I. INTRODUCTION

This article analyzes the “essential facilities doctrine,” under EC law, as it stands six years after the Court of Justice of the European Communities’ decision in *Bronner* and subsequent cases.\(^1\)

The essential facilities doctrine imposes on owners of essential facilities a duty to deal with competitors. The doctrine was first developed in the United States. Its roots originate in the *Terminal Railroad Combination* case of 1912.\(^2\)

Under EC law, the development of the essential facilities doctrine has been based on Article 82 of the EC Treaty. This provision prohibits abuses of dominant position within the common market.\(^3\) A refusal to deal can indeed constitute an abuse of dominant position under Article 82.

The Court of Justice first dealt with refusals to deal in the case of *Commercial Solvents*.\(^4\) It has never, however, explicitly used the term “essential facilities.” In 1998, the Court of Justice issued its decision in *Bronner*. In this article, I will explain the two ways in which *Bronner* is a catalyst.

First, *Bronner* restricts the scope of the essential facilities doctrine by limiting its application to situations in which the owner of a facility holds more than a dominant position. *Bronner* requires that a facility be indispensable. In this article, I will explain that despite this formal criterion, the *Bronner* opinion could be interpreted more broadly. Second, *Bronner* imposes the application of a forward-looking test, which asks whether the refusal to deal will lead to monopolization of a downstream market. The test imposed by *Bronner*, therefore, transforms the conceptualization of abuse of dominant position detailed in Article 82 of the EC Treaty toward the concept of monopolization embodied in Section 2 of the Sherman Act.

In the first part of this article, I will consider the case law leading up to *Bronner*. In Part II, I will examine the Court of Justice’s decision in *Bronner* and explain the criteria developed by the Court for applying the essential facilities doctrine. In Part III, I will apply the *Bronner* criteria to the earlier case law in order to determine

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\(^3\) Treaty Establishing the European Community [TEC] art. 82.

whether a different result would have been reached post-Bronner. I will conclude that Bronner imposes a stricter test of the essential facilities doctrine. Next, in Part IV, I will consider whether the post-Bronner case law persisted in applying the Bronner doctrine. I will conclude that the Commission and the Court’s subsequent decisions are consistent with the principles developed in Bronner. Finally, in Part V, I will consider when courts are likely to apply the doctrine and when they will deem a refusal to deal to be justified. Part V indicates that courts have followed a more liberal interpretation of Bronner.

This article uses the term “facilities” in a broad sense. I use the term to include infrastructures such as ports, intellectual property rights, and legal monopolies.

II. THE CASE LAW PRE-BRONNER

The first section of this article analyzes some of the most significant decisions of the European Commission and the Court of Justice in order to demonstrate the evolution of the essential facilities doctrine under EC law.5 Most of these decisions refer to refusals to deal, rather than referring to the essential facilities doctrine. The essential facilities doctrine is, however, a variation of the principle of refusal to deal.6

A. Commercial Solvents7

In the leading case of Commercial Solvents, the Court of Justice found that, under certain circumstances, an undertaking in the dominant position had a duty to deal with another undertaking operating in a downstream market.

Commercial Solvents held a dominant position in the production and sale of raw materials used for the manufacture of ethambutol.8 It was the only supplier of the raw materials in the EEC.9

The company had supplied Zoja, a manufacturer of ethambutol, since 1966.10 In the spring of 1970, Zoja cancelled its purchase of large quantities of the raw materials. In the winter of 1970, Zoja contacted Commercial Solvents to resume its order, but Commercial Solvents refused.11 Commercial Solvents had decided to produce ethambutol itself. In order to facilitate its own access to the ethambutol market, it had decided to cease supplying raw materials to Zoja.12 The European Commission held that Commercial Solvents had abused its dominant position in the ethambutol market in ceasing to supply raw materials to Zoja.13

6 Id. at 446 (stating that what the Commission calls “essential facilities” has been merged with the general class of cases in which dominant companies have a duty to supply).
7 Commercial Solvents, 1974 E.C.R. at 223.
8 Id. at para. 18.
9 Id. at para. 24.
10 Id. at para. 1.
11 Id. at para. 23.
12 Id. at para. 24.
13 Id. at para. 3.
Commercial Solvents filed an appeal. The Court of Justice affirmed the Commission’s finding that the company had abused its dominant position.\textsuperscript{14} The Court found that an undertaking which has a dominant position in the market in raw materials and with the object of reserving such raw materials for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position . . . \textsuperscript{15}

Commercial Solvents appears to have had enough capacity to satisfy Zoja’s needs.\textsuperscript{16} It is an open question, therefore, whether the Court would have found a duty to deal if Commercial Solvents had required its entire capacity to satisfy its own needs, either because its production was less efficient than Zoja’s or because it would have produced more ethambutol than Zoja. The fact that Zoja had itself cancelled purchases did not alter the findings of the Court. Indeed, Commercial Solvents would have ceased to supply Zoja anyway, as soon as the supply it had contracted to provide had been met. The Court also did not consider the market shares in the downstream market.\textsuperscript{17} In addition, there is no indication that the refusal to supply Zoja led, or would have led, to price increases in the downstream market.\textsuperscript{18} The fact that Commercial Solvents refused to supply Zoja in order to produce ethambutol itself was central for the Court’s finding that Commercial Solvents had abused its dominant position. Commercial Solvents had prohibited its distributors in certain countries from reselling the raw materials to manufacturers of ethambutol or from exporting them. According to the Commission, this indicated Commercial Solvents’ intent to prevent Zoja from obtaining the raw materials it required.\textsuperscript{19} It is not clear whether the Court would have found an illegal refusal to deal if Commercial Solvents had decided to shift its production output of raw materials toward other suppliers in the downstream market or toward other downstream markets without itself entering the market.

By contrast, Commercial Solvents’ monopoly in raw materials played an important role in the Court’s decision.\textsuperscript{20} The Court dismissed Commercial Solvents’ argument that the further development of alternative methods of manufacturing ethambutol would not present any difficulties or result in excessive costs.\textsuperscript{21} The Court stated that the Commission was entitled to conclude that “in the present conditions of economic competition it is not possible to have recourse on an

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at para. 25.
\item \textsuperscript{16} Id. at para. 28.
\item \textsuperscript{17} Commission Decision 72/457/EC, 1972 O.J. (L 299) 51 (stating that there were 5 producers of ethambutol, including Commercial Solvents, and that ACC, one of Commercial Solvents’ competitors, was the biggest producer of ethambutol).
\item \textsuperscript{18} Commercial Solvents’ decision to start manufacturing ethambutol itself could have been justified by efficiencies, which could have lead to lower prices.
\item \textsuperscript{19} See Commission Decision 72/457/EC, supra note 17, at II.A.
\item \textsuperscript{20} Id. (stating that even if Commercial Solvents’ patents for the production of raw materials were in the public domain, the necessity to develop extremely long and costly research in know how, the high price and the complex technology related to production installations and the difficulty to find new outputs for the production of raw materials constituted a major barrier to entry for potential competitors).
\item \textsuperscript{21} Commercial Solvents, 1974 E.C.R. at 223, para. 14.
\end{itemize}
industrial scale to methods of manufacture of ethambutol based on the use of
different raw materials. These alternative methods were either in an experimental
stage or confined to the limited needs of their manufacturers.

B. United Brands

The Court of Justice went further in its holding in United Brands, where the
Court held that under certain circumstances an undertaking in dominant position had
a duty to supply to competitors in an upstream market.

United Brands (“UBC”) held a dominant position in the banana market, with a
40-45% market share. It refused to supply Olesen, one of its customers in
Denmark. UBC justified its decision with the fact that Olesen had participated in
an advertising campaign with one of UBC’s main competitors, a company for
which Olesen served as the exclusive Danish representative.

The Court of Justice held that “an undertaking in dominant position for the
purpose of marketing a product which cashes on the reputation of a brand name
known to and valued by the consumers cannot stop supplying a long standing
customer who abides by regular commercial practice, if the orders placed by that
customer are in no way out of the ordinary.” The Court continued, saying that

UBC could not be unaware of the fact that by acting in its way it would discourage
its other ripener/distributors from supporting the advertising of other brand names
and that the deterrent effect of the sanction imposed upon one of them would make
its position of strength on the relevant market that much more effective. Such a
course of conduct amounts therefore to a serious interference with the independence
for small and medium sized firms in their commercial relations with the undertaking
in a dominant position and this independence implies the right to give preference to
competitors’ goods.

The Court then concluded that UBC had abused its dominant position.

One could say that Olesen was not a competitor on a downstream market but a
reseller. However, since Olesen was an exclusive distributor of one of UBC’s
competitors, Standard Fruit, Olesen and Standard Fruit may be considered as an
integrated company. Hence, the key feature distinguishing Commercial Solvents and
United Brands is the fact that in the latter case, there was competition in the
upstream market and that the undertaking in the dominant position was required to
deal with one of its competitors on the upstream market. Second, there was no
indication that the refusal to deal with Olesen resulted in a price increase in the

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22 Id. at para 16.
23 Id. at para 13.
25 Id. at para. 108.
26 Id. at para. 164.
27 Id. at para. 185.
28 Id. at para. 173.
29 Id. at para. 182.
30 Id. at paras. 192-193.
31 Id. at para. 203.
banana market. UBC had seven other ripeners/distributors in Denmark. Additionally, unlike in Commercial Solvents, Olesen retained alternative sources of supply. Moreover, in a later case, the Court of Justice held that fresh bananas were in partial competition with other fruits such as apples, pears, peaches, plums, apricots, cherries, oranges, and mandarins. If the Court in United Brands had taken this position, it would likely have held that UBC did not possess a dominant position and that the refusal to supply was not abusive.

C. BP

The case of BP concerns the duty to deal with customers in a situation of a shortage of supplies. In 1972, ABG and BP terminated an agreement for the supply of oil to ABG. BP agreed, however, to refine the oil that ABG would have bought on the international market. ABG experienced difficulties in acquiring oil, exacerbated by the international crisis in the supply of oil in 1973 brought on by an embargo by producing countries. BP agreed to advance ABG oil which ABG was to return. Due to the shortage of oil, BP reduced its deliveries to its customers but gave preference to the customers with which it had long-term contracts. The Commission accused BP of abusing its dominant position in the market by reducing its supplies to ABG substantially and disproportionately in relation to all of its other customers and having been unable to provide any objective reasons for its behavior. The Commission held that during a period of shortage, an undertaking in dominant position must distribute the quantities available “fairly” among all of its customers.

The Court of Justice reversed this decision, and held that BP could give more favorable treatment to its traditional customers than to its occasional ones such as ABG. The Court said that “a duty on the part of the supplier to apply a similar rate of reduction in deliveries to all its customers in a period of shortage without having regard to obligations contracted towards its traditional customers” could only flow from legislative measures. The Court also stated that ABG had been able to acquire oil from other suppliers, which, though limited, put it in a position to overcome the

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32 Id. at para. 196 (stating that the 40% price decrease was only due to the very lively competition-called at the time “banana war”- on the market).
33 Id. at para. 197.
35 Id. at para. 12.
37 Id. at para. 24.
38 Id. at para. 26.
39 Id. at paras. 4 and 27.
40 Id. at para. 27.
41 Id. at para. 19.
42 Id. at para. 21.
43 Id. at para. 32.
44 Id. at para. 34.
difficulties engendered by the crisis.\footnote{Id. at para. 42. It must be pointed out that in its decision, the Court does not refer to United Brands in which it had decided that the refusal to deal with a customer was an abuse of dominant position when it was a disproportionate retaliatory measure.} It is not clear what the Court’s decision would have been had there been no alternative sources of supply. Furthermore, the Court did not consider whether BP had ceased to supply ABG in order to favor its own distribution network of motor gasoline.

\textit{D. Telemarketing}\footnote{Centre Belge d’Études de Marché-Telemarketing (CBEM) v. SA Compagnie Luxembourgeoise de Télédiffusion (CLT) and Information Publicité Benelux (IPB), Case 311/84, 1985 E.C.R. 3261, [1986] 2 C.M.L.R. 558.}

In the case of Telemarketing, the Court defined the duty to deal of an undertaking possessing a legal monopoly.

CLT ran the RTL television station and had a legal monopoly on television advertising on the Belgian market.\footnote{Id. at para. 6.} Its subsidiary IPB was CLT’s exclusive agent for television advertising aimed at the Benelux countries.\footnote{Id. at para. 2.} The complainant in this case, Centre Belge, was an undertaking that specialized in telemarketing. This is a technique by which an advertiser places an advertisement carrying a phone number, which those at whom the advertisement is aimed can call, either to obtain information on the product offered or to respond to the advertising campaign in some way.\footnote{Id. at para. 3.} In 1983, IPB granted Centre Belge the exclusive right to conduct telemarketing on RTL Television. The station advertised Centre Belge’s telephone number to viewers, and Centre Belge made its telephone lines and operators available to advertisers and to the television station.\footnote{Id. at para. 4.} When this agreement expired, IPB notified advertisers that RTL would no longer accept advertisements involving an invitation to make a telephone call to a number other than its own.\footnote{Id. at para. 5.} The Belgian Court stayed the proceedings initiated by Centre Belge and referred preliminary questions to the Court of Justice.

The Court referred to its ruling in \textit{Commercial Solvents}\footnote{Id. at para. 25.} and held that to subject the sale of advertising time to the requirement that only its own phone number be used amounted to a refusal to deal.\footnote{Id. at para. 26.} The Court said that if “that refusal is not justified by technical or commercial requirements relating to the nature of the television, but is intended to reserve to the agent any telemarketing operation broadcast by the said station, with the possibility of eliminating all competition from another undertaking,” it amounted to an abuse of dominant position.\footnote{Id. at para. 27.} Hence, the reservation of an ancillary activity by an undertaking in the dominant position with the possibility of eliminating all competition in the downstream market counted as an abuse of dominant position. The Court did not consider whether the one year
exclusive agreement between IPB and Centre Belge was compatible with competition law.

E. Maxicar v. Renault55 and Volvo v. Veng56

In some cases, the grant of intellectual property rights will confer to their owner a dominant position or a monopoly. The Court has tried to devise a balance between an owner’s legitimate rights and a third party’s needs. In the following two cases, the Court set forth the fundamental principles governing the duty to deal in relation to intellectual property rights.

Renault and Volvo owned design rights in spare parts for vehicles they manufactured. They refused to grant independent manufacturers of spare parts a license to manufacture, import, or sell reproductions of their spare parts without their consent.57 The spare parts manufacturers argued that this constituted an abuse of dominant position. The Court of Justice held that “the right of the proprietor of a protected design to prevent third parties from manufacturing and selling and importing, without its consent, products incorporating the design constitutes the very subject matter of this exclusive right.”58 The Court said that the refusal to grant a license, even in return for a reasonable royalty, did not in itself constitute an abuse of the dominant position.59 However, the Court stated that the exercise of intellectual property rights might constitute an abuse if it involved certain abusive conduct, such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level, or a decision to cease production of spare parts for a particular model, despite the fact that many cars of that model were still in circulation.60

In Volvo and Renault, the car manufacturers, which were the owners of the intellectual property rights, and the independent spare parts manufacturers were competitors in the market for spare parts. In the first example given by the Court, the intellectual property owner uses its right to gain market share in the downstream market of car repairing services. This situation would be similar to Commercial Solvents or Telemarketing. The second example also concerns the relationship between car manufacturers and car repairers. The third example concerns a situation in which a car manufacturer refuses to grant a license to an independent spare parts manufacturer when the car manufacturer no longer produces the spare parts and the vehicles which need the spare parts are still in circulation. Scant motivation exists, however, for a car manufacturer to refuse a license in this case. A rational company would maximize its profits by granting a license.

58 Volvo, 1988 E.C.R. at 6211, para. 8; see also Renault, 1988 E.C.R. at 6039, para. 11.
60 Id. at para. 9; Renault, 1988 E.C.R. at 6039, para. 16.
F. RTT v. GB-Inno-BM

RTT held a monopoly under Belgian law over the establishment and operation of public telegraph and telephone lines. RTT also had the power to grant or withhold authorizations to connect telephone equipment to networks, the power to set the technical standards for the equipment, and the power to check whether equipment produced by third parties conformed to the specifications it had laid out. RTT was also in the business of selling its own telephones for the network. A conflict arose when RTT tried to prevent GB-Inno-BM from selling non-approved telephones. The Court of Justice referred to its decision in Telemarketing and held that the fact that an undertaking holding a monopoly in the market for the establishment and operation of the network, without objective necessity, reserves to itself a neighboring but separate market, in this case the market for the importation, marketing, connection, commissioning and maintenance of equipment for connection to the same network, thereby eliminating all competition from other undertakings was an abuse of dominant position. It concluded that a Member State may not grant an undertaking the right to set forth standards for telephone equipment or check that others meet the standards if it itself competed with operators on the market for equipment. Hence, the Court confirmed that an undertaking may not use its dominant position to eliminate competition in a downstream market. However, the Court did not indicate the market shares of RTT and GB-Inno-BM in the downstream market.

G. Port of Rødby

The essential facilities doctrine has also been used to open access to infrastructure that is costly to duplicate, such as ports. In the case of Port of Rødby, the Commission defined an essential facility as "a facility or infrastructure without which [the owner’s] competitors are unable to offer their services to customers." DSB was a Danish public company, which owned and operated the port of Rødby. DSB also operated the only ferry service between Rødby and the port of Puttgarden. Stena, another ferry company, intended to exploit the same sailing route as DSB. The Danish Government refused Stena the right to use the port of Rødby on the grounds that doing otherwise would prevent companies already operating in
the port from expanding their activities.71 The Danish Government meant to have a 
duty to protect the public undertaking DSB from competition.72 It also refused Stena 
the right to build a new port in its vicinity,73 saying that Stena had not demonstrated 
an unsatisfied demand for a ferry service and that it was unlikely that such a demand 
would arise.74 The Commission considered the refusal to grant access to the port 
abusive and said that the effects of this abuse were exacerbated by the refusal to 
authorize the construction of a new port.75 The Commission referred to 
Telemarketing76 and held that “an undertaking that owns or manages an essential 
port facility from which it provides a maritime transport service may not, without 
objective justification, refuse to grant a ship owner wishing to operate on the same 
maritime route access to that facility without infringing article [82].”77 The 
Commission also said that “even on a saturated market, an improvement in the 
quality of products or services offered or a reduction in prices as a result of 
competition is a definite advantage for consumers . . .”78

In this case, there was no competition in the downstream market since DSB was 
the only operator.79 The refusal to grant access to the port could have been justified 
for technical reasons and also on the grounds that Stena could build its own 
infrastructure. Therefore, the port of Rødby was not indispensable for the activity on 
the downstream market. However, the refusal of the Government to grant Stena 
access made any competition from Stena impossible.

H. Sea Containers v. Stena Link80

The case of Sea Containers v Stena Link also concerned access to a port. Stena 
Link was the owner and operator of the port of Holyhead. One of its subsidiaries 
operated ferry services from the same port.81 Sea Containers intended to start ferry 
services on the same route as Stena Link’s subsidiary but with a faster ship.82 Stena 
Link delayed negotiations, but, after a complaint was lodged with the Commission, it 
concluded an agreement with Sea Containers. The Commission nevertheless stated 
that the port was an essential facility, since any other alternative, i.e. another port, 
would substantially increase the length of sail, and building a new port would not be 
realistic.83 The Commission said that “an undertaking which occupies a dominant 
position in the provision of an essential facility and itself uses that facility ( . . . ),

71 Id. at para. 14.
72 Id. at para. 16.
73 Id. at paras. 1-3.
74 Id. at para. 14.
75 Id. at para. 13.
76 Telemarketing, 1985 E.C.R. at 3261.
78 Id. at para. 16.
79 Id. at para. 4 (stating that the route was operated jointly by DSB and Deutsche Bahn. The two 
entities jointly sold tickets, fixed rates and timetables and granted the same discounts. There were no other 
companies providing ferry services on the sea route between Rødby and Puttgarden).
80 Commission Decision 94/19/EC, 1994 O.J. (L 015) 8 (relating to a proceeding pursuant to Article 
86 of the EC Treaty (IV/34.689- Sea Containers v. Stena Sealink-Interim Measures)).
81 Id. at paras. 2 and 4.
82 Id. at para. 20.
83 Id. at para. 64.
and which refuses other companies access to that facility without objective justification or grants access to competitors only in terms less favorable than those which it gives its own services” commits an abuse of dominant position.\(^{84}\) The Commission also defined the behavior of the independent harbor authority, “which has to consider whether the interests of existing and proposed users of the port could best be reconciled by a solution involving modest changes in the allocated slot times or in any plan for the development of the harbor.”\(^{85}\)

One can conclude from this decision that an owner must exploit its essential facility independently of its own interest as a user. In other words, it must seek to maximize the revenues of its activities related to the ownership of the facility.

In this case, competition existed in the downstream market, since two operators existed already. The Court left open whether the obligation to grant access would also apply when a new entrant wants to use facilities for activities that do not compete with the owner in a downstream market, for example, if Sea Container’s intention was to exploit a route on which Stena was not present.

\(I.\) Magill\(^{86}\)

As illustrated by \textit{Volvo} and \textit{Renault}, the Court considered exercising intellectual property rights as constituting an abuse of dominant position. Hence, the Court opened the door to the application of a duty to deal in intellectual property rights. In \textit{Magill}, the Court had the opportunity to define the notion of abusive conduct.

ITV, RTE and BBC were broadcasting television programs in Ireland and Northern Ireland.\(^{87}\) Under Irish and UK law, they held copyright in their program listings. Each published its own weekly guide to its own programs.\(^{88}\) They provided licenses on their daily listings to newspapers and periodicals free of charge.\(^{89}\) Magill started a comprehensive guide that covered the programs of all broadcasters in May of 1985.\(^{90}\) Through a license agreement, RTE allowed Magill to publish its program schedules and summaries either (i) for the day of issue of Magill’s guide; or (ii) for the Friday and Saturday of the week of publication; or (iii) for the Saturday and Sunday of the week of publication.\(^{91}\) Magill was also allowed to refer to the highlights of the week following publication.\(^{92}\) BBC’s and ITP’s licensing policies were identical.\(^{93}\) The publication of Magill’s guide, in compliance with these limitations, continued for several months until an industrial dispute caused it to stop. Publication ceased for twenty weeks. Magill’s guide reappeared in May of 1986.

\(^{84}\) Id. at para. 66.
\(^{85}\) Id. at para. 75.
\(^{87}\) Id. at para. 6.
\(^{88}\) Id. at para. 8
\(^{89}\) Id. at para. 9.
(\textit{Application for An Interlocutory Injunction}).
\(^{91}\) Id. at para. 2.
\(^{92}\) Id.
This time it included program listings for the whole week in violation of the licensing policies.\(^{94}\) Invoking their copyright, the broadcasters obtained an injunction against Magill.\(^{95}\) Magill subsequently filed a complaint with the European Commission, which found that the broadcasters had abused their dominant position and ordered them to license weekly program listings to Magill.\(^{96}\)

The Court of First Instance confirmed the Commission’s decision.\(^{97}\) The Court defined the relevant market as the weekly program listings and the television guides in which these listing were published\(^{98}\) and concluded that the broadcasters possessed a dominant position in this market.\(^{99}\) The Court repeated its statement in *Volvo*\(^{100}\) that “the exercise of an exclusive right which, in principle, corresponds to the substance of the relevant intellectual property right may nevertheless be prohibited by Article [82] if it involves on the part of the undertaking holding a dominant position, certain abusive conduct.”\(^{101}\) The Court of First instance held that by reserving the exclusive right to publish its weekly television program listings, the broadcasters were preventing the emergence of a new product, namely a general television magazine likely to compete with their own guides.\(^{102}\) The Court concluded that the broadcasters were thus “using [their] copyright in the programme listings which [they] produced as part of [their] broadcasting activity in order to secure a monopoly in the derivative market of weekly television guides.”\(^{103}\)

The Court of Justice confirmed the decision of the Court of First Instance.\(^{104}\) It held that the exercise of an exclusive right by its owner may, in exceptional circumstances, involve abusive conduct.\(^{105}\) In this particular case, the abusive conduct resulted from the fact that the refusal to license prevented the emergence of a new product, a comprehensive weekly guide, from the fact that the refusal was not justified by the activity of television broadcasting or of publishing television magazines, and from the fact that the broadcasting organizations reserved to themselves the secondary market of weekly television guides by excluding all competition in that market. Access had been denied to basic information, the raw material necessary for the compilation of such a guide.\(^{106}\)

In this holding, the Court did not state an absolute rule as to when the refusal to grant a license would constitute an abuse. Rather, the Court opted for a circumstances-based analysis.\(^{107}\) However, the Court has provided little guidance as to the circumstances in which a refusal to license intellectual property rights would

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\(^{94}\) *Magill*, 1986 E.C.C. at 574, para. 3 (Application for An Interlocutory Injunction).

\(^{95}\) Id. at para. 10.

\(^{96}\) Id. at para. 12.


\(^{99}\) Id. at para. 63.

\(^{100}\) *Volvo*, 1988 E.C.R. at 6211.


\(^{102}\) Id. at para. 73.

\(^{103}\) Id.


\(^{105}\) Id. at para. 50.

\(^{106}\) Id. at paras. 52-56.

be considered abusive. The Court did not define what it meant by a “new product” in highlighting that a refusal prevents the emergence of a new product. The novelty of Magill’s guide consisted in the fact that it included the programs covering the entire week while “old products” covered only two days, with a reference to the highlights of the week ahead. Hence, one can ask what is the threshold to distinguish new from old products. For example, would a guide covering four days be a new product? The Court also did not suggest whether it would be sufficient for the owner of intellectual property rights to launch a new product himself to avoid a compulsory license. As to the third condition, that of reserving for oneself the downstream market, one must point out that the broadcasters sought to exclude competition from the market of their copyright, not an ancillary market.

This decision gave rise to a heated debate. There was a fear that compulsory licenses could be easily granted under Magill. However, the impact of the decision should not be overstated. The basic idea remained that the mere exercise of intellectual property rights was not abusive in itself and an abuse would be found only in exceptional circumstances. I agree with Korah that the exceptional circumstances in this case consisted in the granting of copyright protection to program listings. Korah argues that Magill must be understood as a way of dealing where a grant of intellectual property rights is questionable, either because of overbreadth or due to other reasons. Ridyard argued that the compulsory license in program listings was justified because television listings were a by-product of another activity, broadcasting, rather than a creative activity subject to effective competition. He considers that the monopoly intellectual property rights problem in television listings stems not from the exclusivity inherent in intellectual property rights, but in the very strong market position enjoyed further upstream by the terrestrial broadcaster, which effectively blocked the prospect of competition between rival owners of television listings. The case law post-Magill was expected to clear the uncertainty surrounding the scope of the Court’s decision.

J. Ladbroke

The Court was given another opportunity to define the duty to deal when the facility to which access was requested was an intellectual property right and to fine-tune Magill. Ladbroke, which possessed the largest market share of the Belgian betting market, invoked Magill to obtain a license to retransmit pictures of horse races organized in France. The facts can be summarized as follows. PMU was a group set up by the main sociétés de courses in France and had the exclusive responsibility for organizing off-betting courses in France and had the exclusive responsibility for organizing off-betting courses in France as well as the right to

110 Id. at 814 (suggesting however that nothing in the language of the decision can be interpreted in this sense).
market television pictures of these races. Its subsidiary, PMI, had the right to exploit these pictures in Germany. PMI licensed this right to DSV, but included a prohibition against marketing the pictures outside Germany. DSV, PMI and PMU refused to grant Ladbroke a license to exploit the pictures on the Belgian market. Ladbroke lodged a complaint with the European Commission arguing an abuse of dominant position on the grounds that it was technically feasible to supply the pictures in return for payment of a reasonable fee, that PMU and PMI were prepared to license these pictures to one of Ladbroke’s competitors on the Belgian market, that the retransmission of the pictures had already been authorized in France and Germany, that the refusal to supply Ladbroke prevented the introduction of a new product, and in so far as the sociétés de courses had rights over the pictures, they were not entitled to abuse these rights.

The Commission dismissed the complaint and the Court of First Instance rejected the appeal brought by Ladbroke. It held that even if the defendants possessed a dominant position, there was no duty to license the pictures since the defendants were not present on the geographical market on which Ladbroke operated and had not granted any license to other operators on that market. Hence, there was no discrimination between operators on the downstream market. The Court held further that Ladbroke could not rely on Magill since the refusal was not preventing it from entering the downstream market. Indeed, Ladbroke had the largest market share in that market. Furthermore, the refusal to grant a license did not distort competition on the downstream market in the absence of any exploitation of the pictures in that market. The Court held that even if the presence of the defendants in the downstream market was not a decisive factor, the conditions set forth in Magill were not fulfilled since the pictures were not essential for the exercise of betting activities and no emergence of a new product was being prevented. Indeed, the broadcasting of the races, although constituting an additional and suitable service for bettors, was not indispensable for the exercise of the activity on the downstream market, that of taking bets. This was evidenced by the fact that Ladbroke already occupied a significant position on the downstream market. Furthermore, the pictures were not indispensable since the races were taking place after the bets were placed.

Hence, it seems that Ladbroke limited the scope of Magill, in that there was no duty to license when the owner of the facility was not present on the downstream market or when the undertaking that required a license was dominant in the downstream market. However, according to the Court, even when the owner of the facility was not present in the downstream market, the refusal to grant a license could be abusive if a license had been granted to other operators on the downstream market.

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113 Ladbroke, 1997 E.C.R. at II-923, para. 2.
114 Id. at para. 3.
115 Id. at para. 4.
116 Id. at paras. 5-9.
117 Id. at para. 13.
118 Id. at para. 110.
119 Id. at para. 129.
120 Id. at para. 130.
121 Id. at para. 131.
122 Id. at para. 132.
123 Id.
124 Korah, supra note 109, at 814.
market. Moreover, as to the three conditions set forth in *Magill*, the Court seemed to indicate that they were not cumulative. Finally, one can question the motivation that led the defendants to refuse a license to Ladbroke. Indeed, since they were apparently not present in the Belgian betting market, they should have been willing to grant a license if they had acted rationally by trying to maximize their profits.

**K. European Night Services**

This is the last case of essential facilities submitted to the Court before *Bronner*. The main railway companies in the United Kingdom, France, Germany, and The Netherlands had formed a joint venture, European Night Services (“ENS”), to provide and operate overnight passenger rail services through the Channel Tunnel. The railway companies agreed to provide ENS with railway paths through the Channel Tunnel, crew, and locomotives. The market share of ENS on the routes it served was between five and eight percent. The Commission found that the agreement violated Article 81 of the EC Treaty but granted an exemption for eight years provided that the parties would make the same rail services, train paths under the Channel Tunnel, crews and locomotives, available to eventual competitors.

The Court of First Instance annulled the Commission’s decision on numerous grounds. It held that the Commission had not made an adequate and correct assessment of the restrictions of competition in applying Article 81 of the Treaty. The Court nevertheless considered whether the remedies imposed by the Commission would have been appropriate if an infringement of Article 81 had been found. The Court held that neither the parent undertaking nor [ENS] may be regarded as being in possession of infrastructure, products or services which are necessary or essential for entry in the relevant market unless such infrastructure, products or services are not interchangeable and unless, by reason of their special characteristics—in particular the prohibitive cost of and/or time reasonably required for reproducing them—there are no viable alternatives available to potential competitors of the joint venture, which are thereby excluded from the market.

Regarding train paths, the Court decided that there were no grounds for the conditions imposed since Directive 91/440/EEC already guaranteed access to

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126 Id. at para. 131. See also Frank Fine, NDC/IMS: A Logical Application of Essential Facilities Doctrine, 23 Eur. Competition L. Rev. 461 (2002); see also contra Korah note 109, at 814 (stating that on this point the decision of the Court might have been obiter dicta); see also infra the discussion of IMS Health in which the President of the Court doubts the Commission’s interpretation that the three conditions are not to be applied cumulatively.
128 Id. at para. 9.
129 Id. at para. 12.
130 Id. at para. 100.
131 Id. at para. 17.
132 Id. at para. 207.
133 Id. at para. 209.
potential competitors of ENS. It held that the supply of locomotives could not be considered “as necessary or essential facilities unless they are essential for ENS’s competitors, in the sense that without them they would be unable, either to penetrate the relevant market or to continue operating on them.” However, the Court held that a refusal to provide locomotives to ENS’ competitors would not have the effect of excluding competitors from the market. Indeed, it was not demonstrated that ENS’ small market share could give it a position to exert any influence on the functioning or structure of the downstream market. For this reason, the Court dismissed the obligation to provide ENS’ competitors with train crews.

L. Conclusion

The essential facilities doctrine has been helpful in opening up competition, particularly where access to a downstream market results from legal monopolies, other state intervention, or a facility’s owner using its legal monopoly to monopolize a downstream market. Hence, the essential facilities doctrine has contributed to the integration of the common market. Under the pre-Bronner case law, it appears that an undertaking, merely because of its dominant position, could be required to grant access to its facility. There had been, however, no economic analysis of the conditions prevailing in the market, such as possible alternatives to the facility, market shares in the downstream market of the respective undertakings, or the effect of the refusal on prices. The application of the essential facilities doctrine to cases where the facility’s owner was only in dominant position could have led to disincentives to invest. Indeed, once an undertaking had reached a dominant position without being a monopolist, competitors would be able to piggyback on its investments. Hence, there was a need for the Court to intervene and define the conditions under which the essential facilities doctrine should apply. Bronner was the occasion.

III. BRONNER

The legal and economic context in which the Court was asked to intervene in Bronner is an important aid in understanding the rationale of the Court’s decision. First, the case took place at the end of the nineties. At that time, the integration of the common market had made significant progress. Market integration was no longer the priority of competition law. Second, Bronner did not involve the protection of a national market against foreign competitors or the extension of a legal monopoly to a downstream market. Instead, it concerned an “Austro-Austrian” story of access to a facility developed with private funds. Third, Bronner took place after two unsuccessful attempts to apply the essential facilities doctrine, which suggested the need to issue guidance for its application.

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134 Id. at para. 211.
135 Id. at para. 212.
136 Id.
137 Id. at para. 218.
Mediaprint was the publisher of two newspapers, which together accounted for 46.8 percent of the Austrian daily newspaper market in terms of circulation and 42 percent in terms of advertising revenues.\textsuperscript{139} Mediaprint had established the only nationwide delivery scheme, which made possible the distribution of its newspapers in the early hours of the morning.\textsuperscript{140} Oscar Bronner was the publisher of a competing newspaper, which accounted for 3.6 percent of the Austrian daily newspaper market in terms of circulation and 6 percent in terms of revenues.\textsuperscript{141} Bronner’s newspaper was enjoying spectacular growth in new subscriptions and in advertisement revenues.\textsuperscript{142}

Mediaprint refused to grant Bronner access to its delivery scheme. Bronner filed a complaint in its national court seeking an order requiring Mediaprint to grant it access in return for reasonable remuneration.\textsuperscript{143} The national court stayed the proceedings and referred preliminary questions to the Court of Justice. In essence, the national court asked whether Mediaprint’s refusal constituted an abuse of dominant position.\textsuperscript{144}

The Court held first that it was up to the national court to determine whether home-delivery schemes constituted a separate market or whether other methods of distribution, such as sales in shops or at kiosks, delivery by post, or regional delivery schemes, could be considered interchangeable.\textsuperscript{145} The Court held that if the national court concluded the relevant market was nationwide home-delivery schemes, Mediaprint would be deemed to possess a dominant position in that market.\textsuperscript{146} The Court further held that there could be an abuse of dominant position if (i) the refusal was likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service; (ii) that such refusal was incapable of being objectively justified; and (iii) that the service in itself was indispensable to carrying on that person’s business, inasmuch as there is no actual or potential substitute in existence for the home-delivery scheme.\textsuperscript{147} The Court decided these conditions were not met since other, less advantageous methods of distributing daily newspapers existed,\textsuperscript{148} and there were no technical, legal, or economic obstacles to establishing another nationwide delivery scheme.\textsuperscript{149}

The first and second conditions can be found in the Court’s earlier case law.\textsuperscript{150} The third condition is the most important and raises the standard for assessing whether an undertaking in dominant position has a duty to deal. The Court held that

\textsuperscript{139} Id. at para. 6.
\textsuperscript{140} Id. at para. 7.
\textsuperscript{141} Id. at para. 4.
\textsuperscript{142} Opinion of Advocate General Jacobs, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Case C-7/97, 1998 E.C.R. I-7791, [1999] 4 C.M.L.R. 112, para. 67 (stating that new subscriptions had increased by 15% and advertisement revenues by 30% in comparison with the year before).
\textsuperscript{143} Bronner, 1998 E.C.R. at I-7791, para. 8.
\textsuperscript{144} Id. at para. 11.
\textsuperscript{145} Id. at para. 34.
\textsuperscript{146} Id. at para. 35.
\textsuperscript{147} Id. at para. 41.
\textsuperscript{148} Id. at para. 43. One can then ask the question whether the relevant market should not have been defined more broadly to include these alternative methods of distribution.
\textsuperscript{149} Id. at para. 44.
\textsuperscript{150} Commercial Solvents, 1974 E.C.R. at 223, para. 25; Telemarketing, 1985 E.C.R. at 3261, para. 27.
it was not sufficient that the establishment of a second home-delivery scheme was not economically viable because of the small circulation of the daily newspaper to be distributed.\textsuperscript{151} Instead, it said that it must be demonstrated that it is not economically feasible to create a second delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by Mediaprint.\textsuperscript{152} Advocate General Jacobs wrote in his opinion that “it would be necessary to establish that the level of investment required to set up a nationwide home distribution system would be such as to deter an enterprising publisher who was convinced that there was a market for another large daily newspaper from entering the market.”\textsuperscript{153} Hence, it is an objective test and not a subjective one that the Court put forward, based on the needs of the undertaking requesting access.\textsuperscript{154} Logically, one should first ask the question whether the facility is indispensable. If so, one should determine whether the refusal is likely to eliminate all competition and, lastly, whether this refusal is justified.\textsuperscript{155}

One might, however, ask whether there is any difference between the first condition, i.e. that the refusal is likely to eliminate all competition on the downstream market, and the third condition, i.e. that the facility is indispensable to carrying out the requisite undertaking’s business, inasmuch as there is no actual or potential substitute in existence for that facility. It seems that if a facility is essential for the requesting undertaking, the refusal to grant access to it will inevitably prevent that undertaking from competing on the market and, thus, will eliminate it. Alternatively, if the refusal to use the facility is not likely to eliminate all competition on the part of the requesting undertaking, it inevitably means that the facility is not essential. Hence, there would actually be only two conditions. First, the facility must be indispensable for the requesting undertaking to compete on the downstream market. Second, there must be no objective justification for a refusal.

The Court has not considered the question of “objective justification”. In \textit{Bronner}, it found that the facility was not indispensable, so this question was not relevant. Two interpretations of the “objective justification” are possible. First, one could consider that a refusal is objectively justified when the pro-competitive advantages of the refusal outweigh the negatives. Second, one could argue that “objective justification” must be assessed not from a competition policy point of view but from that of the owner of the facility. Temple Lang argues that “the basic principle is that if a reasonable owner of the facility who had no interest in any downstream operation would have a substantial interest, acting rationally, to refuse access, the owner is entitled to do so.”\textsuperscript{156}

\textit{Bronner} can be distinguished from the earlier case law in two ways. First, it sets a higher standard for the application of the essential facilities doctrine. The fact that the facility’s owner has a dominant position is no longer sufficient. Under \textit{Bronner},

\textsuperscript{151} Id. at para. 46.
\textsuperscript{152} Id.
\textsuperscript{154} Id. at para. 67; see also John Temple Lang, The Principle of Essential Facilities in European Community Competition Law - The Position since Bronner, 1 Journal of Network Industries 375, 380 (2000).
\textsuperscript{156} Lang, supra note 154, at 385.
the facility must be indispensable. Second, Bronner entails a forward-looking assessment of the competitive conditions in the downstream market.

In the next section, I will apply the new criteria to the prior case law to determine whether Bronner in fact constitutes a break with the past.

IV. APPLICATION OF THE BRONNER DOCTRINE TO THE PRE-BRONNER CASE LAW

In this section, I will examine whether the conditions set forth in Bronner imposing a duty to deal, if applied to earlier case law, would have lead to different results. Under Bronner, a refusal to deal is considered an abuse of dominant position when a facility is indispensable to compete on a downstream market and a refusal is not objectively justified. If it appears that Bronner would not have imposed a duty to deal in cases in which the Court of Justice did impose such a duty, this will confirm our findings that Bronner imposes more stringent criteria. This section confirms that under Bronner the essential facilities doctrine has a more restrictive scope of application than under earlier case law, and hence, Bronner constitutes a watershed in the application of the essential facilities doctrine.

A. Commercial Solvents

The first question is whether the raw materials supplied by Commercial Solvents were indispensable for the manufacture of ethambutol by Zoja. The Court acknowledged the existence of alternative methods of manufacturing which did not require Commercial Solvents’ raw materials. The Court rejected these because they were either in an experimental stage or limited to the needs of their manufacturers.158 The Court determined that these alternative methods did not “lend themselves to substantial and competitive marketing.”159 However, under Bronner, one must also take potential substitutes into account.160 Hence, the Court should have considered whether the existence of such methods would constitute alternatives for Zoja. The Court had brushed off Commercial Solvents’ argument that development of alternatives did not present difficulties or require excessive costs.161 Moreover, the Court held that the question was not whether “Zoja by adapting its installations and its manufacturing processes, would have been able to continue its production of ethambutol based on other raw materials but whether Commercial Solvents had a dominant position in the market in raw materials for the manufacture of ethambutol.”162 According to Bronner, however, this is the very question that the Court should have asked: was it technically feasible and economically viable for Zoja to develop these alternative methods of production. In that respect, the fact that two Italian companies manufactured ethambutol on a modest scale for their own needs could have been an indication that alternatives were technically feasible and

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158 Id. at para. 13.
159 Id.
162 Id. at para 15.
The Court might have found that the raw materials supplied by Commercial Solvents were not indispensable for allowing Zoja to compete on the ethambutol market.164

B. United Brands165

Bronner applies to situations in which the owner of a facility uses it to increase its market share in a downstream market. In United Brands, however, Olesen was a reseller of UBC’s products and not a competitor in a downstream market. Hence, Bronner should not apply to this case. Moreover, the Court’s decision was justified by considerations other than the access to an essential facility. Indeed, the retaliatory measures taken by UBC were a way to prevent its customers from selling competing products or from participating in advertising for these products. UBC’s behavior foreclosed an important share of the market.

If Bronner were nevertheless to be applied, it can be argued that the bananas to which Olesen required access were not indispensable. Indeed, Olesen had alternative sources of supply: UBC’s competitors. The same solution could have been reached if the Court had considered that the relevant market was not limited to bananas, but also included other fruits.166 Under Bronner, the Court could have ruled that UBC did not have a duty to deal with Olesen.

C. BP167

In this case, the facility possessed by BP, the supply of motor gasoline, was not indispensable since ABG had been able to find alternative sources of supply, even though these supplies were limited because of the shortage of oil created by the embargo.168 Even if BP’s motor gasoline had been indispensable in order for ABG to compete, the refusal would have been objectively justified. The Court considered that in periods of shortage, it is legitimate for an undertaking to favor its traditional customers.169 There is no indication in the Court’s decision that BP had stopped supplying ABG to favor its own distribution network. Under Bronner, the Court is likely still to have held that BP did not have a duty to deal with ABG.170

D. Telemarketing171

The outcome of this case would likely have been identical under Bronner. CLT and IPB possessed a legal monopoly in the upstream market in television advertising aimed at viewers in French-speaking Belgium.172 Access to television advertising

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163 Id. at para. 13.
164 Doherty, supra note 155, at 397.
168 Id. at para. 42.
169 Id. at para. 32.
170 Doherty, supra note 155, at 420.
172 Id. at para. 6.
was indispensable to carry out Telemarketing’s business. It was legally impossible for Telemarketing to set up its own broadcasting organization and attract advertisers in order to compete in the downstream market for telemarketing services.\(^{173}\) However, the referring national court pointed out that other French language broadcasters could be received in Belgium.\(^{174}\) Would this alternative have allowed Telemarketing to compete on the downstream market? The answer is probably negative because the advertising on these channels was only rarely aimed at the Belgian public.\(^{175}\) The Court did leave the door open to a justification for technical or commercial requirements relating to the nature of the television.\(^{176}\) In that respect, CLT/IPB argued that the decision to require advertisers to mention only its number was justified by the close links between the two services supplied, advertising and telemarketing, as well as the need to preserve the television station’s image.\(^{177}\) The Court of Justice left it to the national court to determine whether there was an objective necessity for CLT/IPB to reserve for itself the telemarketing activities.\(^{178}\)

**E. Renault\(^ {179}\) and Volvo\(^ {180}\)**

In these two cases, the independent manufacturers of spare parts requested access to the facility, the design rights owned by Volvo and Renault, to compete on the same market as that of the facility, the market in spare parts. Bronner does not cover this situation since it applies to the refusal to grant access to a facility indispensable to compete in a downstream market. Bronner would apply in cases where independent car repairers required access to Volvo and Renault’s spare parts to carry out car repair services.\(^ {181}\) If one nevertheless considers that Bronner is applicable when access is required to compete on the same market as that of the facility, one would probably conclude that intellectual property rights were indispensable to manufacture spare parts, provided that spare parts could not be manufactured without infringing these rights. However, the refusal would be justified on the ground that it is the purpose of intellectual property rights to exclude third parties from manufacturing products incorporating these rights.\(^ {182}\) Hence, under Bronner, the result of these cases would have been identical.

**F. GB-Inno-BM\(^ {183}\)**
In this case, RTT had a legal monopoly in the market for the establishment and operation of the telephone network.\textsuperscript{184} It also had a legal monopoly in the granting of authorizations to connect telephone equipment to the network, to lay down the technical standards to be met by that equipment and the power to check whether equipment produced by third parties conformed to the specifications it had laid down.\textsuperscript{185} It is clear that RTT’s approval was indispensable for allowing GB-Inno-BM to carry on its activities of selling telephones. If GB-Inno-BM had challenged a refusal to approve its telephones, RTT would have had to demonstrate that the refusal was justified, for example, for technical reasons. However, in this case, GB-Inno-BM challenged the law granting the power to approve telephones, so that the question of the refusal’s justification was not raised.

\textit{G. Port of Rødby}\textsuperscript{186}

The port of Rødby was not indispensable since Stena was ready to build a new one in its vicinity. However, the refusal to authorize the construction rendered access to the port indispensable to compete in the downstream market. The Danish government justified its decision with the need to preserve spare capacity for companies already operating in the port, to protect DSB from competition, and for technical reasons.\textsuperscript{187} The Commission rejected these justifications. Under \textit{Bronner}, the Court would also have considered that the refusals were an abuse of dominant position. Indeed, even if technical reasons had justified the refusal to grant access to the port itself, nothing justified the refusal to build a new infrastructure. The Danish government had argued that there was no need for a new terminal since Stena had not demonstrated that there was an unsatisfied demand for ferry service.\textsuperscript{188}

\textit{H. Sea Containers v. Stena Link}\textsuperscript{189}

Under \textit{Bronner}, the port facility at issue would have been considered essential. Indeed, the Commission had pointed out that using another port would substantially increase the sailing distance and the building of a new port would not be physically or economically realistic.\textsuperscript{190} Since Stena Link did not formally refuse access but merely delayed the negotiations, it is not necessary to examine whether the refusal was justified. However, the decision of the Commission suggests some elements that could be used to justify a refusal to grant access: absence of spare capacity or congestion at certain times, effect of passing on other vessels, and navigational issues.

\textsuperscript{184} Id. at para. 5.
\textsuperscript{185} Id. at para. 15.
\textsuperscript{186} Commission Decision 94/119/EC, supra note 68.
\textsuperscript{187} Id. at para. 16.
\textsuperscript{188} Id. at para. 14.
\textsuperscript{189} Commission Decision 94/19/EC, supra note 80.
\textsuperscript{190} Id. at para. 64.
I. Magill

Under Bronner, the Court could have found that there was no abuse of dominant position since the full weekly program listings required by Magill were not indispensable to compete in the market in weekly guides. Indeed, the program listings that Magill was authorized to use, i.e. listings covering two days and the highlights of the week ahead, were sufficient to produce a guide capable of competition on the downstream market. Were this not the case, Magill would not have entered the market in 1985. Magill retained a competitive advantage vis-à-vis the broadcasters’ guides in that the latter only included their own program listings, while Magill’s was comprehensive. Furthermore, the refusal to grant access to the weekly listings could not lead to monopolization of the downstream market since the broadcasters were still competing against each other in that market. Hence, it appears that the full weekly program listings were not indispensable for Magill to compete in the market for weekly guides.

If one considers the full weekly program listings to be indispensable, the next question is whether the refusal to license them was objectively justified. One could argue that the refusal was justified since it is the purpose of intellectual property rights to exclude competitors from the market of their intellectual property rights. For the same reason Volvo and Renault can prevent other manufacturers of spare parts from reproducing their protected work to manufacture spare parts, the broadcasters should be authorized to prevent competitors from reproducing their protected work to produce weekly guides. However, one could also argue that the exceptional circumstances found by the Court justified the granting of a compulsory license.

J. Ladbroke

In this case, the Court did not consider the pictures to be indispensable for competing in the downstream market of taking bets. Ladbroke occupied a dominant position in this market without having access to the pictures, and the bets were placed before the pictures were broadcasted. Hence, under Bronner, the decision of the Court would have been identical.

K. European Night Services

In this case, the Court found that train paths under the Channel Tunnel and crews and locomotives owned by ENS or its parent companies were not essential for ENS’ competitors, given the small market share of ENS’ parent companies. Hence,

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192 Contra Doherty, supra note 155, at 421.
194 Id. at para. 132.
195 Id.
196 Doherty, supra note 155, at 421-422.
197 European Night Services, 1998 E.C.R. at II-3141.
under Bronner, the Court would have concluded that the facilities concerned were not indispensable to allow ENS’ competitors to compete in the downstream market.

M. Conclusion

In the third section of this article, I argued that, at first sight, the criteria set forth in Bronner restricted the scope of the application of the essential facilities doctrine. This section confirms the view that Bronner limits the application of the essential facilities doctrine. Under Bronner, it does not suffice to demonstrate that the owner of the facility is in dominant position in the upstream market, since a dominant position does not exclude the existence of alternative facilities. Moreover, even if alternatives do not exist yet, it cannot be concluded that the facility is indispensable. Indeed, a forward-looking assessment of the downstream market will have to determine whether viable alternatives can be developed. Thus, Bronner confines the application of the essential facilities doctrine to a particular form of dominant position, a kind of “super-dominance”. Hence, one can state that Bronner constitutes a turning point in the application of the essential facilities doctrine in EC law.

Frank Fine argues that Bronner and Ladbroke did not restrict the effect of Magill. He claims that

Bronner […] confirms that the ECJ, since 1998, had consistently and without exception or backtracking deemed the test of ‘exceptional circumstances’, as laid down in Magill, to be satisfied in cases involving intellectual property, in which the rights in question protect an essential facility, and the refusal to license eliminates competition on the relevant market.

However, it is the notion of “essential” facility that has been narrowed in Bronner. As mentioned earlier, it no longer suffices to find that the owner has a dominant position. It must be demonstrated that there is no viable alternative to compete without the intellectual property right or to invent around it. Nevertheless, there is still room for the “exceptional circumstances” test of Volvo/Renault and Magill. Indeed, the second condition of Bronner requires the refusal to deal to be objectively justified. In “exceptional circumstances,” such as those described in these decisions, the refusal could be unjustified.

V. THE CASE LAW POST-BRONNER

In the last section, I concluded that Bronner constituted a turning point in the essential facilities doctrine. It is, however, important to determine whether Bronner truly imposes a new set of criteria to apply the essential facilities doctrine or whether it may merely be considered a response to a particular case that will not be applied in subsequent cases. Hence, in this section I will analyze how the Bronner doctrine has been treated in the subsequent cases of Aéroport de Paris and IMS Health. I will conclude that these cases confirm the Bronner doctrine.


199 Id. at 461.
A. Aéroport de Paris

Aéroport de Paris ("ADP") had a legal monopoly over running Paris airports. ADP had granted a concession to AFS to carry on airline catering services at Orly Airport. Later, ADP granted a concession to OAT, one of AFS’ competitors, to provide similar services, at conditions more favorable than those imposed on AFS. AFS claimed that this constituted a form of discrimination and requested that the rate of the fees be aligned. AFS lodged a complaint with the Commission, which found that ADP had abused its dominant position as manager of the Paris airports to impose discriminatory fees. The Commission ordered ADP to apply a non-discriminatory scheme of commercial fees. The Court of First Instance dismissed ADP’s appeal against the Commission’s decision. The Court of Justice affirmed the Court of First Instance’s decision. It held, in particular, that the relevant market was the management of airport facilities and that access to these facilities was indispensable for the provision of ground handling services. A license from ADP was a prerequisite for access to the airport. Hence, ADP’s authorization to access the airport was indispensable to carry out ground handling activities. The Courts confirmed the Commission’s position that the owner of an essential facility may not impose discriminatory conditions.

It is puzzling that the Court did not seek to understand why ADP was discriminating. Indeed, if ADP had been acting rationally and efficiently, it would not have let OAT undercut AFS and monopolize the downstream market. On the contrary, it can be argued that the more competitors in the downstream market, the more profits ADP would be able to extract. There must have been a reason for ADP not to act rationally. Perhaps ADP, a state-owned undertaking, wanted to favor OAT, a subsidiary of Air France, another state owned undertaking. Discrimination under these circumstances would be unlawful because it distorts competition in the downstream market. However, it is difficult to understand why ADP, if it acted rationally, could not discriminate among its customers. The result of the Court’s decision is that the price imposed on the first entrant is a maximum price. Indeed, a second entrant is able to claim the more favorable conditions imposed on the first entrant. This is counterintuitive. One would assume that as there is less capacity because of the addition of new entrants, the owner of the facility could obtain a higher price. In fact, the Court’s decision strengthens the ability of the essential facility to extract a monopolistic rent by preventing it from lowering its prices for subsequent users.

201 Id. at paras. 1-2.
202 Id. at para. 5.
203 Id. at para. 10.
204 Id. at para. 12.
205 Id. at para. 17.
206 Id.
209 Id. at para. 93.
Second, according to the Court, the presence or absence of the essential facility’s owner on the downstream market has no bearing on the owner’s conduct. Indeed, the Court rejected ADP’s argument that its behavior did not constitute an abuse of dominant position since it was not present in the downstream market for ground handling services.\(^{210}\) Instead, it is the effect of the abuse on the downstream market that is relevant, not the owner’s presence in that market.

Third, this case did not fully address the question of whether the owner of an essential facility must grant access to competitors in the downstream market. Rather, it dealt with the duty of the owner vis-à-vis its customers. Nevertheless, the case confirmed the criteria developed in Bronner to determine whether a facility is essential. In fact, the Court pointed out that access to the airport was *indispensable* to carrying out ground handling activities.\(^{211}\) However, it was also clear that there was no alternative possible to ADP’s authorization to carry out ground handling activities at Orly Airport.

**B. IMS Health\(^{212}\)**

The *IMS Health* case has given rise to a heated debate.\(^{213}\) IMS Health is a market research company that provides regional data reporting services to pharmaceutical companies. Its reports concern sales of pharmaceutical products throughout Germany. These reports are based on data purchased from pharmaceutical wholesalers, which are checked and formatted according to a brick structure.\(^{214}\) IMS’ reports are based on an 1860 brick structure.\(^{215}\) Each brick represents a geographical area with at least four to five pharmacies.\(^{216}\) Since a high proportion of pharmaceutical products are sold by pharmacies located in a prescribing doctor’s neighborhood, these reports allow pharmaceutical companies to focus their marketing on doctors located in certain areas, or bricks.\(^{217}\)

IMS has refined its brick structure since its inception in 1969 with the help of the pharmaceutical industry. IMS brought a copyright infringement suit against two competitors, AzyX and NDC, which it suspected were selling data reports based on the same 1860 brick structure.\(^{218}\) Claiming copyright protection, IMS obtained from

\(^{210}\) Id. at paras. 164-165.

\(^{211}\) *Aéroports de Paris*, 2000 E.C.R. at II-3929 (Ct. First Instance), at para. 122 (stating that “[s]imilarly, the facilities within the Paris airports are essential, since their use is indispensable to the provision of various services, in particular ground handling”); see also id. at para. 138; see also *Aéroports de Paris*, 2002 E.C.R. at I-9297 (E.C.J.), para. 92.


\(^{213}\) See e.g. Korah, supra note 109; Frank Fine, Response and Replies: NDC/IMS: In Response to Professor Korah, 70 Antitrust L.J. 247 (2002); John Temple Lang, Comment on Professor Korah’s Paper Essential Facilities and Duty to License-IMS, Fordham University School of Law, 10th Annual Conference on International Intellectual Property Law and Policy (2001); see also Frank Fine, supra note 198.


\(^{215}\) Id. at para. 5.

\(^{216}\) Id. at para. 2.

\(^{217}\) Id. at paras. 1-2.

\(^{218}\) Id. at para. 8.
the German Courts an order barring AzyX and NDC from using the 1860 brick structure.\textsuperscript{219}

The conflict gave rise to two parallel procedures before the European Courts, which I will analyze in turn. First, NDC lodged a complaint with the European Commission, whose decision was appealed by IMS. Second, in the copyright case pending in Germany, the local court referred preliminary questions to the Court of Justice.

1. The Proceedings Before the Commission

Upon NDC’s complaint, the Commission issued a decision imposing interim measures pending a final decision.\textsuperscript{220} It sided with NDC and required IMS to grant licenses for the use of the 1860 brick structure.\textsuperscript{221} The reasoning of the Commission followed the Bronner doctrine. The Commission first considered whether the brick structure was indispensable to compete on the market for regional sales data services in Germany.\textsuperscript{222} It considered that the possibility of creating an alternative brick structure was limited, for technical and legal reasons.\textsuperscript{223} First, the Commission held that the 1860 brick structure had become an industry standard, in part because of the cooperation of the pharmaceutical industry.\textsuperscript{224} Many pharmaceutical companies had expressed that they would not be willing to switch to another standard.\textsuperscript{225} Moreover, any report formatted according to a new structure would have to be “translated” into the 1860 brick structure in order to allow pharmaceutical companies to compare data from earlier years and from third parties, who also use the 1860 brick structure.\textsuperscript{226} Furthermore, the Commission held that administrative boundaries were a technical constraint to the development of new structures.\textsuperscript{227} IMS’ structure relied significantly on postcodes.\textsuperscript{228} Another constraint was the probability that the existence of different structures might enable the comparison of data and the identification of information about individual pharmacies, which would violate the German data protection law.\textsuperscript{229} Yet another constraint was that German data protection law also required that at least three pharmacies be included in each brick.\textsuperscript{230} Furthermore, the uncertainty as to the scope of protection for IMS’ structure deterred competitors from devising an

\textsuperscript{219} Id. at paras. 9 and 17.
\textsuperscript{220} Commission Decision 2002/165/EC, 2002 O.J. (L 59) 18 (relating to a proceeding pursuant to article 82 of the EC Treaty (Case COMP D3/38.044-NDC Health/IMS Health: Interim Measures)).
\textsuperscript{221} Id. at para. 48.
\textsuperscript{222} Id. at para. 71.
\textsuperscript{223} Id. at para. 127.
\textsuperscript{224} Id. at paras. 75-84.
\textsuperscript{225} Id. at para. 129.
\textsuperscript{226} Id. at paras. 93 and 99.
\textsuperscript{227} Id. at para. 132.
\textsuperscript{228} Id. (stating a.o. that around 500 of the bricks in the 1860 structure are identical with a single postcode area).
\textsuperscript{229} Id. at para 142.
\textsuperscript{230} Id. at para. 148.
alternative, for fear of legal challenge. Finally, the Commission considered the unsuccessful attempts made by competitors to devise alternative brick structures.

Having found that the 1860 brick structure was indispensable to compete on the market in regional sales data, the Commission turned to the question of whether the refusal was objectively justified. In that respect, the Commission held that there were “exceptional circumstances” in the light of Magill, in that “IMS [had] created, in collaboration with the pharmaceutical industry over a long period of time, a brick structure which had become the de facto industry standard for the presentation of regional data services. . . .” and is now using the right on that standard to exclude any competition. The Commission concluded that, based on the available evidence, there was a prima facie case of abuse of dominant position and imposed the measures described above.

IMS applied for the annulment of the Commission’s decision. This procedure is still pending. IMS also asked the President of the Court to suspend the decision awaiting the Court of First Instance’s judgment. The President of the Court of First Instance suspended ex parte the operation of the Commission’s decision. In a subsequent order, the President suspended the Commission’s decision until the Court of First Instance issued its judgment in the main action. He decided that there were a number of potentially important differences between Magill, on which the Commission had relied, and the Commission’s decision. The question was, in particular, whether the conditions considered as constituting exceptional circumstances under Magill had to be interpreted cumulatively. The President held that contrary to Magill, IMS had not sought to prevent the emergence of a new product, but of new competitors with the same product. Hence, according to the President, there was, at the very least, a serious dispute regarding the correctness of the fundamental conclusion that there were exceptional circumstances justifying the imposition of a compulsory license. According to the President, the balance of the parties’ interests tilted in favor of a suspension of the Commission’s decision. The President of the Court of Justice rejected NDC’s appeal.

Several remarks can be made in connection with this case. First and foremost, it must be recalled that up until now, the debate had been limited to the granting of

231 Id. at paras. 143-145 (stating that the German Courts gave an injunction preventing the use of the 1860 brick structure and any other derivative without however defining what had to be considered as a derivative).
232 Id. at paras. 146-152.
233 Id. at para. 167.
234 Id. at para. 181.
235 Id. at para. 186.
237 Order of the President of the Court of First Instance of October 26, 2001, IMS Health Inc. v. Commission, 2001 E.C.R. at II-3193.
238 Id. at para. 100.
239 Id.
240 Id. at para. 101.
241 Id. at para. 106.
242 Id. at para. 149.
interim measures. Hence, the question was whether, prima facie, IMS had abused its dominant position and whether the granting of a compulsory license was justified to restore competition in the market until the Commission had taken a final decision on the merits.

Second, one can ask whether it is legitimate to grant copyright protection to the 1860 brick structure. The creation of this “work” seems dictated by logical and functional elements (e.g., minimum number of pharmacies, administrative boundaries) rather than by the arbitrary choice of its author. Hence, the grant of a compulsory license could be justified as a reaction à la Magill. Moreover, even if one considered copyright protection of the brick structure legitimate, it seems that the pharmaceutical industry could be considered a co-author. This would change the balance of power in the relationship between IMS, its competitors, and the industry. The industry has some leverage to force IMS to grant a license to its competitors.

Third, the three decisions described do not discuss the Commission’s finding that the brick structure was indispensable to compete in the regional sales data market. Perhaps the Courts decided that this point should be left to discussion of the merits or the Courts decided that the structure was indispensable. However, the President of the Court of First Instance has mentioned that the ability of the pharmaceutical industry to switch to other brick structures was not excluded. The President stated that “[i]t cannot therefore be excluded that such discontent could manifest itself in a willingness to undertake the expense necessary to accept sales-data in a non-1860-brick-compatible format so as to avoid a return to the applicant enjoying a quasi-monopolistic position on the relevant market.” This element could indicate that the 1860 brick structure is not indispensable, according to Bronner.

Fourth, the Courts did not disagree with the Commission’s thinking, based on Bronner, that a facility was essential when it was indispensable.

2. The Preliminary Questions asked by the German Court

In one of the procedures opposing IMS and NDC in Germany, the national court asked the European Court of Justice whether (i) the refusal to license constituted an abuse of dominant position if the potential clients requested the use of the 1860 brick structure, (ii) the fact that the pharmaceutical industry had participated in the creation of the brick structure was relevant and (iii) the costs involved by switching to another structure were relevant. The Court confirmed that a facility will be considered essential where (i) there are no alternatives, even less advantageous ones; and (ii) there are technical, legal or economic obstacles making it impossible or at least unreasonably difficult to develop an alternative facility.

244 Order of the President of the Court of First Instance of October 26, 2001, IMS Health Inc. v. Commission, 2001 E.C.R. II-3193, para. 128; see also id. at para. 131 (stating that if NDC and Azyx were granted a compulsory license, they could use the period of protection from copyright infringement action to persuade their present and future clients to switch to other brick structures).


246 IMS Health v. NDC Health, Case C-418/01, (not yet reported), para. 28.
Moreover, the Court considered that for a refusal to grant a license on a copyright to constitute an abuse of dominant position, “it is sufficient that three cumulative conditions be satisfied, namely, that a refusal is preventing the emergence of a new product for which there is a potential consumers demand, that it is unjustified and such as to exclude any competition on a secondary market.”

The Court’s decision is not particularly clear. As we already pointed out in relation to Magill, the notion of “new product” could give rise to uncertainty. Moreover, it is not clear whether the three conditions identified by the Court only apply when the facility is an intellectual property right or also when it is an infrastructure. Finally, the Court mentions that it is “sufficient” that the three conditions are met. This could mean that other conditions might also apply.

Hence, it is likely that only the decision of the Court on the merits of the Commission’s decision will be able to dispel all uncertainties.

C. Conclusion

This section was intended to determine the scope of the Court’s decision in Bronner. In particular, I wanted to determine whether Bronner had to be considered a response to a particular factual situation not to be applied to other factual situations or whether the Court intended to impose a set of principles which would from this point forward constitute the legal threshold for the application of the essential facilities doctrine.

It appears from Aéroport de Paris and IMS that the Courts and the Commission have continued to apply the principles developed in Bronner. This confirms that Bronner is a watershed separating the case law pre- and post-Bronner. One can therefore argue that the case law pre-Bronner has lost some of its relevance, at least as regards the criteria to apply a duty to deal.

V. CONCLUDING THOUGHTS

In this section I will consider (i) why Bronner is a catalyst, (ii) when the owner of an essential facility has a duty to deal, and (iii) what the objective justifications are for a refusal to deal.

A. Bronner as a catalyst

Bronner appears to be a catalyst in two respects. First, it limits the scope of application of the essential facilities doctrine to a particular kind of dominant position. It no longer suffices to be in dominant position to have a duty to deal, as it was pre-Bronner. The facility owned by the undertaking in dominant position must be indispensable to compete on the downstream market. This is clearly a higher threshold, which could lead to a more limited application of the doctrine. The criteria set forth by Bronner, however, could be interpreted more liberally.

The essential facilities doctrine is less important than in previous decades, given the substantial progress made in the integration of the common market. It remains to be seen, however, whether the essential facilities doctrine will find a new life in the new Member States.
Second, the criteria set forth by Bronner move the concept of abuse of dominant position towards that of monopolization as developed in Section 2 of the Sherman Act. Indeed, Article 82 of the EC Treaty was said to examine abuses of dominant position once they had been committed, i.e. ex post. As pointed out by Eleanor Fox, the EEC wished not to prevent the emergence of power but rather to control its use. On the other hand, Section 2 of the Sherman Act condemns attempts to monopolize and, hence, works ex ante. To impose a duty to deal under Bronner becomes a question of whether by refusing to deal, the facility’s owner has attempted to monopolize the downstream market. The refusal to deal does not constitute an abuse of dominant position if the undertakings in the downstream market are still able to compete with the facility’s owner because of the existence of alternative or potential facilities. The answer to this question entails a careful economic analysis of the obstacles to the creation of alternative facilities, as the Commission’s decision in IMS demonstrates.

The shift towards an ex ante analysis of monopolization could be explained historically. The EEC somehow welcomed the emergence of power in the Community since it led to market integration. Now that markets have been integrated and the main barriers to trade among the Member States have disappeared, EC law should be more concerned with monopolization ex ante than with abuse of dominant position ex post.

B. When does the owner of a facility have a duty to deal?

The owner of a facility has a duty to deal when its facility is essential to compete in a downstream market. A facility is deemed indispensable when no alternative exists and there are no technical, legal, or economic obstacles that make it impossible or unreasonably difficult to create an alternative facility. These three conditions do not apply cumulatively. It suffices to conclude that the facility is indispensable and essential if one of the obstacles is found. Examples of legal obstacles can be found in Telemarketing and GB-Inno-BM, where the facilities were deemed indispensable due to a legal monopoly. Technical obstacles have been found in the Commission’s decision in IMS.

For “economic obstacles,” the Court held that it must be established that “it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers

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247 15 U.S.C.A. § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony [...]”).
248 Eleanor Fox, Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness, 61 Notre Dame L. Rev. 981, 984 (1986); see also Eleanor Fox, What is Harm to Competition? Antitrust, Exclusionary Practices, and Anticompetitive Effect, 70 Antitrust L.J. 371, 393 (2002).
250 Id. at paras. 43 and 44.
251 Telemarketing, 1985 E.C.R. at 3261.
This means that it must not be economically viable for Bronner to duplicate its delivery scheme, even if a new scheme would allow the company to distribute the same number of newspapers Mediaprint currently distributes. In other words, the revenues currently captured by the facility’s owner must be insufficient to justify the building of a new facility. Bergman suggests a second interpretation of the “economic obstacle” criteria. He states that the Court’s criteria mean that a new entrant must lack the ability to duplicate the facility, even if it were able to reach a “market share” comparable to that of Mediaprint. I disagree with this interpretation. Indeed, it seems to me that if the Court (and the Advocate General) had meant “market share,” they would have used that term instead of the term “circulation.”

The question remains whether only the revenues captured on the market in which the new entrant seeks to compete must be taken into account or also revenues captured in other markets through the use of the essential facility. Consider a situation under Bronner in which Mediaprint’s delivery scheme also delivered Mediaprint’s magazines. Supposing that magazines were deemed a separate market, should one take into consideration the revenues captured only by the sale of newspapers, the market in which Bronner wanted to compete, or also in the magazine market? This is an important question. It might not be economically viable for Mediaprint to maintain a delivery scheme solely for newspapers, as opposed to a delivery scheme for the distribution of both newspaper and magazines. It might equally not be economically viable to build a competing delivery scheme for the distribution of newspapers. The Court seems to take the view that only the downstream market in which the new entrant seeks to compete should be taken into account. Indeed, the Court said that it must be impossible for any other publisher of daily newspapers, “alone or in cooperation with other publishers” to build a competing scheme and use it “to distribute its own daily newspapers.” The Court considered only publishers of daily newspapers, the market in which Bronner operated. This constitutes a significant attenuation of the stricter standard set forth by Bronner. Indeed, if the facility to which access is required is only profitable when used in separate downstream markets, the facility could be indispensable in each separate downstream market. On the other hand, one could argue that the Court did not address this question since it did not appear that Mediaprint’s delivery scheme was used in markets other than daily newspapers. Nevertheless, I do not think that the fact that the new facility could be shared by undertakings not present in the daily newspapers market could have escaped the attention of the Court.

In my view, the fundamental question is whether a second facility makes sense from an economic point of view, i.e. whether the costs linked to the building of a new facility can reasonably be recouped. An economic assessment should take all parameters into account, including the increase in market size created by the new facility and the possibility of sharing the facility with other competitors or other

256 As opposed to "circulation".
257 Bronner, 1998 E.C.R. at 1-7791, para. 44.
undertakings in other markets. If the new entrant cannot recoup the costs of a new facility, access to the existing facility should be granted.

Bergman suggests that the Bronner decision will cause the essential facilities doctrine to apply only in cases of “natural monopoly,” where only one facility can be profitable.258 Doherty finds Bronner’s criteria too harsh, especially since they constitute a higher standard than U.S. law.259 However, one must keep in mind that other obstacles might exist to the creation of a second facility, i.e. technical or legal constraints. Hence, by interpreting technical constraints broadly, one can mitigate the strict scope of Bronner. For example, one could consider the unwillingness of competitors in the downstream market to join the new facility a technical constraint, which would justify access to the essential facility. The existence of long-term exclusive contracts between the facility’s owner and the new entrant’s competitors in the downstream market might constitute another obstacle for the creation of a second facility since it would foreclose the sharing of the new facility by other competitors.

Moreover, according to the Court, the criterion is whether it is technically, legally, or economically impossible or “even unreasonably difficult” to create a competing facility. Hence, the courts might have some leeway to determine whether the difficulties associated with the creation of a competing facility are “unreasonable.” Indeed, the result of the economic analysis might be that if the new entrant’s competitors or undertakings in other markets share the new facility it might be economically viable to build it. However, if it appears that the new entrant’s competitors do not want to join the new facility, the courts could consider that, although it is not economically impossible to build the new facility, it is unreasonably difficult to do so.

Furthermore, one must address the question of whether the fact that the facility has been built with state funds or under non-competitive conditions makes any difference. The mere fact that the state has intervened is not sufficient to conclude that it is not economically viable to build a competing facility. Indeed, the cost of building a second facility might have dropped dramatically since the first facility was built. However, it is obvious that the intervention of the state in the funding of the facility to which access is requested could be an indication that it was not economically viable to build under competitive conditions. Hence, all things being equal, one could conclude a fortiori that it should not be economically viable to build a second facility.

Another question is whether the essential facilities doctrine applies when the facility owner is not present in the downstream market. Bronner did not deal with this possibility. Ladbroke suggests that there is no duty to deal when the owner of a facility is not present in the market, since the refusal to deal is not likely to distort competition,260 but I disagree.

I would make a distinction between two possible situations. First, the facility is already used in the downstream market but not by the essential facility’s owner, for example, a sailing route that is served by a port but not by the port owner. In that case, the facility’s owner could resort to anti-competitive practices, such as exclusive

258 Bergman, supra note 255, at 61.
259 Doherty, supra note 155, at 424.
dealing or tying, in order to thwart any competition in the downstream market and
extract a monopolistic rent, especially if there are only poor substitutes for the
essential facility. In this instance, a duty to deal should be applied, even if the
essential facility’s owner is not present in the downstream market.

Second, the facility is not yet used on the downstream market. This would, for
example, be the case for a sailing route that is not served from a specific port. If the
essential facility’s owner was acting rationally, he would seek to maximize profits by
granting access to the operator of the new route, provided there was spare capacity.
If the owner was not acting rationally, the emergence of a new product would be
prevented. However, I doubt that this should be considered sufficient to justify the
application of competition law.

Hence, the absence of a facility owner in the downstream market should not
exclude the possibility that the refusal to deal distorts competition in the downstream
market.

Another question is whether the owner must have market power in the
downstream market to trigger the application of the essential facilities doctrine.
Advocate General Jacobs suggested it should in his opinion in Bronner.261 John
Temple Lang has written that the essential facilities doctrine will be applied when an
owner is likely to obtain a dominant position in the downstream market.262 This
means that when the refusal to grant access has no influence on the competition in
the downstream market and the market remains competitive, the essential facilities
doctrine should not apply. This view confirms that the essential facilities doctrine
tends to prevent monopolization, i.e. the emergence of market power ex ante, in the
sense of Section 2 of the Sherman Act.

C. When is the refusal to deal justified?

Once it has been determined that the essential facility is indispensable, the next
question is whether the refusal to deal is objectively justified. In Bronner, the Court
did not elaborate on this point. According to John Temple Lang, the basic principle
is that if a reasonable owner of the facility who had no interest in any downstream
operations would have a substantial interest in refusing access, the owner is entitled
to do so.263 He has listed a series of reasons for which it would be objectively
justified to refuse access:264

The foremost reason is if an owner does not have spare capacity. The Court will,
however, examine whether the facility owner operates his facility inefficiently to
prevent the arrival of any new entrant.

Another possible justification for a refusal is if the price offered by a new
entrant is too low. If the owner of a facility is present in the downstream market, it is
clear he must offer a price not higher than what he charges his subsidiary.265 This

261 Opinion of Advocate General Jacobs, Bronner, 1998 E.C.R. at I-7791, para. 58; see also Doherty,
supra note 155, at 425.
262 Lang, supra note 154, at 384.
263 Id. at 385.
264 Id. (mentioning i.e. reduction of efficiency of downstream users, reduction of the facility’s value,
interference with technical or safety standards).
265 Id. at 390.
could create pricing problems if the downstream activity is integrated within the same company or if the owner charges a very high price to its subsidiary. However, price differentiation among users of the facility is generally justified, unless there is a connection between the facility’s owner and the favored undertaking, as my interpretation of Aéroport de Paris suggests, or unless discrimination leads to distortion of competition.

Another exception could apply to cases in which the owner of a facility is more efficient than the current user. For example, Commercial Solvents could have claimed that it could produce ethambutol more cheaply than the dominant company. Temple Lang and Hancher suggest this should be an objective justification. The owner should have to clearly demonstrate that the pro-competitive effects of the refusal outweigh the anti-competitive ones. If the owner of the facility, after eliminating competition in the downstream market, raises its prices above the competitive level, he should be required to grant access to a more efficient competitor.

**D. Final Conclusion**

*Bronner* is a catalyst for the essential facilities doctrine. Some authors have suggested that the Court’s decision in *Bronner* will lead to a stricter application of the essential facilities doctrine. This makes sense historically, since at the end of the nineties there were less indispensable facilities in the European Union. Hence, competition law should shift its focus toward other anti-competitive behaviors.

However, *Bronner* could apply a duty to deal where it should not, and could deny one when it should apply a duty. Indeed, if there are no alternatives to the facility, not even poor ones, one could argue that there is no need to impose a duty to deal, since the facility’s owner would remain able to extract an entire monopolistic rent. However, in this case, *Bronner* would impose a duty to deal.

In the presence of poor substitutes to a facility, a narrow reading of the *Bronner* criteria could lead to the conclusion that a facility was not indispensable and, hence, that no duty to deal should be imposed. However, in the presence of poor substitutes, the facility’s owner could resort to anti-competitive practices, such as exclusive dealing or tying, to extract the entire monopolistic rent. For example, he could forbid his customers from dealing with poor substitutes or refuse to deal with competitors who used poor substitutes. In this case, however, it would certainly be pro-competitive to impose a duty to deal on the essential facility’s owner. I have, however, indicated that the courts might still have leeway to construct the *Bronner* criteria more liberally. In any event, the decision to impose a duty to deal should

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266 Id. at 386.
268 Lang, supra note 154, at 386.
269 Moreover, while the economic theory recognizes that competition law must protect competition not competitors, resulting in the elimination of less efficient undertakings, careful attention must be paid to the actual cause of the greater efficiency or the way such efficiency was created, especially, for example in the telecommunications sector, where the greater efficiency is due to state aids or an earlier authorization to enter a particular market.
270 Bergman, supra note 255, at 61.
only be made after careful economic analysis of the downstream market. Only when pro-competitive advantages clearly outweigh negative results should access be granted.

On the other hand, one can welcome the *ex ante* perspective given to the concept of abuse of dominant position by the Court. The convergence toward the concept of monopolization is useful, as it will allow antitrust agencies from both sides of the Atlantic to make the same decisions on similar cases.

Finally, I remain hopeful that the subsequent procedures before the Court in *IMS* will clarify some of the questions left unanswered by *Bronner*. 