

# Kluwer Competition Law Blog

## How Indispensable Is Indispensability?

Thomas Graf (Cleary Gottlieb Steen & Hamilton LLP) · Monday, April 18th, 2011

In its recent *TeliaSonera* judgment, the Court of Justice discusses whether a margin squeeze can only be abusive if the dominant company has a duty to supply the input at issue. The Court concludes that a duty to supply is not needed. The judgment, however, does not offer a clear definition of the scope for the rules governing a duty to supply under Article 102 TFEU. A finding of an abusive refusal to supply is subject to higher legal hurdles than other forms of abuse. Notably, as the Court of Justice made clear in *Bronner*, it must be shown that the relevant input is indispensable, such that its refusal would eliminate all viable competition on the relevant market. The question in which circumstances these stricter conditions should apply is therefore of critical importance for the understanding of the relationship between refusal to supply cases and other forms of abuse.

Margin squeezes have traditionally been viewed as instances of a constructive refusal to supply. While the dominant company ostensibly offers the input concerned, it does so on conditions that are in effect not viable for third party competitors. Typically, such cases have arisen in connection with infrastructure monopolies that sought to circumvent regulatory obligations to supply. At first sight, one would therefore have assumed that the same legal conditions as necessary for a refusal to supply should also apply for abusive margin squeezes. Indeed, the European Commission's Guidance Paper on Article 82 EC (now Article 102 TFEU) treats margin squeezing as a variation of a refusal to supply, thereby suggesting that the same basic analysis applies.

The Court offers little explanation for its conclusion to the contrary. The Court's reasoning on this issue is limited to a few short paragraphs. Essentially, the Court presents two main arguments:

The Court's first argument is that the *Bronner* judgment only dealt with an outright refusal to supply. The *Bronner* judgment did not hold that the conditions for a refusal to supply need necessarily apply where a dominant company supplies products under commercial terms that are "disadvantageous". This is true, but does not support the Court's conclusion. In *Bronner*, the question was not addressed because it was simply not relevant for that case.

The Court's second argument is that if the conditions for an abusive refusal to supply were widely applied this would unduly restrict the application of Article 102 TFEU. The Court expresses a concern that in such a case, any conduct of a dominant company in relation to its "terms of trade" would be subject to the more narrow conditions of a refusal to supply abuse. It is, however, questionable whether this concern was justified in the case at hand. Abusive conduct with regard to "terms of trade" such as predatory pricing, exclusionary discounting, or tying, do not concern

supplies made to competitors. They concern the “terms of trade” applied to customers for which both the dominant company and its rivals compete. They therefore do not involve an obligation to assist competitors.

It is true that margin squeeze cases sit at the dividing line of these two types of abuse. This is because for the analysis of a margin squeeze, both the prices applied upstream to competitors and the prices applied downstream to customers are relevant. However, if the supply of the upstream input is viewed as the determinative characteristic, then it is possible to distinguish margin squeezing from “terms of trade” abuses and avoid the concern identified by the Court. A different conclusion would only be conceivable if the pricing conditions applied to downstream customers are viewed as equally or more determinative for margin squeezing, which is what the Court seems to have done.

Independent of the view one takes on the merits of the conclusion reached by the Court, the more important question going forward is probably what the circumstances are in which the stricter conditions for refusal to supply cases, notably the indispensability criterion, should apply following the *TeliaSonera* judgment. While the judgment does not offer a clear explanation in this regard, it is possible to draw some conclusions from the Court’s reasoning.

First, the Court does not suggest that the indispensability condition is limited to absolute refusals to supply. Indeed, it would be difficult to see how such a position could be justified. Consider, for example, a situation where the owner of a gas pipeline provides a certain percentage of its capacity to its competitor, but the competitor demands a higher share. There is no good reason why such a refusal to supply incremental capacity should be treated differently from an absolute refusal to supply any capacity at all. A finding of abuse would therefore, as an initial matter, require showing that the gas pipeline is in fact indispensable.

Second, the Court’s distinction between refusal to supply cases and abusive conduct relating to commercial terms of trade confirms that the application of the indispensability criterion is not limited to absolute refusals to supply. In fact, as seen, one possible reading of the judgment is that the dividing line should be drawn between cases that concern (solely) the supply of an input to competitors and cases that concern supplies to (non-competing) customers. In addition, it is manifest from the judgment that the Court distinguishes between issues relating to commercial terms of supply and matters that concern the supply of the input more directly. Thus, for example, a dispute about incremental supplies or a complaint that a dominant company discriminates by supplying more to one party than another are matters that concern supplies directly and therefore can only be relevant under Article 102 TFEU if the input at issue is indispensable.

Third, further guidance can be drawn from the *Bronner* judgment to which the Court refers in *TeliaSonera*. It is apparent from *Bronner* that the indispensability criterion reflects the Court’s recognition that the imposition of a duty to supply represents a significant interference with a company’s property rights and fundamental freedoms, particularly so if the request is for the dominant company actively to facilitate competition against itself. The imposition of such a positive obligation can only be envisaged in exceptional and narrow circumstances reflected in the indispensability criterion. The prohibition of abusive conduct relating to commercial terms of trade, on the other hand, arguably involves less far reaching interference because it concerns only a negative obligation to abstain from specific commercial practices.

This can serve as a benchmark for determining the scope of the indispensability criterion beyond a

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duty to commence supplies: Demands that represent a similar far reaching interference with a company's rights and freedoms, such as demands for incremental supplies or other broad demands to assist competitors, should be subject to the same strict and narrow legal conditions.

Fourth, the Court concedes that even in cases where indispensability is not a necessary condition for a finding of abuse, it may nevertheless be a relevant factor. In discussing the assessment of the potential anti-competitive effects of a margin squeeze, the Court notes that such anti-competitive effects can be presumed if the input at issue is indispensable. On the other hand, if the input is not indispensable, then additional evidence of anti-competitive effects is needed. As a practical matter, this means that the indispensability criterion will likely remain relevant for most margin squeeze cases. Indeed, it is difficult to see how it could be said that a margin squeeze forecloses competition if competitors have viable alternatives available to the input at issue.

Ultimately, therefore, the TeliaSonera judgment reflects a compromise. The Court did not wish to declare the indispensability criterion a necessary condition for margin squeeze cases as a matter of law. At the same time, the Court recognized the relevance of the criterion for the assessment of foreclosure effects, thereby confirming its importance as a practical matter.

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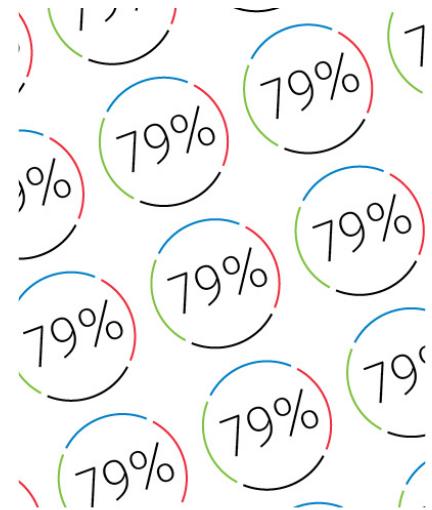
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