the appropriate royalty, as well as to set up an apparatus to check compliance with the obligation on a continuous basis.

Nature of intervention	*Type*	*Monitoring*	*Example*
Reactive	Behavioural	One-off	Cease-and-desist
Proactive	Structural	One-off	Divestiture
	Behavioural	Continuous	Access obligation

Table 1: Reactive and proactive remedies in the case law and administrative practice

As shown in Table 1, this paper distinguishes between *reactive* and *proactive* remedies. This is a crucial distinction in the sections that follow. Where intervention is reactive in nature, it amounts to a behavioural obligation of a negative nature (a cease-and-desist order) that can be implemented on a one-off basis (that is, it does not require monitoring). Intervention is deemed proactive in nature in two instances. First, where a structural remedy (for the purposes of this paper, the structural separation of the vertically-related activities) is imposed on the firm. Second, the concept refers to behavioural intervention of a positive nature, which cannot be administered on a one-off basis and thus requires monitoring. Intervention in this sense comprises the following: giving (or resuming) access to a rival to an input or platform, prescribing (directly or indirectly) the terms and conditions

under which access to an input or platform is to be given and intervention that results in the alteration of the design of a product.

Given the sharp difference between proactive and reactive intervention, there are reasons to argue that the nature of the remedy should influence whether indispensability is required as an element of the legal test. One could argue, more precisely, that it is sensible to require indispensability in cases that involve the administration of proactive remedies. Because of the difficulties that come with the design, implementation and monitoring of such remedies, it would be reasonable to confine to exceptional circumstances the instances in which competition law intervention leads to the regulation of the terms and conditions of access to an input or platform. The indispensability condition would be an effective mechanism to limit the exposure of the system to the complexities that are inherent in proactive intervention. Since these difficulties are not present where remedial action is reactive, the arguments in favour of requiring indispensability would be far less compelling.

2.3.*Indispensability and legal categories: from refusal to deal to tying*

Courts, authorities and commentators have used various legal categories to capture the basic setting described above (and its variations). Outright refusals to start dealing with a would-be rival are either referred to as a 'refusal to deal' or they are broken down based on the nature of the input or platform to which access is requested. Thus, it is not unusual to distinguish between a refusal to supply (which applies to tangible property) and a refusal to license (which applies to intangible goods).[18] A separate legal category is also sometimes used for terminations of a course of dealing (in particular to emphasise the fact that such conduct may be subject to less stringent conditions).

[18] For a discussion of this question, see O'Donoghue and Padilla (n 9) 562-563.

Of all manifestations of constructive refusals to deal, only 'margin squeeze' conduct is typically presented as a separate legal category.[19]

The basic setting described above can also be (and has in fact been) categorised as a form of tying.[20] This point justifies closer scrutiny. As a potentially anticompetitive strategy, tying concerns instances in which a dominant firm conditions the sale of product A to the acquisition of product B. Traditional tying scenarios give rise to issues that are fundamentally different from the one on which this paper focuses. As shown in Figure 2, these traditional settings do not involve access to an input or platform controlled by a vertically-integrated firm. The concern relates instead to access to customers by rivals. The example that perhaps best captures this traditional scenario is one in which a dominant supplier of soft drinks conditions the sale of product A (say, a cola-flavoured carbonated drink) to the acquisition of product B (say, tonic water).

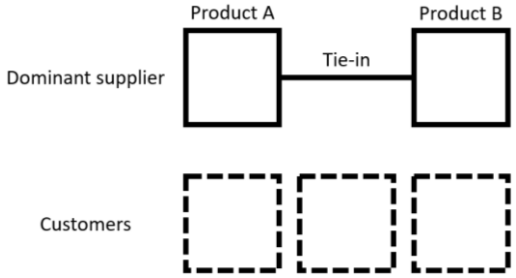

Figure 2: Traditional instances of tying

Figure 3 shows how some non-traditional tying scenarios are identical, in essence, to the basic setting described above. Consider an instance in which a vertically-integrated dominant firm only licenses its operating system (the platform) with its own applications (the input) embedded in it. The operating system is not available as a stand-alone product, and competing applications are not sold with it. The operating system, together with the affiliated applications, is licensed to its

[19] This is suggested by an overview of the relevant textbooks and treatises in the field, including O'Donoghue and Padilla (n 9), Jonathan Faull and Ali Nikpay (eds), *The EU Law of Competition* (3rd edn, Oxford University Press 2013); Alison Jones and Brenda Sufrin, *EU Competition Law – Text, Cases and Materials* (6th edn, Oxford University Press 2016); Richard Whish and David Bailey, *Competition Law* (9th edn, Oxford University Press 2018).

[20] On the issue of tying, see me Maurits Dolmans and Thomas Graf, 'Analysis of Tying Under Article 82 EC: The European Commission's Microsoft Decision in Perspective' (2004) 27 World Competition 225; and David S Evans and Jorge Padilla, 'Tying Under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf' (2004) 27 World Competition 503.

customers, such as computer manufacturers. One could present this instance as one of tying. One could indeed argue that the sale of the operating system ('OS', product A) is conditional on the acquisition of the applications embedded in it ('apps', product B). One could also claim, in the same vein, that the legal treatment given to traditional and non-traditional scenarios should be the same.

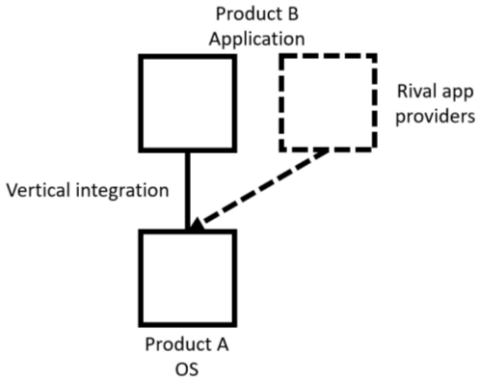

Figure 3: A non-traditional instance of tying

A careful look at this scenario, however, shows that it involves access to a platform. Unlike traditional scenarios, exclusion by rival application developers would not result from them being denied access to customers but from them being denied access to the platform (the operating system) controlled by the vertically-integrated operator. Insofar as this is the case, this non-traditional scenario is impossible to distinguish from the basic setting described above. In fact, it would be reasonable to present every refusal to deal as an instance of tying. Where a vertically-integrated firm refuses to deal with its downstream rivals, for instance, it effectively conditions the sale of its input to the acquisition of the finished product from it. In the scenario at stake in *Magill*, the broadcasters made the sale of product A (the intangible property protected by copyright) conditional upon the acquisition of product B (the publication bearing the intangible property).

There are fundamental differences between traditional and non-traditional tying scenarios. One of the key differences lies in the remedy that is required to bring the alleged infringement to an end. The nature of intervention is a reliable indicator of whether the concerns are similar to those at stake in traditional tying scenarios or whether they relate to access to an input or platform (as in the

basic setting described above). In the context of a traditional tying scenario, effective remedial action can take the form of a cease-and-desist order – that is, a negative obligation. In such a scenario, it is sufficient to order the dominant firm, on a one-off basis, not to condition the sale of product A (a cola-flavoured carbonated drink, in the example above) to the acquisition of product B (tonic water). Reactive intervention along these lines would suffice to eliminate any concerns raised by the practice.

In non-traditional tying scenarios, on the other hand, access to an input or platform is at stake. As a consequence, negative remedies can be expected to be ineffective or unworkable. Ordering a firm to sell a finished product (for instance, a GPS navigation device) without a key input or component (for instance, a digital map) would not be possible if it compromises its basic functionality. Even where a negative remedy is technically feasible, it may be unworkable if, according to normal business practice, the finished product (for instance, an operating system) is only sold together with the input or component in question (for instance, a web browser). In such circumstances, the only effective remedy would be to regulate the conditions of access to the platform (that is, the finished product). The fact that negative remedies are ineffective and/or unworkable reveals that a case, far from concerning a traditional tying scenario, is in essence a variation on the basic setting described above.

The *Microsoft* saga[21] provides an example of how non-traditional scenarios that are formally categorised as tying involve in fact the regulation of access to an input or platform. At stake in the first decision (*Microsoft I*) was, inter alia, the integration of Microsoft's operating system and a media player functionality. On the assumption that the practice was a traditional form of tying, the Commission required Microsoft to sell a version of Windows without the media player. The

[21] This paper distinguishes between two cases in the saga: *Microsoft I – Microsoft* (Case COMP/C-3/37.792) Commission Decision of 24 May 2004 and Case T-201/04 *Microsoft Corp v Commission*, EU:T:2007:289 (hereinafter, '*Microsoft I*') – and *Microsoft II – Microsoft (tying)* (Case COMP/C-3/39.530) Commission Decision of 16 December 2009 (hereinafter, '*Microsoft II*').

implementation of the remedy revealed that there was no customer demand for the product offered by virtue of the decision.[22] Inevitably, reactive intervention treating the case as a traditional instance of tying failed. In the second case (*Microsoft II*), which concerned the integration of the operating system with the web browser functionality, the Commission accepted commitments that amounted, in essence, to ensuring that rival web browsers would have access to the operating system on equal terms and conditions.[23] The administration of proactive remedies, in other words, revealed that the setting in the *Microsoft* saga was indistinguishable from the basic setting described above.

3. Mapping the case law: when and why indispensability is required

3.1. *Where indispensability is required*

3.1.1. Overview of the case law

The instances in which indispensability is required to establish an abuse were reviewed in *Bronner*.[24] The Court clarified, in line with the preceding case law, that indispensability is required, first, where a vertically-integrated dominant firm terminates a course of dealing with a rival on the upstream or downstream market. This factual scenario was at stake in *Commercial Solvents*, the first case in which the ECJ was confronted with the basic setting described above.[25] *CBEM-Télémarketing*,

[22] See in this sense 'EU ruling on Microsoft "flawed"' (BBC News 24 April 2006) ('"As of today no PC maker has shipped a version of XPN […] not a single one" said Microsoft's lawyer, Jean-Francois Bellis, noting that such companies accounted for nine out of 10 sales of Windows. As for the rest, stores ordered 1,787 copies of XPN among 35m copies of Windows, giving it an order ratio of 0.005%, he said').
[23] *Microsoft II* (n 21), para 60.
[24] 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*, EU:C:1998:569, paras 37-41.
[25] Joined Cases 6 and 7/73 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18. The case concerned the supply of aminobutanol, an input for the manufacture of ethambutol. Even though indispensability was not expressly mentioned as an element of the legal test in *Commercial Solvents*, the consensus view among commentators following *CBEM-Télémarketing* and *Bronner* is in line with the Court's position

which relies on *Commercial Solvents* as precedent and which makes an explicit reference to indispensability, also concerned a decision to terminate a course of dealing.[26] Second, the Court explained in *Bronner* that indispensability is also required when a vertically-integrated firm refuses to start dealing with a would-be rival on the upstream or the downstream market. This is so irrespective of whether the refusal relates to a tangible good (such as a distribution platform, as in *Bronner*[27]) or an intangible one (such as the programme listings in *Magill* or the 'brick structure' at stake in *IMS Health*).

3.1.2. Rationale behind the case law

Bronner is also the most obvious starting point to make sense of the rationale behind the case law. In his opinion in the case, Advocate General (hereinafter, 'AG') Jacobs was explicit about the reasons a refusal to deal with a rival is only abusive in exceptional circumstances (which include a finding that access to the relevant input or platform is indispensable).[28] The Advocate General focused primarily on one key consideration, which is the negative impact of access obligations on long-run competition. While forcing a firm to deal with rivals seemingly promotes competition – in the sense that it appears to increase rivalry and might even lead to reduced prices for consumers –

in the latter judgment. Accordingly, it is generally accepted as undisputed that indispensability is an element of the legal test in the event of a termination. See inter alia Faull & Nikpay (n 19) 469 (who explain that there was no express reference to indispensability in *Commercial Solvents* but that the input was arguably indispensable on the facts); O'Donoghue and Padilla (n 9) 575-576 (who show that there is a common set of principles across the case law); and Whish and Bailey (n 19) 717-723 (who interpret *Commercial Solvents* in light of *Bronner* and thus as requiring indispensability).

[26] Case 311/84 *Centre belge d'études de marché - Télémarketing v SA Compagnie luxembourgeoise de télédiffusion and Information publicité Benelux*, EU:C:1985:394, paras 4, 5 and, in particular, para 26 ('That ruling [*Commercial Solvents*] also applies to the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another undertaking on another market'). This is the first judgment in which there is an explicit reference to indispensability in the case law. The case concerned access to advertising space on television for the telephone marketing operations.

[27] *Bronner* (n 24) concerned a refusal to give access to a service for the distribution of periodicals.

[28] Opinion of AG Bronner in Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG*, EU:C:1998:264

it necessarily has an impact on firms' incentives to invest and to innovate. On the one hand, firms may be less inclined to invest and innovate if it appears that rivals would reap the fruits of their efforts. On the other hand, firms may quickly learn that the profitable strategy is to request access from a vertically-integrated rival, instead of investing in the development of an input or platform. Thus, imposing a duty to supply may in the long run lead to less, rather than more, competition.[29]

It is understood that other reasons, tightly related to the preceding one, explain the introduction of the indispensability condition. These were explored by Areeda in a celebrated piece on essential facilities.[30] In particular, it is well understood that requiring a firm to give access to an input or platform typically involves the administration of proactive remedies. In *Commercial Solvents*, for instance, the Commission had to set the prices and the quantities to be supplied.[31] In *Microsoft I*, it imposed (in addition to the media player-related remedies discussed above) an obligation to license interoperability information to rivals on reasonable and non-discriminatory terms and conditions.[32] Such remedies are considerably more demanding in terms of resources than reactive ones. In *Microsoft I*, for instance, the effective administration of the remedy (which involved estimating the reasonable rate for the information) proved to be very complex and resulted in the imposition of a second fine on the firm after the delays involved in its implementation.[33] Areeda explained, in addition, that, given their constraints, competition law institutions are not particularly well suited to design, monitor and implement the positive obligations that come with proactive intervention.[34] This is true irrespective of the underlying legal test.

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[29] Ibid, para 57.
[30] Phillip Areeda, 'Essential Facilities: An Epithet in Need of Limiting Principles' (1990) 58 Antitrust Law Journal 841.
[31] *Commercial Solvents* (n 25), para 42.
[32] Article 5 of Commission Decision in *Microsoft I* (n 21).
[33] Case T‑167/08 *Microsoft Corp. v Commission*, EU:T:2012:323.
[34] See, for an example revealing the limits of competition law institutions, the Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services [2014] OJ C295/79, para 16 and Commission, 'Explanatory Note accompanying the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive

3.2. *Where indispensability is not required*

3.2.1. Overview of the case law

As the law stands, it is clear that 'margin squeeze' practices can be abusive even where the input or platform is not indispensable. The Court was explicit on this point in *TeliaSonera*.[35] Before that judgment, there was some uncertainty about this point. In its Guidance Paper outlining the enforcement priorities on exclusionary practices (hereinafter, the 'Guidance Paper'), the Commission suggested that it would examine constructive refusals to deal, including 'margin squeeze' conduct, as an outright refusal to deal, and thus that it would prioritise these practices in accordance with the same conditions, including – at least in principle – indispensability (or objective necessity).[36] In *Deutsche Telekom*, in turn, the issue was not discussed explicitly. In any event, the infrastructure at stake in the case was indispensable for downstream rivals to compete.[37]

It was necessary to wait until *TeliaSonera* (a case concerning access to the incumbent's infrastructure in the telecommunications industry) for the Court to spell out the legal test against which the legality of 'margin squeeze' conduct is assessed. This practice amounts to an abuse where (i) there is a 'margin squeeze' in the strict sense of the expression (defined as a spread between wholesale and retail prices that is insufficient for an equally efficient downstream rival to cover its costs)[38] and (ii) an exclusionary effect.[39] As far as the second element of the legal test is concerned, the ECJ followed its prior ruling in *Deutsche Telekom*, where it held that a 'margin squeeze', in and

2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services' SWD(2014) 298.

[35] *TeliaSonera* (n 7).

[36] Guidance (n 16), para 80.

[37] Case C-280/08 P *Deutsche Telekom AG v Commission*, EU:C:2010:603, para 255.

[38] *TeliaSonera* (n 7), para 32. But see para 74 and the discussion below.

[39] Ibid, paras 60-77.

of itself, is insufficient to establish an abuse. Thus, for this practice to amount to be caught by Article 102 TFEU, it is necessary to consider its impact on competition in light of the economic and legal context of which it is a part.[40]

3.2.2. Rationale behind the case law

A reading of *TeliaSonera* suggests that the Court placed an emphasis on the mechanism through which the potential effects of the practice are manifested. In this sense, the ECJ held that it was not ruling on a refusal to deal, but on whether the dominant firm's conduct amounted to unfair pricing within the meaning of Article 102 TFEU (and, more generally, on the trading conditions imposed on a dominant firm).[41] If it appears, against this background, that the 'margin squeeze' is abusive, it would matter little whether the relevant input or platform is indispensable. One could interpret this position as suggesting that the Court believes that there are grounds to distinguish between price and non-price mechanisms. In the same vein, *TeliaSonera* reflects a concern about the potential creep of the indispensability condition beyond the basic setting described above.[42] In line with what has been explained, the Court suggested that it would make little sense to require indispensability in the context of a 'margin squeeze' if indispensability is not (and has never been) required in predatory pricing cases. By the same token, the moment indispensability becomes an element of the legal test in the case of the former, it could also be required for the latter.

Prior to *TeliaSonera*, other reasons were advanced to justify not requiring indispensability in the context of a 'margin squeeze'. As already summarised above, it had been suggested (including

[40] *Deutsche Telekom* (n 37), para 250.
[41] *TeliaSonera* (n 7), paras 30-34.
[42] Ibid, para 58 ('[…] if *Bronner* were to be interpreted otherwise, in the way advocated by TeliaSonera, that would, as submitted by the European Commission, amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU').

by the Commission itself) that the rationale identified by AG Jacobs in *Bronner* – the need to preserve firms' incentives to invest and innovate – is not relevant where the vertically-integrated firm has benefited from State aid and/or exclusive rights.[43] Second, it has also been argued that indispensability should not be required where there is a regulatory regime in place. A reading of *TeliaSonera* suggests that these arguments are not decisive. Nothing in the ruling suggests that its scope is confined to instances in which the vertically-integrated firm has benefited from subsidies and/or exclusive rights. In addition, the judgment makes it clear that the relevance of the indispensability condition does not depend on whether there is a regulatory obligation imposing an access duty on the firm.[44]

3.3. *'Grey area' practices*

3.3.1. Non-price-based constructive refusals to deal: *Slovak Telekom*

Slovak Telekom is one of a long line of Commission decisions concerning the behaviour of incumbent telecommunications operators.[45] What is particularly valuable about the case is that it exposed a 'grey area' of practices that share features both with 'margin squeeze' conduct and with outright refusals to deal with rivals. In its decision, the Commission identified several courses of conduct that were found to have, as their object or effect, the exclusion of Slovak Telekom's downstream rivals. Some conduct was categorised as a 'margin squeeze' whereas other practices were deemed to amount to a refusal to deal. The latter included the imposition of unfair trading conditions (such as withholding the necessary information to gain effective access to the

[43] Guidance (n 16), para 82.
[44] *TeliaSonera* (n 7), para 59.
[45] Commission Decision in *Slovak Telekom* (n 4). This long line of administrative practice includes, inter alia, *Deutsche Telekom* (n 37), *Wanadoo* (n 15), and *Telefónica* (n 16). *TeliaSonera*, on the other hand, reached the Court via a reference for a preliminary ruling.

infrastructure and unjustifiably reducing the scope of its obligations under sector-specific regulation). These conditions are best understood as a constructive means to deny access to Slovak Telekom's infrastructure.

It would be reasonable to infer from the relevant case law that a refusal to deal is only abusive where the input or platform is indispensable. According to this view, the two sets of practices at stake in *Slovak Telekom* would be subject to two different sets of legal tests: indispensability would be required for those labelled as a refusal to deal, but not for the 'margin squeeze'. Unsurprisingly, the Commission did not follow this approach in its decision and argued that the legality of both sets of practices should be examined in accordance with the same conditions. Equally unsurprisingly, the Commission concluded that indispensability should not be required for all conduct labelled as a refusal to deal. In this sense the authority noted, in particular, that the practices at stake in *Slovak Telekom* differed from *Bronner*, inter alia, insofar as they concerned the disadvantageous conditions under which access to the operator's infrastructure was being provided, as opposed to a refusal to start dealing with a would-be rival.[46] This analysis is based on the idea that *TeliaSonera* introduces a general principle that applies, beyond 'margin squeeze' conduct, to the terms that vertically-integrated firms apply.[47]

In December 2018, the General Court (hereinafter, the 'GC') validated the substantive analysis of the Commission on this point.[48] It would seem that the primary reason for ruling out the relevance of *Bronner* in the case is the fact that the operator in *Slovak Telekom* was subject to a regulatory obligation requiring it to provide access to its infrastructure.[49] From this perspective, *Bronner* would have introduced the principle that applies only to instances in which there is not a

[46] Commission Decision in *Slovak Telekom* (n 4), para 364.
[47] Ibid, para 365.
[48] Case T‑851/14 *Slovak Telekom* (n 4).
[49] Ibid, paras 117-121.

regime compelling firms to give access.[50] In addition, the GC noted that *TeliaSonera* could be interpreted as suggesting that, as claimed by the Commission in its decision, its scope was not limited to 'margin squeeze' conduct but, more generally, to instances in which dominant firms trade on disadvantageous terms with rivals.[51]

3.3.2. Self-preferencing: *Google Shopping*

In *Google Shopping*, the Commission was confronted with a scenario that was not, in its essential aspects, different from that at stake in *Commercial Solvents* and *CBEM-Télémarketing*.[52] The case revolved around the order in which the results were presented by the Google's search engine. According to the decision, the firm discriminated in favour of its affiliated service when featuring search results (by presenting its results at the top of the page, and this in a more attractive format) and against rival ones (which were subject to a system of penalties that it did not apply to its own affiliate). Crucially, the Commission claims in its decision that Google engaged in this raising rivals' costs strategy once it realised that its own service was not successful.[53] In this sense, the behaviour could be seen as analogous to a termination of a course of dealing.[54] It could be seen, in other words, as a constructive refusal to feature rival services in its search engine. According to the decision, these rival services were placed in a much less favourable position. Rival services were generally displayed in page four of the results list.[55]

[50] Ibid, para 118 ('[…] the conditions referred to in paragraph 115 above were laid down and applied in the context of cases dealing with the question whether Article 102 TFEU could be such as to require the undertaking in a dominant position to supply to other undertakings access to a product or service, in the absence of any regulatory obligation to that end').
[51] Ibid, paras 123-127.
[52] *Google Shopping* (n 5).
[53] Ibid, para 343.
[54] Technically speaking, however, one must acknowledge that the conduct did not relate to the way Google dealt with rivals. The analysis concerned the way Google's search engine worked, and more precisely the way results were listed. For the same reason, only following intervention did Google start dealing with rivals. For an analysis of users' behaviour supporting the conclusion that the practice was analogous to a refusal to deal, see *Google Shopping* (n 5), paras 454-461.
[55] Ibid, para 370.

Google was fined EUR 2.42 billion and was required to apply the principle of equal treatment when displaying results on its engine.[56] The firm argued that such an outcome would only be justified if it were shown that the search engine is indispensable, within the meaning of *Bronner*, for rival services on the neighbouring market in which they operate (comparison shopping).[57] The Commission rejected the argument and claimed, in line with the Court's position in *Van den Bergh Foods*, that *Bronner* would not be applicable in a context in which intervention would not require a firm to 'transfer an asset or enter into agreements with persons with whom it has not chosen to contract'.[58] Formally speaking, the decision simply required the firm to cease and desist its course of conduct and thus allowed the authority to claim it had not imposed a duty to deal with a rival.[59]

The Commission also argued that, unlike the *Bronner* case, the conduct did not involve a 'passive refusal' to deal with a rival, but an active course of conduct consisting in the more favourable display of Google's own services.[60] This argument focuses exclusively on *Bronner*. As a result, it does not consider cases like *Commercial Solvents* and *CBEM-Télémarketing*, which involved an active course of conduct (and more precisely a termination of a course of dealing) but which required indispensability. Finally, the Commission pointed out that it was not novel to find that the leveraging of a dominant position amounts to an abuse.[61] This argument, in and of itself, does not rule out the relevance of indispensability. Indeed, the case law discussed above, including *Bronner* and *CBEM-Télémarketing*, involves the leveraging of a dominant position.

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[56] Ibid, Articles 2 and 3.
[57] Ibid, para 645.
[58] Ibid, para 651. In support of this position, the Commission refers to Case T-65/98 *Van den Bergh Foods Ltd v Commission*, EU:T:2003:281, para 161; and Case C-552/03 P, *Unilever Bestfoods (Ireland) Ltd v Commission*, EU:C:2006:607, paras 113 and 137. These cases concerned the de facto exclusive dealing clauses imposed by *Van den Bergh* on its customers. The firm did not formally prevent customers from getting supplies from competing producers, but required exclusivity in the freezer cabinets it made available to them.
[59] In practice, however, the implementation of the remedy led to the setting up of an auction system through which Google dealt with rivals. See in this sense Pallavi Guniganti, 'Google separates shopping for EU remedy' *Global Competition Review* (London, 26 September 2017).
[60] Ibid, para 650.
[61] Ibid, paras 334 and 649.

4. Analysis of the case law: what are the determinant factors?

4.1. *Factors that are not determinant*

The analysis of the previous section shows that, as the law stands, some factors do not seem to determine whether indispensability is an element of the legal test. To begin with, indispensability may be required both where a dominant firm refuses to start dealing with a rival and where it terminates a course of dealing. *Commercial Solvents* and *CBEM-Télémarketing* – in which indispensability was required – concerned the latter instance. *Bronner*, in turn, concerned the former. Second, it is safe to conclude that the question of whether there is a regulatory obligation to supply is not determinant either. This is clear from *TeliaSonera*, which concern a form of access that was not required by virtue of the relevant sector-specific regime. Third, the same judgment does not appear to give any weight to the fact that the firm's infrastructure had been developed in non-competitive conditions and/or supported by State aid. Nothing in the Court's reasoning suggests that the outcome would have been different had the telecommunications network been developed following the liberalisation of the sector.

4.2. *Factors that may be determinant*

By ruling that indispensability is not an element of the legal test in the context of a 'margin squeeze', the Court suggested that some of the factors discussed above may be determinant. These factors are identified in Table 2. First, the determinant criterion could be whether the practice is price-based. Second, one could interpret *TeliaSonera* as distinguishing between outright refusals to deal (where indispensability would be required) and constructive ones (where it would not). Finally, the remedy could be deemed the determinant factor. Where, as in *Bronner* and *Commercial Solvents*,

intervention would lead to the imposition of positive obligations (involving, inter alia, the access price, the amounts to be supplied and/or the terms and conditions under which the dealings must take place), indispensability would be required. Where, as in *Deutsche Telekom* and *TeliaSonera*, the remedy is reactive in nature, it would be sufficient to show that the practice has, or is likely to have, an anticompetitive effect.

The Commission, in its administrative practice, appears to have taken the view that the first two factors are not determinant. In *Slovak Telekom*, it argued that the scope of *TeliaSonera* was not limited to price-based conduct. In addition, it suggested that the constructive or outright nature of the refusal is not necessarily decisive either.[62] In that case, and in *Google Shopping*, the Commission placed an emphasis on the remedy that is being imposed and used vocabulary suggesting it could be the decisive factor. In the two decisions, it explained that, unlike *Bronner*, intervention against the vertically-integrated firms did not mandate access to an input or platform. Instead, the Commission merely required that the alleged infringement be brought to an end (at least so formally speaking).

4.3. *The nature of the remedy (proactive or reactive) is the determinant – if implicit – factor*

4.3.1. Indispensability is an element of the legal test where the remedy is proactive in nature

There are compelling reasons to agree with the point of principle at which the Commission hinted in *Slovak Telekom* and *Google Shopping*. A careful reading of the case law shows that the (proactive or reactive) nature of the remedy is, as suggested by the authority, the factor that explains why

[62] Commission Decision in *Slovak Telekom* (n 4), para 367.

Case	*Indispensability part of the test?*	*Refusal to start or termination?*	*Outright or constructive?*	*Price- or non-price-based?*	*Regulatory obligation to deal?*	*Exclusive rights and/or State aid?*	*Nature of remedial action?*
Commercial Solvents	**Yes**	Termination	Outright	Non-price-based	No	No	Proactive
CBEM-Télémarketing	**Yes**	Termination	Outright	Non-price-based	No	No	Proactive
Magill	**Yes**	Refusal to deal	Outright	Non-price-based	No	No	Proactive
Bronner	**Yes**	Refusal to deal	Outright	Non-price-based	No	No	Proactive
Deutsche Telekom	No	Refusal to deal	Constructive	Price-based	Yes	Yes	Reactive
TeliaSonera	No	Refusal to deal	Constructive	Price-based	No	Yes	Reactive
Slovak Telekom*	No	Refusal to deal	Constructive	Price and non-price-based	Yes	Yes	Reactive
* Appeal pending							

Table 2: Summary of the case law

indispensability is an element of the legal test in some cases. Several reasons support this conclusion. First, there is explicit support for this position in *Van den Bergh Foods*, mentioned above. Second, it would be somewhat artificial, and impracticable, to distinguish cases based on whether the practice is price-based or not. *Slovak Telekom* is an eloquent example in this regard. It reveals that price-based and non-price-based strategies can be used indistinctly in the same context and can have the same object and/or effect. The same can be said about outright and constructive refusals to deal. This is an aspect that has long been noted in the literature[63] and that is particularly well illustrated by reference to *Google Shopping*. The practice at stake in the case – and, in particular, the fact that rival services were demoted was deemed problematic precisely because it was indistinguishable in practice from the exclusion of these services from the results list.

In addition (and this is the third point), *Slovak Telekom* shows that the boundaries between outright and constructive refusals to deal may be difficult to draw in practice. Thus, it may be arbitrary to rely on one category or the other to qualify the conduct, which is perhaps why the Court has not relied on this divide. The dominant firm's behaviour in *Slovak Telekom* could be seen as a constructive refusal to give access to its infrastructure (and the decision suggests that this is how the practice was understood by the Commission). Formally speaking, however, the behaviour could also be construed as a series of discrete refusals to provide access to some types of information or to some elements that are ancillary but indispensable to make effective use of the infrastructure. It is difficult to see why the applicable test should depend on whether the focus is placed on the overall object and effect of the conduct or on the concrete mechanisms through which it is manifested. More importantly, there seems to be no support in the case law for this idea.

Fourth, and perhaps most importantly, the reasons for introducing indispensability as a legal filter in the legal test are only relevant where administrative action results in the administration of

[63] See above, n 3.

proactive remedies. In this sense, the Court's position in *Van den Bergh Foods* seems not only sensible but consistent with the rest of the case law. The rationale for requiring indispensability is twofold, as explained above. To begin with, positive obligations forcing a firm to give access and/or structural remedies can be expected to impact negatively on firms' incentives to invest and innovate. The promotion of short-term competition is likely to come at the expense of long-run rivalry. In addition, behavioural remedies regulating the terms and conditions of access to an input or an infrastructure is demanding where it requires the sort of positive obligations (price, amounts and/or terms and conditions) involved when intervention is proactive.

Such factors are not relevant where remedies are reactive. Where the infringement can be brought to an end by means of a cease-and-desist order, complex considerations concerning the design, implementation and monitoring of the remedy (and its impact on firm's incentives to invest and innovate) would not be involved. Intervention would in fact be as uneventful as bringing the infringement to an end in predatory pricing, exclusive dealing and conditional rebates cases. From the perspective of the remedy, there is in fact no difference between these three practices and 'margin squeeze' conduct, for instance. For the same reason, it would make little sense to require indispensability in relation only to the latter. As argued by the Commission in *Slovak Telekom* and *Google Shopping*, it is in light of these insights that one can make sense of the Court's position in *TeliaSonera*.

In the specific economic and legal context of *TeliaSonera*, the alleged 'margin squeeze' could be brought to an end by means of a cease-and-desist order, perhaps assorted with a fine.[64] Even though the vertically-integrated firm was under no regulatory obligation to offer the input that was at the origin of the case, there was a sector-specific apparatus in place that ensured the

[64] In the proceedings at the national level, the Swedish Competition Authority brought an action before the Stockholm District Court. The remedy sought was the payment of an administrative fine for an abuse of a dominant position. See in this sense *TeliaSonera* (n 7), para 8. See also the Judgment of the Stockholm District Court of 21 December 2004, available at http://www.konkurrensverket.se/globalassets/press/stamningsansokan_adsl_04-1135.pdf.

effectiveness of reactive intervention. In such circumstances, there was no compelling reason to introduce indispensability as an element of the legal test. The case did not demand the national court to apply competition law in an unconventional way, or to engage in the sort of complex assessments that come with the design, implementation and monitoring of a regulatory regime. What is more (and this is a point expressly made by the Court in the ruling), had indispensability been required in the circumstances of *TeliaSonera*, it is difficult to see why it would not be required in cases demanding the same sort of analysis and intervention. These include, as mentioned above, predatory pricing and conditional rebates.

4.3.2. Navigating the 'grey area': *Slovak Telekom* and *Google Shopping*

It is against this background that one can try and address the uncertainties raised by *Slovak Telekom* and *Google Shopping*. If one accepts, in line with the argument advanced by the Commission, that the remedy is the determinant factor, it becomes clear that indispensability should not be an element of the legal test in the first case. As the decision in *Slovak Telekom* shows, the infringement could be brought to an end merely by requiring the firm to cease and desist the contentious conduct.[65] This is so, in particular, because there was a comprehensive sector-specific regime in place which not only prescribed a set of positive obligations on the vertically-integrated firm but empowered a sector-specific authority to implement and monitor such obligations. What is more, a reading of the decision makes it clear that Slovak Telekom's behaviour could be effectively corrected via regulation. In fact, the Commission presented the practices that were found to be in breach of Article 102 TFEU as violations of the regime in question.[66]

[65] Article 3 of Commission Decision in *Slovak Telekom* (n 4).
[66] Ibid, paras 372-377.

There was no sector-specific regime overseeing the firm's activities in *Google Shopping*. This is one of the chief reasons why, irrespective of what the decision formally required, the alleged infringement could only be brought to an end by means of proactive intervention. The principle of equal treatment, which the Commission imposed on the firm, effectively involved changes to the design and operation of the Google's search engine. Putting the firm's and rival services on an equal footing could have been achieved by removing the rich, attractive format used to showcase its shopping division, by giving rivals access to such format on non-discriminatory terms and conditions or by means of a divestiture. In this sense, the aftermath of the case gives an idea not only of the nature of the positive – even if implicit – obligations involved, but of the difficulties relating to the implementation and monitoring of the remedy. To comply with the decision, the firm altered the presentation of the search results so rivals would be treated equally – that is, it displayed their services at the top of the page and with the same rich, attractive format as its own. This outcome was achieved by setting up an auction mechanism allowing rivals to bid for space at the top of the page on an equal footing with Google's own service.

The remedy package was as complex and far-reaching, if not more, as the positive obligations introduced in cases like *Commercial Solvents*, *Magill* as well as *Microsoft I* and *II*. The difference between *Google Shopping* and these precedents is that the decision did not directly prescribe a particular measure (even though proactive remedies seemed inescapable in light of the obligation imposed and the relevant economic and legal context).[67] Because it simply dictated a principle to be followed by the firm and did not prescribe a particular way to implement it, the Commission was able to claim that, unlike *Bronner*, it did not formally mandate the firm to deal with rivals. Accordingly, the argument goes, the authority would have imposed a reactive measure (a cease-and-desist obligation).[68]

[67] *Google Shopping* (n 5), paras 697-705. See above, n 59.
[68] Ibid, para 651.

The principles-based approach embraced by the Commission in *Google Shopping* raises an important question about the interpretation of the relevant precedents. If one accepts that, as the law stands, indispensability is an element of the legal test when intervention is proactive, the remaining issue is whether the (proactive or reactive) nature of the remedial action is evaluated from a formal perspective (as defended in the decision) or from a substantive one instead. One can think of two main reasons why it is more reasonable to place substance over form. Accordingly, there are reasons to conclude that the relevant criterion is what intervention would actually entail in substance, and not so much what firms may be formally required to do by the Commission or a national competition authority (hereinafter, 'NCA').

If form were placed over substance, it would be easy for the Commission (or any competition authority) to circumvent the indispensability condition in every case by adopting a principles-based approach to the remedy (which would not prescribe a particular route to comply with the decision). In a case involving a factual scenario identical to the one at stake in *Magill*, for instance, a competition authority would be able to avoid the condition by leaving to the firm the exact way in which to bring the abusive refusal to license to an end (the principle of equal access to the technology could be achieved, inter alia, by means of licensing on fair, reasonable and non-discriminatory conditions but also by means of a structural separation between the upstream and the downstream divisions of the dominant firm).

Second, form – as opposed to substance – is a poor guide of the complexities involved in the design, implementation and/or monitoring of a remedy. Even though the Commission could formally declare, in *Google Shopping*, that it did no more than impose a cease-and-desist order, the aftermath of the case reveals that the case gave rise to the sort of issues that were at stake in cases were indispensability was found to be an element of the legal test. Not only the application of the principle of equal treatment require proactive measures, but its design and implementation have proved to be controversial. The decision was adopted in June 2017 and, at the time of writing this

piece (more than two years later), some aspects remain controversial.[69] Arguably, the very fact that the Commission followed a principles-based approach to compliance is itself evidence that the *Google Shopping* case has little to do with cases in which any concerns would be effectively addressed by means of a one-off, reactive remedy.

4.3.3. Beyond the 'grey area': non-traditional tying and other scenarios

It has already been explained that non-traditional tying scenarios, such as *Microsoft I* and *II*, are not fundamentally different from the basic setting described above. Where the remedy in a case labelled as tying involves regulating the conditions of access to an input or platform, the issues are essentially identical to those at stake in *Commercial Solvents*, *Bronner* and *Google Shopping*. For the same reason, it would come across as sensible to require indispensability as an element of the legal test in such non-traditional scenarios. This point was suggested by commentators who, in the aftermath of *Microsoft II*, argued that the case was a refusal to deal one in disguise.[70] The issue has not been addressed in the case law – *Microsoft I* was never challenged before the ECJ. The discussion may arise, however, in future cases.[71]

A second category of cases in which it would be reasonable to require indispensability concerns the terms and conditions of access to the stores run for the distribution of applications for

[69] See for instance Gary Reback, 'Google outwits the European Commission once again' *Financial Times* (London, 26 October 2017); Matt Richards, 'Google not complying with shopping remedies, rivals claim' *Global Competition Review* (London, 22 November 2018); and Rochelle Toplensky, 'Google overhauls European search results to avoid probe' *Financial Times* (London, 19 March 2019).
[70] Nicolas Petit and Norman Neyrinck, 'Back to Microsoft I and II: Tying and the Art of Secret Magic' (2011) 2 Journal of European Competition Law & Practice 117.
[71] See in particular the *Android* case, where the Commission, inter alia, concluded that Google's conduct amounted to unlawful tying – *Google Android* (Case AT.40099) Commission Decision of 18 July 2018 (the decision was unavailable at the time of writing). Interestingly, Google has announced that it would introduce a remedy similar to the one implemented in *Microsoft II* to bring the alleged infringement to an end. See in this sense https://www.android.com/choicescreen/.

iPhone and Android devices.[72] As in the basic setting described above, Apple and Google run the distribution platform and also offer applications in competition with rival developers. Complaints by the latter point to issues that are essentially similar to those underpinning *Commercial Solvents* and *Google Shopping*. Third-party developers have argued that Apple and/or Google grant more favourable terms and conditions to their own applications. This behaviour, it is claimed, is or has been manifested in a variety of ways. For instance, the press has reported claims that competing products face the threat of being delisted if a platform operator as soon as affiliated products are developed.[73]

A third category comprises some (closed and ongoing) investigations of Amazon's conduct. These investigations (by the Commission[74] and, inter alia, the German[75] and the Italian[76] competition authorities) focus on the firm's multiple role as online retailer, logistic platform and platform (marketplace) enabling third-party retailers to offer their products via the Internet. The complaints, in turn, essentially argue that Amazon favours its own services at the expense of rival ones. The Commission, for instance, investigates, inter alia, whether the firm obtains an unfair advantage from the data obtained from the operation of its marketplace.[77] The Italian authority, in

[72] See for instance Matt Reynolds, 'Devs call on EU antitrust chiefs to rein in Apple's App Store abuse' *Wired* (London, 29 April 2019), available at https://www.wired.co.uk/article/apple-eu-vestager-screen-time-antitrust-competition-app-store.
[73] Ibid.
[74] Commission, 'Antitrust: EC opens formal investigation against Amazon' IP/19/4291 (Brussels, 16 July 2019), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4291.
[75] Bundeskartellamt, 'Bundeskartellamt obtains far-reaching improvements in the terms of business for sellers on Amazon's online marketplaces' (Bonn, 17 July 2019), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/17_07_2019_Amazon.html?nn=3600108.
[76] Autorità Garante della Concorrenza e del Mercato, 'A528 – Amazon: avviata istruttoria su possibile abuso di posizione dominante in marketplace e-commerce e servizi di logistica' (Rome, 16 April 2019), available at https://www.agcm.it/media/comunicati-stampa/2019/4/Amazon-avviata-istruttoria-su-possibile-abuso-di-posizione-dominante-in-marketplace-e-commerce-e-servizi-di-logistica.
[77] In its press release (n 74), the Commission points out that it 'will focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition'.

turn, examines claims concerning the alleged advantage given by merchants fulfilling their orders via Amazon's logistic service.[78]

Finally, concerns have been raised about the control of data by some firms in the digital space.[79] Several proposals that would require dominant firms to share their data with rivals on neighbouring markets have been put forward.[80] Intervention in this sense would inevitably lead to the emergence of a regulatory apparatus prescribing the terms and conditions of access to the relevant datasets. For this very reason, it seems appropriate to require indispensability for a refusal to amount to a breach of Article 102 TFEU. In this sense, whether or not the data is protected by intellectual property does not seem to be a crucial factor. Whether or not such data is a by-product of other activities would not be decisive either. One must bear in mind, in this regard, that indispensability was required in *Magill*, and this even though it had been openly questioned throughout the case whether the information, a mere by-product (programme listings) of the broadcasters' main activities, was worthy of copyright protection.[81]

5. The future of indispensability in the case law: demise or clarification?

5.1. *Indispensability as an administrable proxy: substantive and institutional perspectives*

There are compelling substantive and institutional reasons to preserve indispensability as an element of the legal test. A fundamental lesson to draw from *Bronner* (and AG Jacobs' Opinion in the case)

[78] See Thibault Larger, 'Italy competition watchdog opens probe into Amazon, adding to EU list' *Politico* (Brussels, 16 April 2019), available at https://www.politico.eu/article/italy-competition-watchdog-opens-probe-into-amazon-adding-to-eu-list/

[79] For a discussion, see Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era*, available at http://ec.europa.eu/competition/publications.

[80] For an example, see Jason Furman and others, *Unlocking digital competition Report of the Digital Competition Expert Panel* (March 2019), 74-77.

[81] See in this sense the Opinion of AG Gulmann in Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*, EU:C:1994:210, para 123. For a discussion, see Inge Govaere, *The Use and Abuse of Intellectual Property Rights in EC Law* (Sweet & Maxwell 1996), 5.60-5.62.

is that EU competition law takes into account the ex ante dimension of competition – that is, the preservation of firm's incentives to invest and innovate. The EU legal order does not simply assume that investments and innovation would have taken place (or would continue to take place) under the conditions resulting from competition law intervention. The system acknowledges, in other words, that a firm may never have developed an infrastructure (or may not continue investing in it) if it had been subject, from the outset, to an obligation to deal with rivals on regulated terms and conditions. Accordingly, an abuse cannot be established simply by pointing out that, from an ex post perspective, a given practice appears to restrict competition. If ex post considerations alone were relevant, any refusal to deal would be deemed anticompetitive insofar as it would reduce rivalry on the neighbouring market.

If follows that the evaluation of the lawfulness of a practice under Article 102 TFEU involves considering the ex ante and ex post dimensions of competition.[82] This exercise, which may be undertaken explicitly or implicitly, is a manifestation of the need to evaluate the impact of practices in light of the relevant counterfactual. The Court has consistently held, in this regard, that the term competition must be understood as competition that would have existed in the absence of the practice.[83] For instance, a refusal to deal would not be in breach of Article 102 TFEU if the infrastructure would never have been developed had the firm been under a duty to give access to its would-be rivals. Weighing the ex ante and ex post dimensions of competition is particularly complex. In this context, the indispensability condition provides a meaningful and administrable proxy to filter out instances in which intervention would have harmed firms' incentives to invest and innovate.

[82] The importance of considering both the ex ante and ex post dimensions of competition is emphasised in Einer Elhauge, 'Defining Better Monopolization Standards' (2003) 56 Stanford Law Review 253.
[83] Case 56/65 *Société Technique Minière*, EU:C:1966:38, 249. According to this judgment, the notion of competition 'must be understood within the actual context in which it would occur in the absence of the agreement in dispute'.

In addition, the integration of various products and/or functionalities by a single firm is known to be a source of pro-competitive gains.[84] The benefits of vertical integration have long been part of the consensus among economists.[85] This consensus is also reflected in the Commission's administrative practice.[86] The crucial point, in this regard, is that these gains may be lost following proactive intervention. This would be the case, in particular, where action takes the form of a structural remedy. Balancing whether the gains from the structural separation from two activities are likely to weigh more than the losses resulting from it is as complex as weighing the ex ante and the ex post dimensions of competition. It is not by chance that Regulation 1/2003 provides that structural remedies are deemed a measure of last resort.[87] Against this background, the indispensability condition is, again, a valuable filter.

Equally important are the institutional considerations identified by Areeda and discussed above. It is not a secret that proactive intervention can be particularly demanding, in terms of resources, for courts and competition authorities. And the case law and administrative practice confirm this view. Courts and authorities may devise remedies that are ineffective (as in *Microsoft I*) or too far-reaching (if for instance they do not allow it to obtain a fair return on its investments). Even assuming they are effective and proportionate, their implementation may be protracted and controversial, as the aftermath of *Google Shopping* reveals. If one takes account of these factors, indispensability looks like an appropriate device to limit competition authorities' exposure to

[84] See in this sense Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization* (4th edn, Pearson 2015) 420-428.

[85] For an expression of this consensus, see OECD, 'Vertical Mergers in the Technology, Media and Telecom Sector' DAF/COMP(2019)5, available at https://one.oecd.org/document/DAF/COMP(2019)5/en/pdf; and Simon Bishop, Andrea Lofaro, Francesco Rosati and Juliet Young, 'The Efficiency-Enhancing Effects of Non-Horizontal Mergers' Report by RBB Economics for DG Enterprise and Industry, available at https://ec.europa.eu/growth/content/efficiency-enhancing-effects-non-horizontal-mergers-0_nn.

[86] See in particular Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6.

[87] Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1 provides that '[s]tructural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy'. See also Recital 12 of the same Regulation.

proactive intervention, its complexities and error-prone nature. Importantly, this conclusion is valid irrespective of whether intervention would negatively affect a firm's incentives to invest and innovate. As already discussed, indispensability was an element of the legal test in cases like *Magill*, where such considerations were not relevant.

5.2. *The vulnerability of the case law: substantive and institutional perspectives*

5.2.1. The incentive to circumvent (or water down) the indispensability condition

However compelling the case law may be, it is vulnerable. This is so for substantive and institutional reasons. If one focuses on the latter, it appears that claimants and competition authorities have an incentive to try to circumvent and/or water down the indispensability condition. Given how demanding it is to establish, in light of *IMS Health*, that there are no 'alternative solutions' (even if less advantageous) to an input or platform and that duplicating it would 'impossible or unreasonably difficult', it is reasonable to expect this pattern of conduct from the party bearing the burden of proving a prima facie infringement. The case law and administrative practice provide concrete support for this idea. *Slovak Telekom* and *Google Shopping* suggest that the Commission is likely to use a variety of arguments to claim that indispensability is only relevant, if at all, in the narrow factual circumstances of *Bronner*, *Magill* and *IMS Health*. These two decisions are also interesting in that they shed light on how the Commission might engage with the case law. In *Google Shopping*, for instance, the authority relied on *CBEM-Télémarketing* to support of the proposition that the firm's behaviour amounted to abusive leveraging.[88] The similarities between the two cases are undeniable (they are two illustrations of the basic setting described above). Crucially, however, the

[88] *Google Shopping* (n 5), para 334 and 649.

Commission did not appear to acknowledge that, according to the test set out *CBEM-Télémarketing*, indispensability is a condition to establish a breach of Article 102 TFEU.

Where the Commission does not dispute the relevance of the indispensability condition, it may attempt to re-interpret its meaning and implications. *Microsoft I* is a good example in this regard. The facts of the case suggested that the firm's input was not indispensable within the meaning of *Bronner* and *IMS Health*. There was evidence showing that it was not 'impossible or unreasonably difficult' to enter the market without the interoperability information that was at the heart of this aspect of the case (even though the alternatives were less advantageous).[89] However (and as noted by Vesterdorf, President of the GC at the time of the first instance ruling in *Microsoft I*), the Commission relied on an 'economic viability' test that did not revolve around the objective possibility of entering the market but on rivals' ability to remain on the market and exercise an effective constraint.[90]

5.2.2. Indispensability and legal categories

The strategic use of legal categories can be instrumental in circumventing the indispensability condition. It has already been explained that the basic setting described above can be categorised in different ways – including, as already explained, as a refusal to deal, a 'margin squeeze' and a tie-in. Because the conditions to establish an abuse are not identical for each of these categories, the formal label attached to a practice can be used to frame the terms of the debate and argue that indispensability is not (or should not be) an element of the legal test. The media player aspect of *Microsoft I* is eloquent in this regard. By presenting as an instance of tying a scenario that related, in effect, to the conditions of access to a platform (as the failure in the design and implementation

[89] Case T-201/04 *Microsoft I* (n 21), paras 337-347.
[90] See in particular Bo Vesterdorf, 'Article 82 EC: Where do we stand after the Microsoft judgement?' (2008) 1 Global Antitrust Review 1.

of the remedy would show), the Commission was able to avoid the debate about the applicability of the indispensability condition.

The use of existing and new legal categories has emerged again in the context of *Google Shopping* and similar cases that revolve around the favourable treatment given by a platform to its affiliates.[91] In particular, it has become commonplace to label these cases as instances of 'self-preferencing'.[92] With the use of this category, the terms of the debate have moved away from the indispensability condition. It has been suggested, at least in relation to firms in the digital sphere, that self-preferencing should be deemed prima facie unlawful – that is, that it should be prohibited as abusive unless the dominant firm is able to provide evidence that the practice is unlikely to have anticompetitive effects and/or that the efficiencies it yields outweigh any such effects.[93] This idea follows a widespread perception that there is something inherently problematic in vertically-integrated firms competing with third parties to which they supply an input (or give access to an infrastructure).[94]

5.3. *Two routes for indispensability: demise or clarification*

5.3.1. One route: the demise of indispensability

Against the background described above, the case law may evolve in two opposite directions. One route can be expected to lead to the eventual demise, for all practical purposes, of indispensability.

[91] See in particular the examples mentioned in Section 4.3.3.
[92] See Crémer, de Montjoye and Schweitzer (n 79), 65-68.
[93] Ibid.
[94] See for instance Lina M Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 973. See also Zach Beauchamp, 'Elizabeth Warren's really simple case for breaking up big tech' *Vox* (Washington DC, 22 April 2019), available at https://www.vox.com/policy-and-politics/2019/4/22/18511860/elizabeth-warren-cnn-town-hall-tech, where Elizabeth Warren in quoted as saying: 'you can be the umpire in the baseball game and you can run an honest platform. Or you can be a player, that is, you can have a business or you can have a team in the game. But you don't get to be the umpire and have a team in the game'.

This outcome would become a reality if the EU courts abandoned the existing case law to follow the logic underpinning *Slovak Telekom* and *Google Shopping*. The interpretation of Article 102 TFEU advanced in these two cases would allow it to avoid the need to show indispensability in virtually every instance. The vocabulary used by the Commission in *Slovak Telekom* hints at a threshold for intervention that is markedly lower than the one endorsed in *Bronner* and *Magill*. As pointed out above, the authority suggested that some refusals to deal would not require evidence of indispensability.[95] In a sense, it presented *Bronner* as a *lex specialis*. In addition, it claimed that it would not be necessary to show that the refusal would lead to the elimination of all competition, which is what the relevant precedents would suggest.[96] According to the decision, it would be sufficient to show that the practice is capable of making 'the entry of other operators or their activity on the market more difficult or impossible'.[97]

If anything, *Google Shopping* takes this approach further. The decision is based on the idea that all leveraging abuses, irrespective of how they are labelled, can be abusive if they are deemed capable of having anticompetitive effects.[98] From this perspective, the mechanism through which competition is restricted (leveraging) would become a single, overarching legal category that would not have indispensability as one of the conditions to establish liability. In addition – and this has also been explained above – the Commission argues in the decision that the indispensability condition would not be relevant whenever the Commission adopts a principles-based approach to the remedy (or merely requires the firm to bring the infringement to an end without prescribing a particular way to do so).

One can think of two major consequences for the system if the principles of the case law were to be abandoned in line with the Commission's position. First, the demise of indispensability

[95] See above, n 47.
[96] *Magill* (n 6), para 56; *Bronner* (n 24), para 40; and *IMS Health* (n 1), paras 40-47.
[97] Commission Decision in *Slovak Telekom* (n 4), para 361.
[98] See above, n 85.

would give the authority discretion to decide when indispensability is required to establish an abuse. In this sense, the issue would no longer be driven by law, but by policy (and as such subject to limited judicial review). Second, and insofar as it is a notoriously difficult threshold to meet in practice, it is reasonable to expect authorities and claimants to bring a larger number of cases involving the terms and conditions of access to an input or platform once indispensability is not an element of the legal test. If that is the case, the system would be exposed more frequently to its limits – and more precisely to the difficulties that come with the design, implementation and monitoring of proactive remedies.

5.3.2. A second route: towards clarification

The case law may prove resilient, in the sense that indispensability may continue to be an element of the legal test where intervention leads to the administration of proactive remedies. Resilience depends on the clarification and streamlining of the case law. While the relevant precedents follow a consistent and compelling set of principles, these have not always been spelled out with clarity. As a result, the interpretation of the case law tends to give rise to controversy, legal uncertainty and may open the door to strategic behaviour by stakeholders. The route towards clarification would ideally acknowledge two key points. First, some of the legal categories most commonly used by commentators are neither useful nor reliable. Second, it would be beneficial for the system if the principles underpinning the case law were spelled out more clearly.

As far as the first point is concerned, the evolution of the case law and administrative practice shows that the divide between refusals to deal, on the one hand, and 'margin squeeze' practices, on the other, cannot effectively capture complex factual scenarios and adapt to them. As *Slovak Telekom* reveals, there may be instances in which indispensability is not relevant to evaluate the legality of a refusal to deal. In these instances – and the Commission decision in the case is an

example – it would make sense to apply the legal test spelled out in *TeliaSonera*. Conversely, indispensability may well be required in the context of a constructive refusal, including a 'margin squeeze' if intervention would require the administration of proactive remedies. Similarly, the 'tying' label may cease to be useful and reliable if it is applied beyond traditional scenarios, in particular if it is relied upon strategically to circumvent the indispensability condition.

It seems necessary to capture the essence of the case law around new, streamlined legal categories that better reflect the differences between cases in which indispensability would not be required and instances in which it would. Factual scenarios where reactive intervention would be sufficient to bring the infringement to an end (and thus where indispensability would not be an element of the legal test) are essentially instances of *predatory leveraging*. These scenarios could be categorised as such. In some instances, this form of predation may take the form of price-related conduct (in particular, a 'margin squeeze', as in *TeliaSonera*). Manifestations of the practice may also be manifested through non-price-related means, as *Slovak Telekom* shows.

The legal conditions to show that predatory leveraging is prima facie abusive are twofold. First, it would be necessary to show that there is a practice that places rivals dealing with the firm at a competitive disadvantage. The concrete manifestation of the competitive disadvantage may vary from one practice to the other. A 'margin squeeze', which involves forcing downstream rivals to sell at a loss,[99] is one example. Degrading the quality of the information supplied to a rival is another one. Second, it would be necessary to show that the competitive disadvantage has, or is likely to have, the effect of excluding equally efficient rivals from the relevant market.[100] It is now clear from the case law that a mere competitive disadvantage is not in itself sufficient to establish an anticompetitive effect.[101]

[99] *TeliaSonera* (n 7), para 32.
[100] Ibid, paras 60-77.
[101] *Deutsche Telekom* (n 37), para 250. See also, in the same vein, Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, paras 38-39; Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, paras 39-46; and Case C-295/17 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade*

Factual scenarios in which proactive remedies would be necessary to bring the infringement to an end are essentially instances that involve the *abusive regulation of access* to an input or platform. The peculiarity of these cases is that intervention requires, and leads to, the (direct or indirect) prescription of the terms and conditions under which the firm deals with rivals (and this irrespective of what the decision formally requires). At a minimum, it seems necessary to show that two conditions are met. First, indispensability as defined in the relevant case law (in particular *Bronner* and *IMS Health*). Second, evidence that lack of access would result in the elimination of all competition.[102] This second condition is not simply the mirror image of the first, as has sometimes been suggested.[103] Even if an input (or platform) is indispensable to new entrants, it would not eliminate all competition if the vertically-integrated firm faces competition downstream (or upstream). For instance, access to the incumbent operator's local loop may be indispensable if it is unreasonably difficult to build a competing network. However, a refusal to give access to the local loop may not lead to the elimination of all competition if there is a rival infrastructure, such as a cable television network, already in place.[104]

Tributária e Aduaneira, EU:C:2018:942, para 26 ('the mere presence of an immediate disadvantage affecting operators who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not, however, mean that competition is distorted or is capable of being distorted').

[102] See above, n 93.

[103] Christian Ahlborn, Vincenzo Denicolò, Damien Geradin, and A. Jorge Padilla, 'DG Comp's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries (March 2006), available at https://ssrn.com/abstract=894466. According to the authors, indispensability and the elimination of all competition would be 'two faces of the same coin: if the input is really indispensable, it is difficult to see how a refusal to license could fail to exclude all competition, and vice versa'. See also Inge Graef, EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility (Kluwer 2016)

[104] This reality is not uncommon in the telecommunications industry. Access to the legacy infrastructure may be indispensable, on the one hand, whereas cable networks can be an alternative infrastructure at the downstream level but that is not accessible to would-be rivals at the wholesale level. See in this sense Wholesale local access provided at a fixed location in the Netherlands (Case NL/2015/1794) Commission Decision of 30 November 2015, available at https://circabc.europa.eu/sd/a/cba931ad-bbf3-4ddf-b0e5-d2714e589a3b/NL-2015-1794%20ADOPTED_EN.pdf.

Legal category	*Context*	*Legal conditions (at a minimum)*	*Case law*
Predatory leveraging	Vertical integration Reactive remedies	Disadvantage Anticompetitive effect	*Deutsche Telekom* *TeliaSonera* *Slovak Telekom*
Abusive regulation of access	Vertical integration Proactive remedies	Indispensability Eliminates all competition	*Commercial Solvents* *CBEM-Télémarketing* *Bronner*

Table 3: Clarifying the essence of the case law

6. Conclusions

This paper has sought to identify the instances in which indispensability is a precondition for the application of Article 102 TFEU. An analysis of the case law shows, it is submitted, that indispensability is an element of the legal test where intervention (i) involves a vertically-integrated firm and (ii) would lead to the administration of proactive remedies – such as a structural separation or positive obligations that amount to the regulation of the terms and conditions under which access should be given to an input or platform. Evidence of indispensability is not required where the infringement can be brought to an end by means of reactive remedies – that is, a negative obligation that can be administered on a one-off basis. The nature of intervention (proactive or reactive) is the key to make sense of the divergent outcomes in cases like *Bronner* and *IMS Health*, on the one hand, and *TeliaSonera* and *Slovak Telekom*, on the other.

It is submitted that the case law, as it stands, is sensible. Regulating, on a case-by-case basis, the terms and conditions of access to an input or platform is a particularly complex exercise, prone to errors. Proactive intervention involves considering both the ex ante and ex post dimensions of competition – and more precisely whether the firm's conduct restricts competition that would have existed in its absence. What is more, the design, implementation and monitoring of positive obligations regulating the terms and conditions of access to an input or platform is demanding in terms of resources and (as the administrative practice shows) can fail. Against this background, the indispensability condition looks like a meaningful and administrable proxy that allows competition

authorities to identify with reasonable accuracy the circumstances in which intervention would be justified.

Slovak Telekom and *Google Shopping* are two recent Commission decisions in which the essence of the case law has been put to the test. In the first of these cases, negative obligations alone were sufficient to bring the alleged infringement to an end. Accordingly, it would be sensible to conclude – in line with the Commission in its decision – that the indispensability of the infrastructure is not relevant to establish the lawfulness of the various practices at stake. In *Google Shopping*, the Commission suggested, in line with what has been argued in this piece, that the nature of the remedy is a relevant factor when considering whether indispensability is an element of the legal test. The case provides a valuable opportunity to clarify whether the (proactive or reactive) nature of the remedy is a matter of form (that is, of what the decision formally mandates) or substance (that is, what the decision involves in practice) instead.

Debates around indispensability are likely to continue in the coming years. Some investigations (involving, in particular, large players in the digital sphere) relate, in essence, to the conditions of access to an input or platform (such as a store for the distribution of mobile applications or a marketplace for online retailers). A look at the case law and administrative practice suggests that Article 102 TFEU may evolve in two mutually incompatible directions. One direction, advanced by the Commission in its decisions, would lead to a departure from the case law and thus the progressive demise of indispensability. The case law, however, may prove resilient and remain unchanged. If this is the path that future judgments follow, legal certainty would benefit from a more transparent and explicit exposition of the logic underpinning the relevant precedents.

If the case law is indeed to follow the path of clarification, it is desirable to develop legal categories that accurately capture the essence of the case law. This piece has proposed to distinguish between (i) *predatory leveraging* and (ii) *abusive regulation of access to an input or platform*. The first category is appropriate in an economic and legal context such as the one underpinning

TeliaSonera and *Slovak Telekom*. In such circumstances, any concerns can be effectively addressed by means of reactive remedies. The second category would be appropriate whenever intervention would lead, in effect, to the proactive regulation of the conditions of access to an input or platform, irrespective of how the behaviour is labelled. This category would capture instances that are currently presented, inter alia, refusal to deal, tying and self-preferencing. The crucial factor, again, would not be the label, but the nature of the remedies. After all, the EU competition law system has always placed substance above form.

Some of the concepts explored in this piece are likely to be of relevance beyond discussions around indispensability. The difference between proactive and reactive remedies is one of these concepts. It has been discussed, in recent years, whether competition authorities should make greater use of interim measures to prevent lasting damage to the competitive process.[105] The consequences of an interim measures decision are typically different depending on whether such measures involve the administration of proactive or reactive remedies. Reverting a proactive measure may prove substantially more difficult – assuming reverting it is feasible in the first place – than a reactive one. For the same reason, there would be compelling reasons, as a matter of law and policy, to prove more cautious when intervention would involve the administration of the former. As the GC explained in its Order in *IMS Health*, insofar as a proactive remedy does not merely seek to preserve the status quo but to alter it (whether by means of structural or behavioural obligations), it may go beyond what is necessary to ensure the effectiveness of the final decision and may lead to irreparable damage to the firm.[106]

[105] It has been recommended that it is made easier for competition authorities to adopt interim measures. See in this sense the Furman Report (n 80), paras 3.121-3.127. In 2019, the Commission imposed interim measures for the first time since 2001. See in this sense Commission, 'Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets' IP/19/6109 (Brussels, 16 October 2019).
[106] Case T-184/01 R IMS Health Inc v Commission, EU:T:2001:200, para 25.