

The Google Shopping Judgment: Lessons for Article 102 TFEU & Digital Market Regulation

Giorgio Monti, Tilburg Law and Economics Center

G.Monti@tilburguniversity.edu

Purple Parking Ltd & Anor v Heathrow Airport Ltd

[2011] EWHC 987 (Ch)

Heathrow's own Valet Parking allows drop-off at the forecourt



Purple Parking customers would have to park here



Abuse of dominance: promotion and demotion [138]

Promotion & demotion

Heathrow Airport Ltd (HAL) operates from the forecourt at T3 and from an equivalent at T1; Purple and Meteor would operate from the car park for all activities

“The T1 car park presents as a tight, somewhat gloomy, functional concrete car park.”

Demotion

HAL has a permit, for no payment. Purple and Meteor would have to operate from the car park, for a charge which is currently at least £1.50 per vehicle.

Google: promotion and demotion

Google abuses dominance as search engine to give illegal advantage to “Google Shopping”

Google promotes Google Shopping by placing it at the top

Google shows rival comparison shopping services much lower in results, where consumers do not see them

wireless headphones Search

1 2 3 4 5 6 7 8 9 10 Next >

General legal principles

Something old

Special responsibility, abuse objective...

Something borrowed

‘The abuse may take the form of an **unjustified difference in treatment**. In that regard, the general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.’ [155]

‘a system of undistorted competition can be guaranteed only if **equality of opportunity is secured as between the various economic operators**’ [180]

Something borrowed

From

Art 106(1) + 102 TFEU case-law: holder of exclusive rights

Something (relatively) new

“in view of its ‘superdominant’ position, its role as a gateway to the internet and the very high barriers to entry on the market for general search services, it was under a stronger obligation not to allow its behaviour to impair genuine, undistorted competition on the related market for specialised comparison shopping search services.” [183]

The approach of the General Court

The abuse consists of leveraging market power from general search to vertical search by

- **Discrimination**

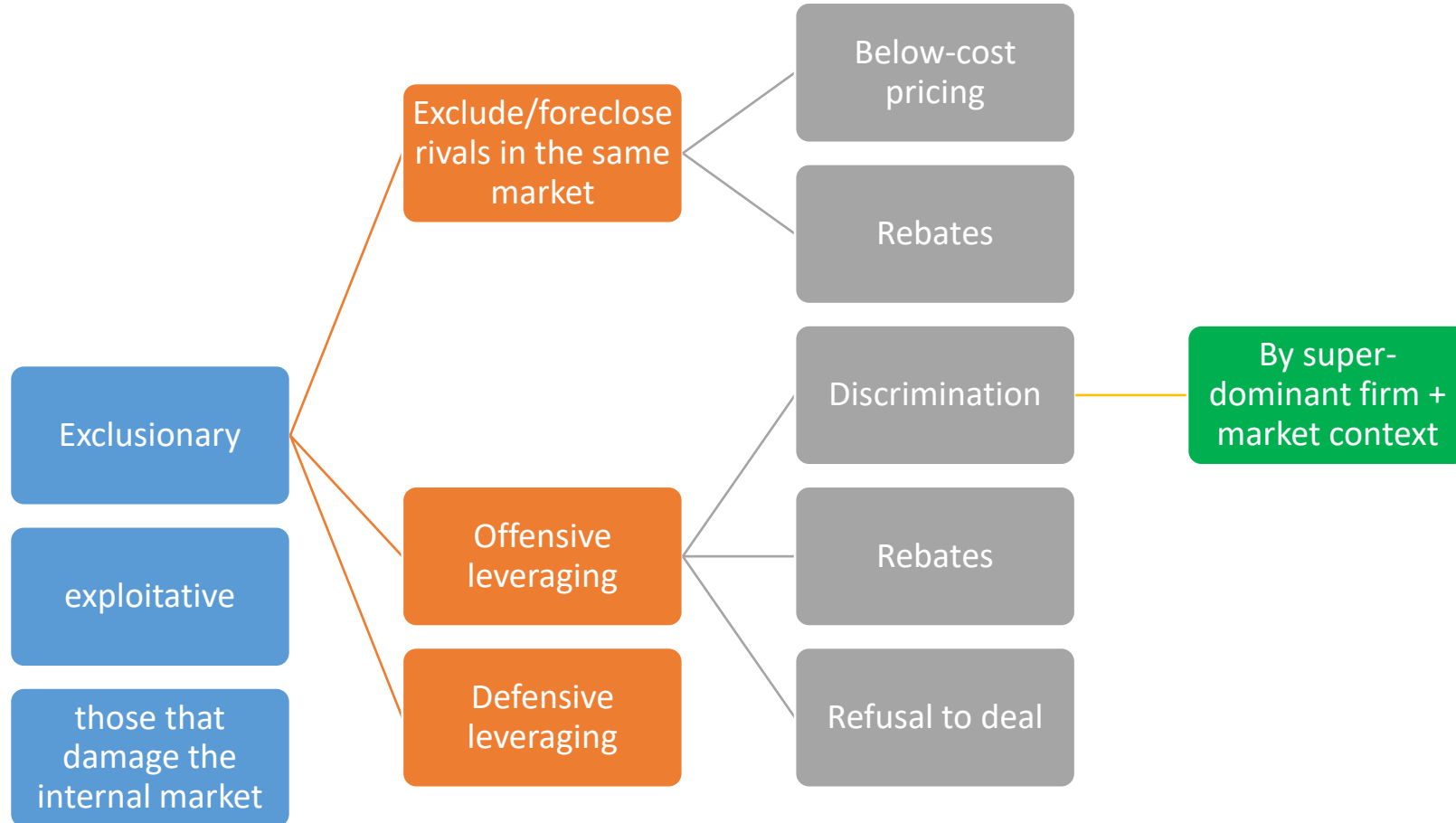
- Promotion of Google's comparison services
- Demotion of rival's comparison services

- **By a super-dominant firm**

- **Where**

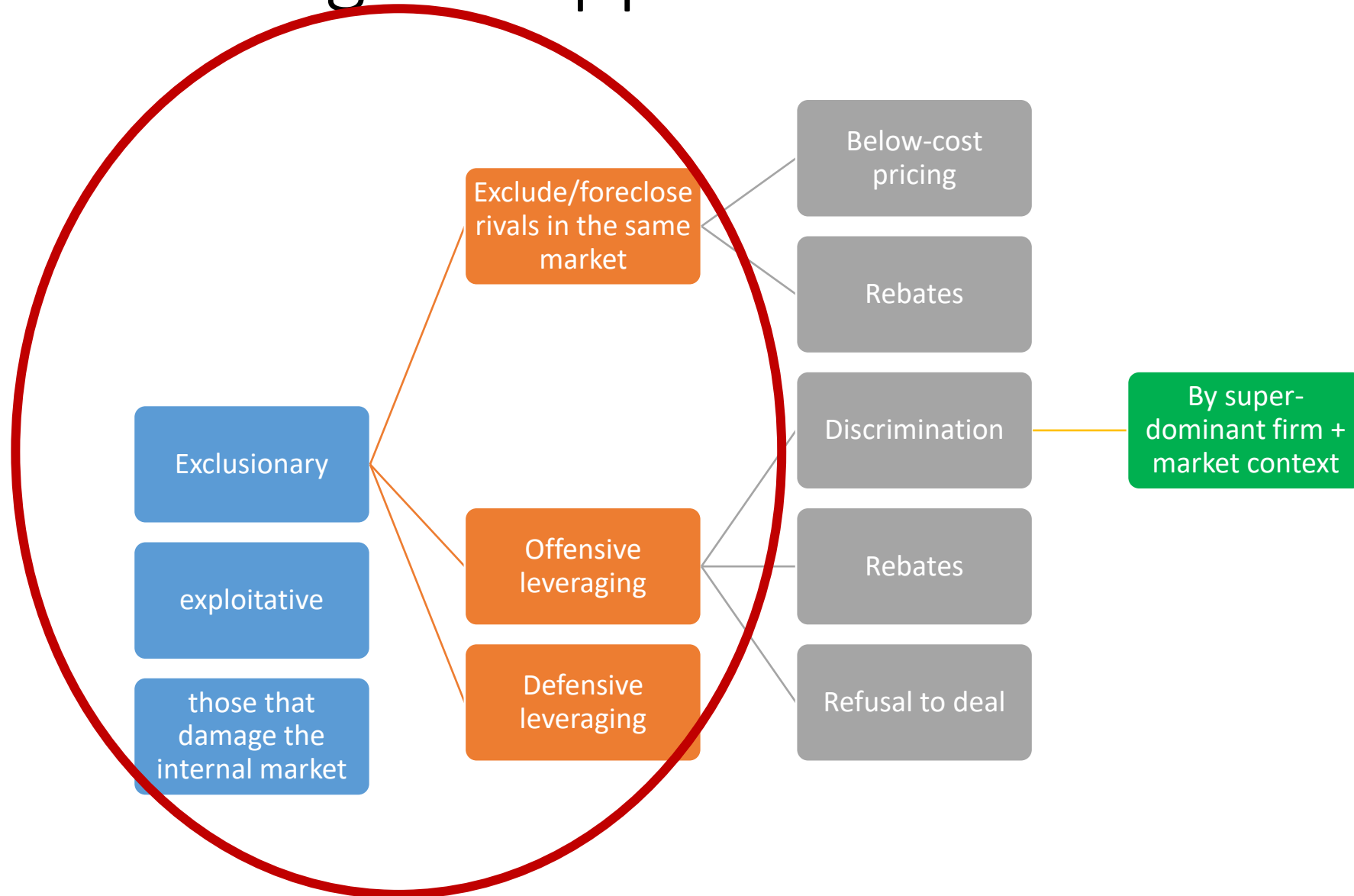
- 1) Rivals need traffic from Google search (to attract users)
- 2) Users only look at the first page of results
- 3) Impossible to attract traffic from other websites (e.g. Facebook/Twitter)

Generalizing the approach



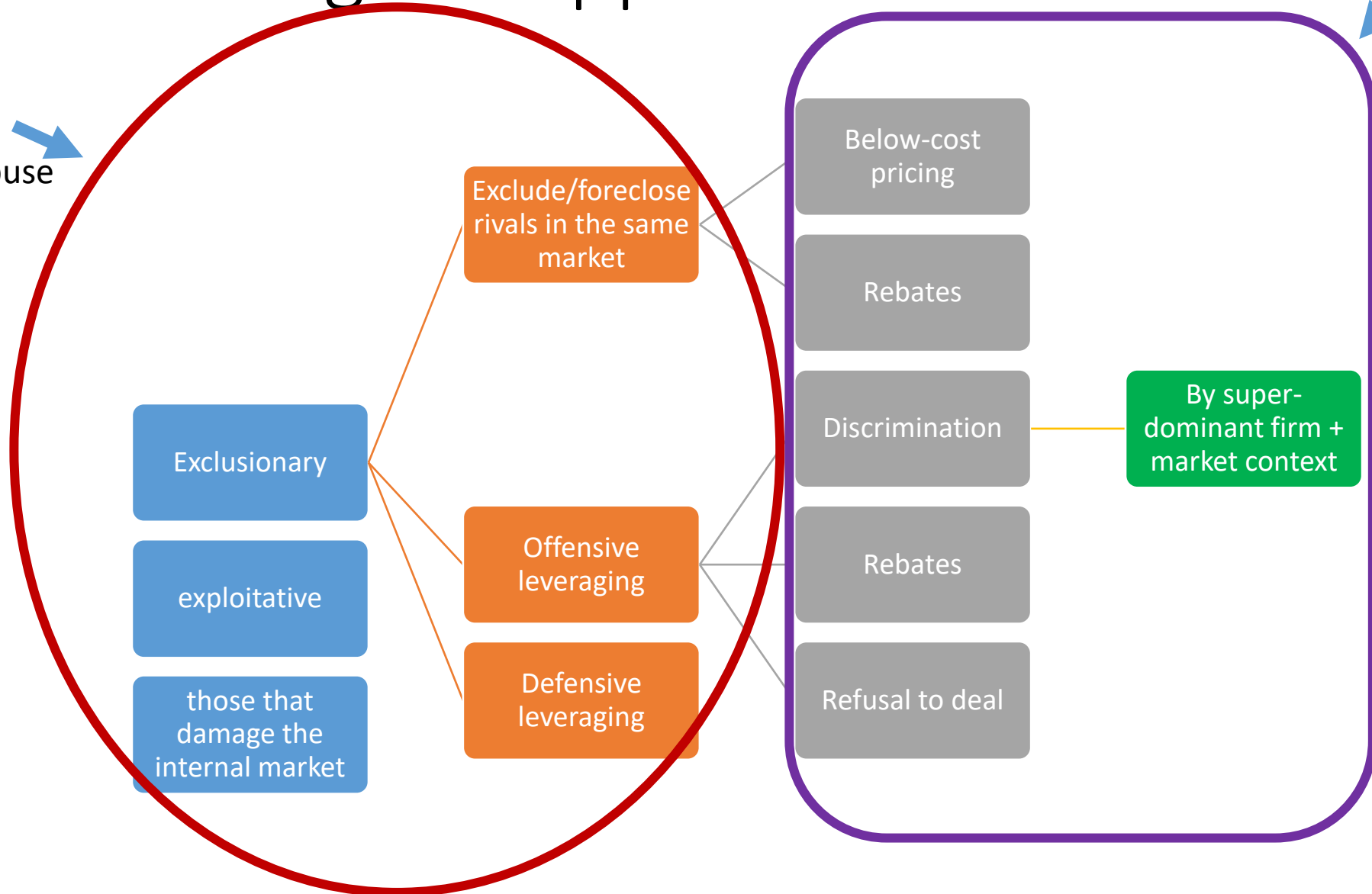
Generalizing the approach

ECONOMIC
RATIONALE



Generalizing the approach

ECONOMIC
RATIONALE
Family of abuse



Was the abuse obvious?

the fact, assuming it to be established, that Google favours its own specialised results over third-party results, **which seems to be the converse of the economic model underpinning the initial success of its search engine**, *cannot but involve a certain form of abnormality*. It follows that... *it is for the person responsible for that difference in treatment to justify it in the light of competition law [179]*

Emerging burden-shifting approach

Ordinary approach

Commission to show conduct has actual/potential anticompetitive effects

Defendant may challenge

- no abuse
- objective justification/efficiency

Burden-shifting

Commission to show conduct is ordinarily anticompetitive

- exclusivity rebates
- reverse payment w a large payoff

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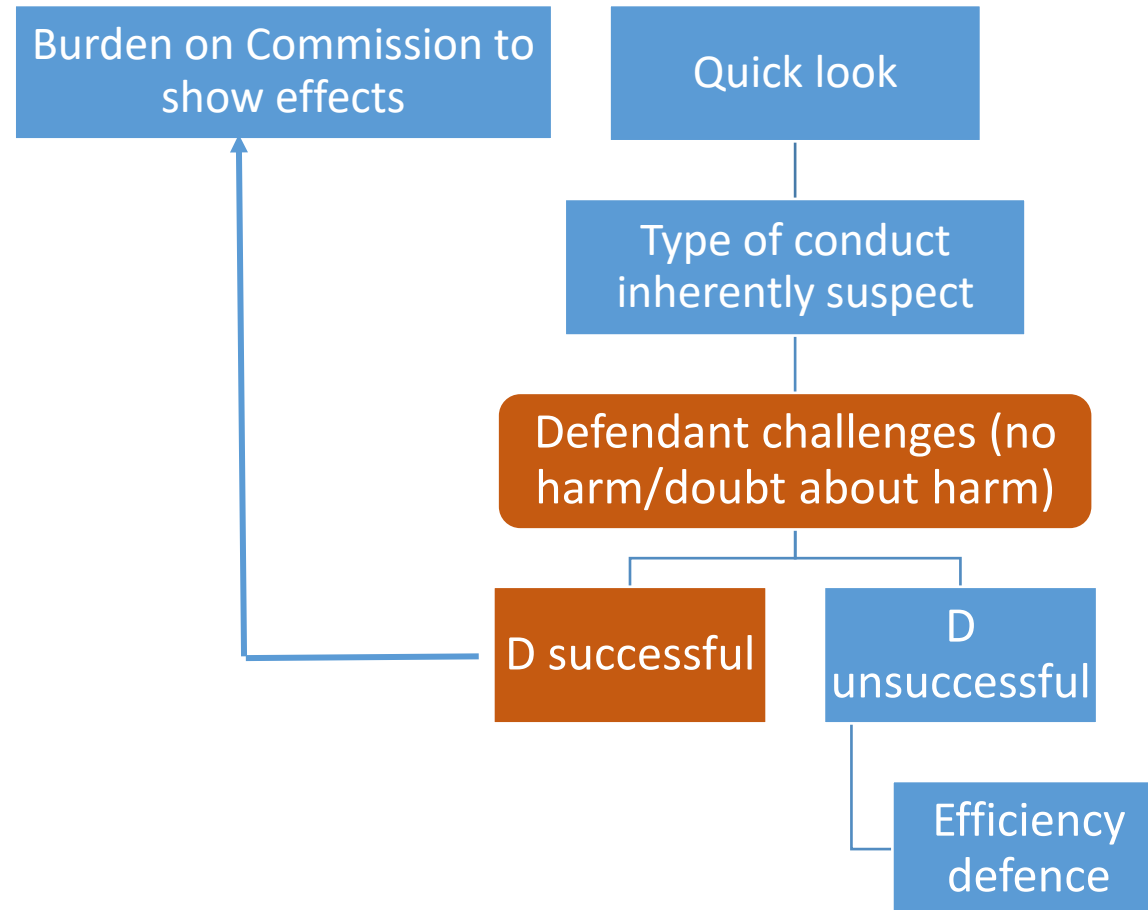
Commission to show conduct is ordinarily anticompetitive

- exclusivity rebates
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Defendant may bring 'supporting evidence... that its conduct was not capable of restricting competition' [Intel, 138]

Defendant may claim pro-competitive effects to justify reasonable doubt about anti-competitive harm [Paroxetine, 107]

Burden-shifting



Must the Commission show that Google search is indispensable? (Bronner criteria)

NO

A 'refusal' to supply that warrants the application of the conditions set out in [Bronner] implies (i) that it is express, that is to say, that there is a 'request' or in any event a wish to be granted access and a consequential 'refusal', and (ii) that the trigger of the exclusionary effect – the impugned conduct – lies *principally* in the refusal as such, and not in an extrinsic practice such as, in particular, another form of leveraging abuse.

Purple Parking again

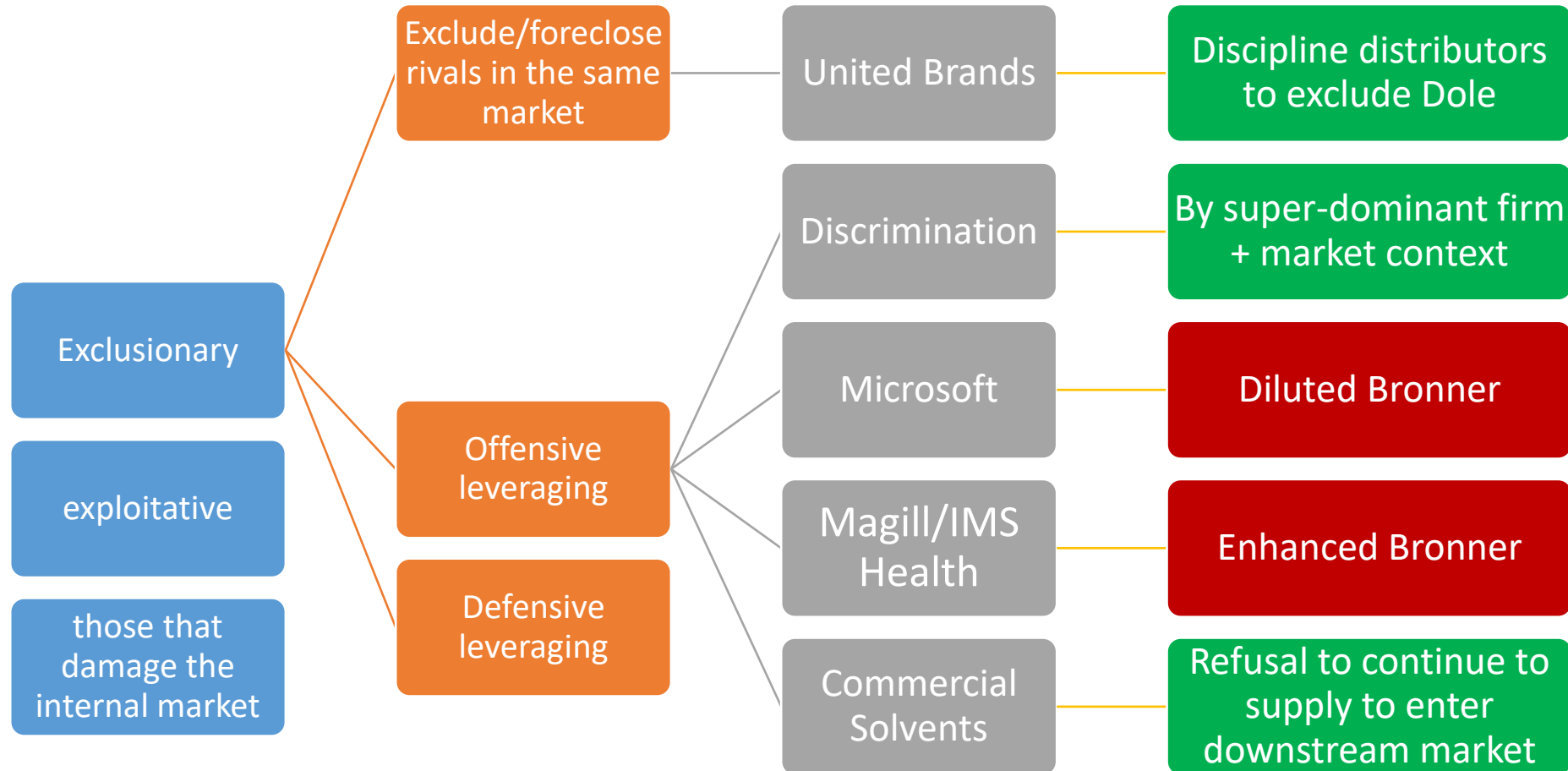
Defendant's argument

- Must show that forecourt is indispensable & refusal eliminates rivals
- On the facts
 - Valet parking in the car park less profitable

Court's view [102]

a court is entitled to look at conduct, and ask the overall question of whether there is an abuse by reference to various *ways of committing that abuse*, and is not forced to find one single appropriate label to the abuse (particularly at the behest of the defendant) and apply some test applicable only to that form

Bronner applies to a species of conduct, not a family of abuse



Effects – potential, but measurable

Actual or potential effects

the Commission had to demonstrate the – at least potential – effects attributable to the impugned conduct ... taking into account all the relevant circumstances, particularly in the light of the arguments advanced by Google to contest the notion that its conduct had been capable of restricting competition [441]

- Yes – vertical search; No – general search

Measurable [504-506]

- Even if there is competition from: vertical search & merchant platforms,
- Foreclosure of vertical search was significant enough to amount to an abuse

Google Shopping after the Digital Markets Act

DMA Article 6(1)(d) – European Parliament IMCO version:

A gatekeeper shall

refrain from treating not treat more favourably in ranking or other settings, services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply transparent, fair and non-discriminatory conditions to such third party services or products ranking

DMA fares no better at remedy stage

- Art 102: dominance + abuse + effect = prohibition (slow)
- DMA: Gatekeeper designation + black list = prohibition (fast)

How to guide a firm in product re-design?

- Informal guidance postdecision (*Michelin 2*)
- Commitment decisions (market test)
- Regulatory dialogue (Art 7, DMA, CERRE Report 2021)

What do you want to achieve?

‘As of today, around 75% of all products advertised in this box are from third parties compared to none before the Commission intervened.’ *A competition policy fit for new challenges* COM (2021) 713, p.14

THANKS FOR YOUR ATTENTION

For a paper developing these points, see:

Monti, The General Court's Google Shopping Judgment and the scope of Article 102 TFEU (2021)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3963336