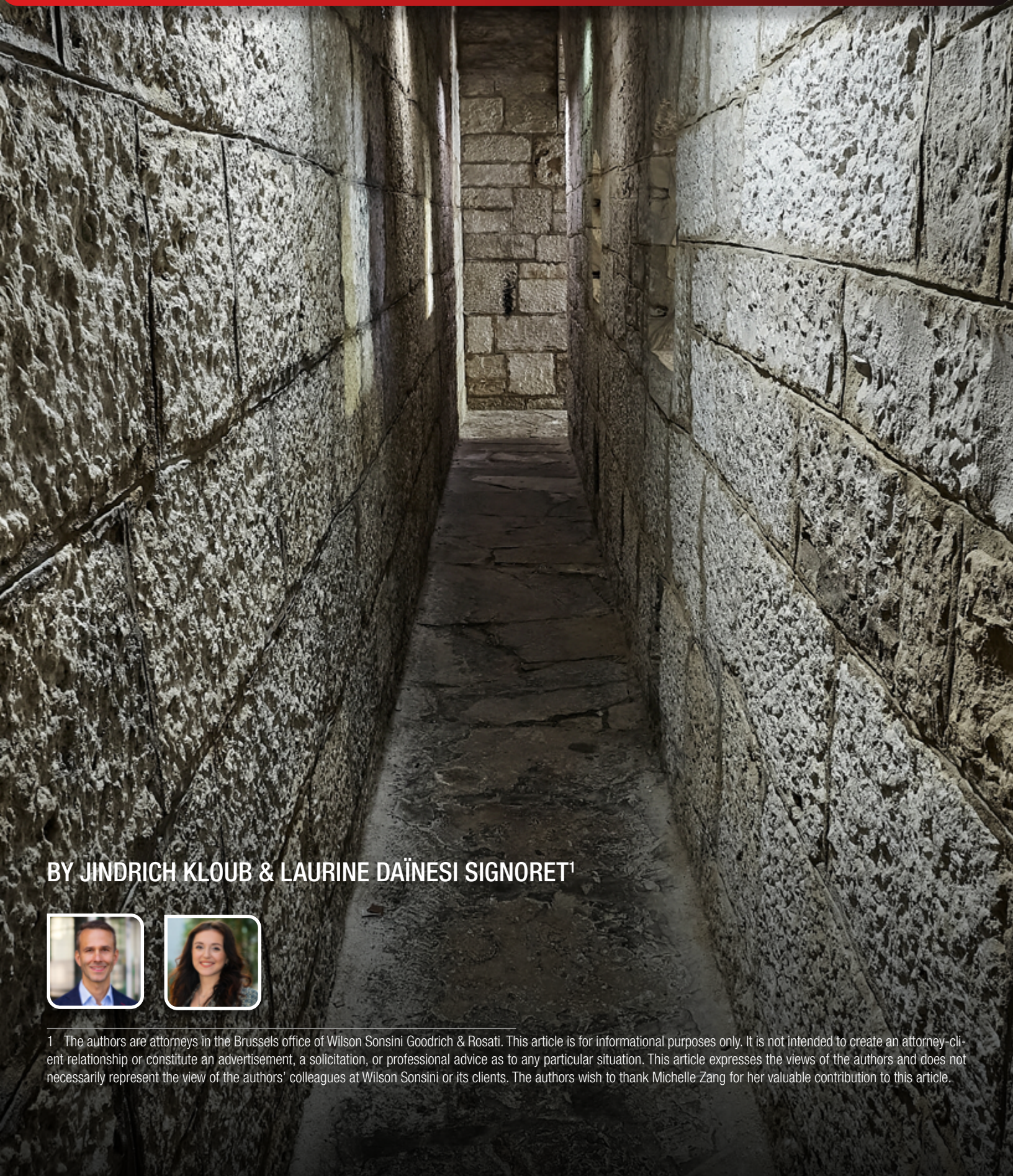
REFUSAL TO DEAL IN THE EUROPEAN UNION: A NARROWED SCOPE EXPANDS THE RISKS FOR DOMINANT FIRMS



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REFUSAL TO DEAL IN THE EUROPEAN UNION: A NARROWED SCOPE EXPANDS THE RISKS FOR DOMINANT FIRMS

By Jindrich Kloub & Laurine Daïnesi Signoret

When can EU competition law compel a company to supply its competitors, overriding its contractual freedom and property rights? Recent EU court rulings have clarified that the strict "essential facilities" test under Bronner applies only to outright refusals to deal. This increases the liability risk for dominant firms, as other conduct involving elements of refusal to deal may be abusive even when the input in question is not indispensable. These developments highlight the importance of companies carefully considering their compliance strategies and ensuring their practices align with EU competition law. Firms with significant market power must be particularly cautious when handling requests for access to products or services, especially in cross-border and parallel trade contexts. This article explores these issues in detail, including the relevant legal tests, agency guidance, and recent enforcement actions.

I. INTRODUCTION

When can EU competition law force a company to supply its competitors, overriding its contractual freedom and property rights?

Recent EU court rulings have sharpened the answer - though not in favor of dominant firms. The courts have clarified the scope of the *Bronner*[2] "essential facilities" doctrine, under which a dominant firm may be liable of an abuse if it refuses to supply a product/service that is indispensable for the requesting firm to compete on a downstream market, and the refusal is likely to lead to the elimination of all competition from that firm.

However, it is now clear that the strict *Bronner* test is limited only to outright refusals to deal. Other situations in which a dominant firm engages in a refusal to deal as part of a broader leveraging practice, or a "constructive refusal to deal" where the dominant firm delays or degrades access, can still be abusive even without meeting *Bronner's* tough criteria.

In this article, we explore the situations in which a dominant firm cannot refuse to deal with third parties, laying out the legal tests established by EU case law (Section II). We also highlight the European Commission ("EC")'s guidance on this topic (Section III) and recent enforcement actions involving alleged refusals to deal (Section IV). A brief conclusion is in Section V.

II. WHEN DOES A REFUSAL TO DEAL CONSTITUTE ABUSIVE CONDUCT UNDER EU COMPETITION LAW?

Article 102 of the Treaty on the functioning of the EU ("TFEU") prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, in so far as it may affect trade between Member States. Such conduct may cover an outright refusal to deal or other practices involving the refusal to supply a product or service (or elements of these) at all or on fair terms.

A. Outright Refusal to Deal

An outright refusal to deal refers to a situation where a dominant firm refuses to provide access to a competitor to infrastructure (product, service, asset) developed for the purposes of its own business, to the exclusion of any other conduct.[3]

To be found abusive under Article 102 TFEU, an outright refusal to deal has to meet the stringent conditions set out in Bronner[4]:

- The refusal eliminates all competition in the market on the part of the person requesting access;
- Access to the infrastructure is indispensable to carrying on the requesting person's business, inasmuch as there is no actual or potential substitute for that infrastructure; and
- The refusal is not objectively justified.

If the refusal relates to an asset protected by intellectual property, EU courts have required an additional condition to be satisfied, which involves showing that the refusal prevents the emergence of a new product for which there is a potential customer demand.[5]

As regards the elimination of all competition limb, the General Court ("GC") in *Microsoft* interpreted it to mean all effective competition, and held that the fact that the competitor retains *"a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition."*[6]

2 Case T-7/97, Oscar *Bronner v. Mediaprint.*

3 Case C-48/22 P, *Google (Shopping)*, para 90.

4 Case C-7/97, *Oscar Bronner v. Mediaprint*, para 41 and Case C-48/22 P, *Google (Shopping)*, para 89.

5 Case C-418/01, *IMS v. NDC Health*, paras 37, 38 and 49.

6 Case T-201/04, *Microsoft v. Commission*, paras 332 and 563.

Concerning indispensability, an infrastructure is deemed indispensable if there are no real or potential substitutes to it, because it cannot be obtained at all from other sources or realistically duplicated for technical, legal, or economic reasons.[7]

Regarding the objective justification limb, an otherwise abusive conduct may be justified either on account of objective necessity or because it produces efficiencies that outweigh the anticompetitive effects of the conduct.[8] In the context of a refusal to deal, the objective necessity defense is arguably the more relevant of the two, and encompasses protecting the dominant firm's legitimate commercial interests.[9]

Finally, in *Bulgarian Energy Holding* the GC confirmed that the *Bronner* test is applicable in a situation where a dominant firm refuses access to an infrastructure (i.e. a pipeline), which it does not own but over which it enjoys *"exclusive right …which took the form of a situation of control comparable to that of an owner."*[10]

B. Other Conduct Involving Elements of a Refusal to Deal

Outside of the narrow category of an outright refusal, there are situations where a refusal to supply a service or product, or elements thereof, may be found abusive even if it does not meet the high bar of the *Bronner* test. Such refusals can constitute an abuse if they are capable of giving rise to potentially anticompetitive effects but cannot be equated to an outright refusal to deal since the finding of an abuse does not oblige the dominant company to give access to its infrastructure, as that access has already been granted.[11]

This is the case for instance when a dominant firm, without an objective justification:

- engages in a "constructive refusal to deal" by delaying access or making it subject to unreasonable or unfair conditions,[12]
- provides access subject to discriminatory conditions,[13]
- fails to comply with a regulatory obligation to provide access,[14]
- ceases to supply existing customers that abide by regular commercial practice and whose orders are in no way out of the ordinary, for example to prevent intra-EU parallel exports,[15]
- prevents competitors from obtaining access by destroying infrastructure that it did not develop and that it does not own.[16]

According to a recent opinion by Advocate General ("AG") Laila Medina, another such practice may be where a dominant firm excludes, obstructs, or delays access by a third-party app to a platform that the dominant firm didn't develop for its own exclusive use, but that has been conceived and designed to be nourished by third-party apps.17 However, it remains to be seen whether the European Court of Justice will follow the AG's recommendation on this point.

7 Case T-7/97, *Oscar Bronner v. Mediaprint*, para 44.

8 Case C-209/10, *Post Danmark*, para 41, and Case C-377/20, *Servizio Elettrico Nazionale and Others*, paras 46 and 86.

9 Case 27/76, *United Brands and United Brands Continentaal v. Commission*, para 182 to 189.

10 Case T-136/19, *Bulgarian Energy Holding and Others v. Commission*, para 268.

11 Case C-48/22 P, *Google (Shopping)*, para 112.

12 Case C-165/19 P, *Slovak Telekom*, para 50.

13 Case C-48/22 P, *Google (Shopping)*, para 113.

14 Case C-42/21 P, *Lietuvos geležinkeliai AB v. European Commission*, and Case C-165/19 P, *Slovak Telekom*, paras 109 et seq.

15 Case C-27/76 *United Brands*, para 182, Case C-468/06 to C-478/06, *Sot. Lélos kai Sia EE and Others v. GlaxoSmithKline AEVE Farmakeftikon Proïonton*, para 49, and Case AT.40632, *Mondelez trade restrictions*, paras 225-249.

16 Case C-42/21 P, *Lietuvos geležinkeliai AB v. European Commission*, para 86-87.

17 AG Opinion in Case C-233/23, para 89(1).

III. EC'S GUIDANCE REGARDING REFUSAL TO DEAL

The EC has reflected its understanding of recent court rulings into its updated guidance on exclusionary abuses.

In March 2023, the EC amended its 2008 Guidance Paper on Enforcement Priorities for Exclusionary Abuses[18] to clarify its intention to now also investigate cases where dominant firms impose unfair access conditions (i.e. constructive refusal to supply), even if the input isn't indispensable, aligning with recent court rulings.

At the same time, the EC announced its intention to replace the 2008 guidance paper with comprehensive guidelines, similar to those that exist for conduct under Article 101 TFEU. In August 2024, the EC took a major step in this direction when it published draft guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings ("Draft Guidelines"), now open for consultation.[19] The EC expects to adopt the final guidelines by 2025.[20]

The Draft Guidelines signal a shift from the effects-based approach in the 2008 Guidance Paper,[21] moving towards a framework that relies on presumptions to shift the evidential burden of proof onto firms accused of an abuse. This shift aims to expedite and strengthen the EC's often lengthy investigations.

Specifically, under the Draft Guidelines, the EC will consider a dominant firm's conduct as abusive[22] if:

(i) it departs from competition on the merits,[23]
(ii) is capable of having exclusionary effects,[24] and
(iii) is not objectively justified.[25]

In assessing whether a conduct is capable of having exclusionary effects, the Draft Guidelines identify three categories of conduct, which impact the allocation of the evidential burden of proof in relation to exclusionary effects:

(i) conduct for which it is necessary to demonstrate exclusionary effects. This includes all types of conduct that doesn't fall into one of the other categories.
(ii) conduct presumed to lead to exclusionary effects. This includes five types of conduct that the EC deems to be *"generally recognized as having a high potential to produce exclusionary effects,"*[26] thus justifying the reliance on a presumption of exclusionary effects, which is up to the dominant firm to rebut.

18 EC Communication, Amendments to the Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (and Annex), March 27, 2023, C(2023) 1923 final.

19 EC Press Release, Commission seeks feedback on draft antitrust Guidelines on exclusionary abuses (1 August 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3623.

20 *Id.*

21 EC Communication, Guidance on the EC's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0224%2801%29.

22 Paragraph 14, Draft Guidelines

23 Section 3.2, Draft Guidelines.

24 Section 3.3, Draft Guidelines.

25 Section 5, Draft Guidelines.

26 This includes (i) exclusive supply or purchasing agreements; (ii) rebates conditional upon exclusivity; (iii) predatory pricing; (iv) margin squeeze in the presence of negative spreads; and (v) certain forms of tying. Paragraph 60.b), Draft Guidelines.

(iii) Naked restrictions, including conduct *"by its very nature capable of restricting competition."*[27] A dominant firm will be able to show that a conduct falling in this category was not capable of producing exclusionary effects *"only in very exceptional circumstances."*[28]

An outright refusal to deal falls into the first category. The same applies to conduct involving the elements of a refusal set out in Section II.B. above, except where the refusal is achieved through the destruction of the infrastructure at issue, which the EC deems to be a naked restriction.

The Draft Guidelines distinguish between (i) an outright refusal to deal referred to as "refusal to supply,"[29] which is subject to the *Bronner* test, and (ii) so-called "access restrictions," comprising *"restrictions on access to an input that are different from a refusal to supply,"*[30] which are subject to the general test of abuse (i.e. an assessment of the departure from competition on the merits and the capability to have exclusionary effects).[31]

It remains to be seen how the EC will adjust its approach when finalizing the guidelines in 2025. While concerns have been raised about the shift towards presumptions and away from economic analyses, these issues largely pertain to conduct other than refusal to deal. As a result, the final guidelines are likely to closely align with the draft on this specific issue.

IV. RECENT ENFORCEMENT ACTIONS IN THE EU

EU enforcers, including the EC and national competition authorities, have actively pursued cases related to refusal to supply in recent years. Notably, the EC and member state authorities have intervened to ensure that online ticketing platforms gain access to data from incumbent railway operators, increasing consumer choice and convenience for purchasing tickets. Additionally, the EC's recent fines in the food sector for refusal to supply in parallel trade signal a renewed focus on this theory. This should serve as a clear warning to companies that stricter enforcement of refusal to supply is on the horizon.

A. EC's Enforcement Actions

In January 2024, the EC accepted commitments from Renfe, the Spanish state-owned rail operator, and closed its investigation into Renfe's alleged abuse of dominance.[32] The EC was concerned that Renfe's refusal to share full ticketing information, discounts, and features and real-time data (pre-journey, on-journey, or post-journey) related to its passenger rail transport services may have prevented rival platforms from competing with Renfe's own direct digital channels. Renfe agreed to provide all current and future content and real-time data to third-party ticketing platforms, regardless of how they access it. Renfe also agreed to certain rules on "Look-to-Book," which require third parties to make a certain number of bookings as a proportion of their information requests, and to cap its error rates. Similar enforcement actions concerning refusal to supply by incumbent rail operators were also taken in Member States such as Germany and Italy, as discussed in the following sections.

In May 2024, the EC fined American food and beverage company Mondelēz € 337.5 million for restricting cross-border trade, in breach of both Articles 101 and 102 TFEU.[33] The EC found that Mondelēz engaged in anticompetitive agreements to restrict cross-border trade of chocolate, biscuit, and coffee products, and abused its dominant position in certain national markets for the sale of chocolate tablets. Specifically, the EC found that Mondelēz abused its dominance by refusing to supply a broker in Germany to prevent the resale of its products in Austria, Belgium, Bulgaria and Romania where prices were higher, and by ceasing the supply of specific chocolate tablets products in the Netherlands to prevent them from being imported into Belgium, where Mondelēz was selling these products at higher prices. The EC

27 Examples include: (i) payments by the dominant undertaking to customers that are conditional on the customers postponing or canceling the launch of products that are based on products offered by the dominant undertaking's competitors; (ii) the dominant undertaking agreeing with its distributors that they will swap a competing product with its own under the threat of withdrawing discounts benefiting the distributors; or (iii) the dominant undertaking actively dismantling an infrastructure used by a competitor. Para 60(c), draft Guidelines.

28 Para 60(c), Draft Guidelines.

29 Section 4.2.3., Draft Guidelines.

30 Section 4.3.4., Draft Guidelines.

31 Section 4.3.4., Draft Guidelines.

32 Case AT.40735, *Online rail ticket distribution in Spain.*

33 Case AT.40632, *Mondelez trade restrictions.*

considered such abuse to be a self-standing form of market partitioning through refusal to supply, underscoring the resurgence of this theory in cases of intra-EU parallel trade.

B. EU Member States Enforcement Actions

1. Germany

In June 2023, the Federal Cartel Office ("FCO") decided that Deutsche Bahn AG ("DB"), Germany's state-owned incumbent rail operator, abused its dominant position in relation to mobility platforms. The FCO found that DB engaged in a variety of anticompetitive practices, such as advertising bans, vertical price controls, discount restrictions, and withholding commissions for processing payments. In addition, DB was found to restrict mobility platforms' real-time access to all the traffic data controlled by DB, such as train delays, cancellations and major disruptions, which are essential for organizing and booking journeys including different means of transport. The FCO ordered DB to change certain practices and to provide mobility platforms with continuous access to real-time data on train delays and cancellations.[34] DB's appeal against the decision is pending before the courts.[35]

In March 2023, the FCO terminated its investigation into Rheinmetall Landsysteme GmbH ("Rheinmetall") after the company agreed to supply its diagnostic software for Boxer wheeled armored transport vehicles to FFG Flensburg Fahrzeugbau GmbH. The FCO initially found Rheinmetall dominant in the market for specialized tools, including DAS inspection systems, essential for maintaining Boxer transport vehicles. As third parties depended on Rheinmetall's maintenance software to compete in the downstream market for the maintenance of Boxer vehicles, Rheinmetall's refusal to make a binding offer to supply the DAS inspection system in return for reasonable payment was deemed abusive.[36] Rheinmetall's agreement to supply the software resolved the concerns.

2. Italy

In May 2023, the Italian competition authority ("AGCM") accepted commitments from Trenitalia, the country's dominant rail operator, resolving an investigation into the company's alleged abuse of dominance in the markets for regional and medium-long-distance public passenger rail transport services.[37] The AGCM was concerned that Trenitalia was leveraging its monopoly in regional and intercity transport to get an unfair advantage in the high-speed sector by being the only operator allowed to integrate the sale of tickets of different distances. Trenitalia committed to allowing its rival, the high-speed passenger rail company Nuovo Trasporto Viaggiatori, to market its regional and intercity tickets in combination with its own high-speed services. The commitments also extend to regional connections operated by Trenitalia's investee companies.

V. CONCLUSION

Recent court rulings and enforcement actions reflect a heightened scrutiny of conduct involving refusal to deal in the EU. The limitation of the strict *Bronner* test to outright refusals to deal exposes firms to a higher risk of liability even where the input at issue is not deemed indispensable.

These developments underscore the need for companies to carefully consider their compliance strategies and ensure that their practices do not run afoul of EU competition law. Companies with significant market power must be vigilant when dealing with requests for access to their products or services from their competitors, particularly in cross-border and parallel trade scenarios.

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34 FCO Press Release, Open markets for digital mobility services – Deutsche Bahn must end restrictions of competition (June 28, 2023), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/28_06_2023_DB_Mobilitaet.html.

35 DB appealed the FCO's decision to the Düsseldorf Higher Regional Court in a summary proceeding. In March 2024, the court upheld the enforceability of large parts of the FCO's ruling, but voiced serious doubts about the regulator's benchmark for minimum remuneration to be paid by DB to the platforms. This issue will face further review during the full proceedings. See FCO Press Release, Düsseldorf Higher Regional Court largely confirms enforceability of the Bundeskartellamt's ruling on abusive practices against Deutsche Bahn (March 11, 2024), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2024/11_03_2024_OLG_DB.html

36 FCO Press Release, Bundeskartellamt safeguards competition in maintenance of *Boxer* wheeled armored transport vehicles (March 13, 2023), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/13_03_2023_Panzer.html.

37 AGCM Press Release, A551-A551B - Italian Competition Authority: NTV will be able to sell tickets for regional and Intercity trains (May 3, 2023), https://en.agcm.it/en/media/press-releases/2023/5/A551-A551B.

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