Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond

Vijver, T.D.O. van der

Citation

Vijver, T. D. O. van der. (2014, September 17). *Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond*. Retrieved from https://hdl.handle.net/1887/29593

Version:	Corrected Publisher's Version
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/29593

Note: To cite this publication please use the final published version (if applicable).

Cover Page

Universiteit Leiden

The handle http://hdl.handle.net/1887/29593 holds various files of this Leiden University dissertation.

Author: Vijver, Tjarda Desiderius Oscar van der
Title: Objective justification and Prima Facie anti-competitive unilateral conduct : an exploration of EU Law and beyond
Issue Date: 2014-09-17

Objective Justification and *Prima Facie* Anti-Competitive Unilateral Conduct:

An Exploration of EU Law and Beyond

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op woensdag 17 september 2014
klokke 11.15 uur

door

Tjarda Desiderius Oscar van der Vijver

geboren te Haarlem in 1984

Promotiecommissie:

Promotores:	prof. mr. T.R. Ottervanger
	prof. dr. M.C.E.J. Bronckers
Overige leden:	prof. A. Jones (King's College London, UK)
	dr. P. Marsden (Collège d'Europe, Brugge, België)
	prof. dr. J. Steenbergen (Katholieke Universiteit Leuven, België)
	prof. dr. S.C.G. Van den Bogaert

per princi

A. TABLE OF CONTENTS – SHORT VERSION

A. Table of contents – short version 5

B. Table of contents – extended version 9

C. Executive summary 16

D. Samenvatting 17

E. Foreword 18

Chapter I INTRODUCTION 21

1 A first encounter with the topic 21

2 Situating the research in a broader debate 23

3 Problem definition, aim and scope of this study 42

4 Road map 46

5 Research methodology 47

Chapter II JUSTIFICATIONS IN EU LAW – A WIDER PERSPECTIVE 55

1 Introduction 55

2 Justifications in EU internal market law – exploring the free movement of goods 55

3 Justifications in EU competition law 69

4 Conclusion 95

Chapter III OBJECTIVE JUSTIFICATION AND ARTICLE 102 TFEU 97

1 Introduction 97

2 Article 102 TFEU 98

3 Objective justification under examination 103

4 The legal assessment of objective justification 141

5 Justifications vis-à-vis specific types of abuse 156

6 Conclusion 167

Chapter IV PROCEDURAL ASPECTS OF OBJECTIVE JUSTIFICATION 169

1 Introduction 169

2 The burden of proof 170

3 Standard of proof 176
4 The burden and standard of proof in a private law context 189
5 Conclusion 193
Chapter V JUSTIFICATIONS IN EU MEMBER STATES 195
1 Introduction 195
2 Legislation & NCA guidance 197
3 Analysis of Member State case law and decisional practice 200
4 Assessing objective justification pleas 222
5 Promising practices 228
6 Conclusion 231
Chapter VI JUSTIFICATIONS IN THE COMMON LAW WORLD 233
1 Introduction 233
2 Australia 236
3 Canada 242
4 Hong Kong 252
5 Singapore 254
6 South Africa 259
7 United States 264
8 Comparative notes 271
9 Conclusion 283
Chapter VII CONCLUSION 285
1 Justifications and unilateral conduct law: the groundwork 285
2 Lessons from other areas of EU law 286
3 The substance of objective justification and Article 102 TFEU 289
4 The procedure of objective justification and Article 102 TFEU 292
5 Objective justification at the level of EU Member States 293
6 Justifications in non-EU jurisdictions 295
7 Key lessons 296
Annex A. Abbreviations 300

Annex B. List of cases ... 303
Annex C. List of literature ... 320
Annex D. Curriculum Vitae ... 328

B. TABLE OF CONTENTS – EXTENDED VERSION

A. Table of contents – short version ... 5

B. Table of contents – extended version ... 9

C. Executive summary ... 16

D. Samenvatting ... 17

E. Foreword ... 18

Chapter I INTRODUCTION ... 21

1 A first encounter with the topic ... 21

2 Situating the research in a broader debate ... 23

2.1 Justifications & Schools of thought ... 23

2.2 State intervention, private & public enforcement, *lex specialis* ... 27

2.2.1 Introduction ... 27

2.2.2 Degree of State intervention ... 27

2.2.3 Private and public enforcement ... 28

2.2.4 The *lex specialis* adage ... 29

2.2.5 Internal market imperative ... 29

2.2.6 Conclusion ... 31

2.3 Abuse of dominance and justifications from an ethical perspective ... 31

2.3.1 Introduction ... 31

2.3.2 Consequentialism and utilitarianism ... 32

2.3.3 Consequentialism and competition law ... 35

2.3.4 Consequentialism and consumer welfare ... 36

2.3.5 Consequentialism and justifications ... 38

2.3.6 Deontology ... 39

2.3.7 Kantian ethics and competition law ... 39

2.3.8 Kantian ethics and justifications ... 41

2.3.9 Conclusion ... 41

3 Problem definition, aim and scope of this study ... 42

4 Road map ... 46
5 Research methodology ... 47
Chapter II JUSTIFICATIONS IN EU LAW – A WIDER PERSPECTIVE ... 55
1 Introduction ... 55
2 Justifications in EU internal market law – exploring the free movement of goods ... 55
2.1 Introduction ... 55
2.2 Justifications under the free movement of goods – Article 36 TFEU ... 58
2.3 Justifications under the free movement of goods – The 'mandatory requirements' .. 62
2.4 Other derogations under the free movement of goods ... 66
3 Justifications in EU competition law ... 69
3.1 Introduction ... 69
3.2 Justifications under Article 101(3) TFEU ... 70
3.2.1 The relationship between Article 101 TFEU and Article 102 TFEU ... 70
3.2.2 The substance of Article 101(3) TFEU ... 72
3.2.3 Article 101(3) TFEU – efficiencies and beyond? ... 75
3.2.4 Lessons from Article 101(3) TFEU ... 79
3.3 Derogations under Article 101(1) TFEU ... 79
3.3.1 Introduction ... 79
3.3.2 Ancillary restraints ... 80
3.3.3 State compulsion ... 83
3.3.4 Influence by (quasi) public bodies ... 84
3.3.5 Lessons from Article 101(1) TFEU ... 86
3.4 Merger control ... 87
3.4.1 The legislative framework ... 87
3.4.2 Efficiencies in merger decisions ... 90
3.4.3 The failing firm plea ... 92
3.4.4 Public interest concerns in merger control ... 93
3.4.5 Lessons for Article 102 TFEU ... 94
4 Conclusion ... 95

Chapter III OBJECTIVE JUSTIFICATION AND ARTICLE 102 TFEU 97
1 Introduction 97
2 Article 102 TFEU 98
2.1 The background and objectives of Article 102 TFEU 98
2.2 The sliding scale of market power 100
3 Objective justification under examination 103
3.1 Introduction 103
3.2 'Objective justification' and Article 102 TFEU 104
3.3 The use and role of ‘objective justification’ within Article 102 TFEU 108
3.4 Three types of objective justification 111
3.4.1 The various types of objective justification 111
3.4.2 Legitimate business behaviour – commercial freedom 113
3.4.3 Legitimate business behaviour – objective necessity 118
3.4.4 Legitimate business behaviour – The *BP* judgment 124
3.4.5 Efficiency 125
3.4.6 Public interest 132
4 The legal assessment of objective justification 141
4.1 Introduction 141
4.2 Legitimate aim & suitability 142
4.3 Necessity test 143
4.4 Proportionality *stricto sensu* 146
4.5 Intent 148
4.6 Effect 153
5 Justifications vis-à-vis specific types of abuse 156
5.1 Introduction 156
5.2 Predation 157
5.3 Rebates 159
5.4 Discrimination 161
5.5 Refusal to deal 163

5.6 Margin squeeze 166
6 Conclusion 167
Chapter IV PROCEDURAL ASPECTS OF OBJECTIVE JUSTIFICATION 169
1 Introduction 169
2 The burden of proof 170
2.1 Introduction 170
2.2 The establishment of a *prima facie* abuse 171
2.3 Responding to the establishment of a *prima facie* abuse 172
2.4 Proving (the absence of) an objective justification 173
2.5 Examining the ECJ's approach 175
3 Standard of proof 176
3.1 Introduction 176
3.2 The standard of proof & judicial review 178
3.3 The ECHR perspective 179
3.4 Responding to the Commission establishing a *prima facie* abuse 183
3.5 The standard of proof related to the various types of objective justification 183
3.5.1 Introduction 183
3.5.2 Legitimate business behaviour 184
3.5.3 Efficiency 186
3.5.4 Public interest 188
4 The burden and standard of proof in a private law context 189
4.1 Introduction 189
4.2 Follow-on private action 190
4.3 Stand-alone private action 191
5 Conclusion 193
Chapter V JUSTIFICATIONS IN EU MEMBER STATES 195
1 Introduction 195
2 Legislation & NCA guidance 197
2.1 Legislation 197

2.2 NCA guidance ... 199
3 Analysis of Member State case law and decisional practice ... 200
3.1 Introduction ... 200
3.2 Legitimate business behaviour ... 200
3.2.1 Introduction ... 200
3.2.2 Commercial freedom – General ... 201
3.2.3 Commercial freedom – Legitimate differentiation ... 207
3.2.4 Commercial freedom – The recovery of costs ... 210
3.2.5 Commercial freedom – Meeting competition ... 211
3.3 Objective necessity ... 214
3.4 Efficiency ... 216
3.4.1 Introduction ... 216
3.4.2 Domestic cases on efficiencies ... 216
3.5 Public interest ... 219
3.5.1 Introduction ... 219
3.5.2 Security & safety standards ... 219
3.5.3 Public interest – other reasons ... 221
4 Assessing objective justification pleas ... 222
4.1 Introduction ... 222
4.2 Legitimate aim & suitability ... 223
4.3 Necessity & availability of alternatives ... 224
4.4 Proportionality & reasonableness ... 226
5 Promising practices ... 228
6 Conclusion ... 231
Chapter VI JUSTIFICATIONS IN THE COMMON LAW WORLD ... 233
1 Introduction ... 233
2 Australia ... 236
2.1 Introduction & legislation ... 236
2.2 Case law ... 236

3 Canada ... 242
3.1 Introduction & legislation ... 242
3.2 Case law ... 244
3.3 Competition Bureau guidance ... 250
3.3.1 The 2009 draft enforcement guidelines ... 250
3.3.2 The 2012 enforcement guidelines ... 250
4 Hong Kong ... 252
4.1 Introduction ... 252
4.2 Legislation ... 252
5 Singapore ... 254
5.1 Introduction & legislation ... 254
5.2 Guidelines ... 255
5.3 Case law ... 257
6 South Africa ... 259
6.1 Introduction ... 259
6.2 Legislation ... 260
6.3 Case law ... 261
7 United States ... 264
7.1 Introduction & legislation ... 264
7.2 Case law ... 265
7.3 Guidance ... 270
8 Comparative notes ... 271
8.1 Introduction ... 271
8.2 Cross-border influences ... 271
8.3 The legal framework of justifications ... 272
8.4 Available types of justification ... 275
8.4.1 Introduction ... 275
8.4.2 Efficiencies ... 276
8.4.3 Justifications other than efficiencies ... 278

8.5 Lessons for EU law ... 282
9 Conclusion ... 283
Chapter VII CONCLUSION ... 285
1 Justifications and unilateral conduct law: the groundwork ... 285
2 Lessons from other areas of EU law ... 286
3 The substance of objective justification and Article 102 TFEU ... 289
4 The procedure of objective justification and Article 102 TFEU ... 292
5 Objective justification at the level of EU Member States ... 293
6 Justifications in non-EU jurisdictions ... 295
7 Key lessons ... 296
Annex A. Abbreviations ... 300
Annex B. List of cases ... 303
Annex C. List of literature ... 320
Annex D. Curriculum Vitae ... 328

C. EXECUTIVE SUMMARY

The prohibition of anti-competitive unilateral conduct by firms with market power is not absolute, but allows for derogation. For the purposes of EU law, the European Court of Justice has accepted that a so-called 'objective justification' plea may be invoked in the case of a *prima facie* abuse of dominance. Even though this is long-standing case law, many uncertainties remain as to its interpretation.

This thesis contains a detailed examination of this concept of '(objective) justification', focusing in particular on its scope and the applicable legal conditions. The thesis submits that this concept is highly important, as it can steer Article 102 TFEU away from a formalistic approach and give ample weight to the prevalent context. The thesis calls for more attention regarding this topic to improve legal certainty, as EU case law and decisional practice currently give insufficient guidance.

Although the thesis focuses on EU law, it also seeks inspiration from the approach in other jurisdictions. A comparative study includes relevant cases from various EU Member States (France, Germany, Ireland, Luxembourg, the Netherlands, Spain and the UK) and non-EU jurisdictions (Australia, Canada, Hong Kong, Singapore, South Africa and the US). The study reveals that these jurisdictions have accepted the availability of a justification plea, and have dealt with the concept in strikingly similar ways. Even though there are clearly many differences between jurisdictions, the identification of common ground is important to avoid any undue divergences in the interpretation of justifications.

The thesis uses the following subdivision of objective justification: companies with market power should be allowed to engage in (i) legitimate business behaviour (either as part of their commercial freedom or in case of objective necessity), (ii) efficient conduct with a positive welfare effect and (ii) conduct that promotes a relevant public interest.

This subdivision of various types of justification should not be seen as a watertight compartmentalisation, as there may be overlaps. Instead, it is an analytical tool to help determine the proper application of objective justification. It is time that we start considering this topic in a well-structured manner, and give 'objective justification' the attention that it deserves.

.

D. SAMENVATTING

"Objectieve rechtvaardiging en prima facie *anti-competitief unilateraal gedrag:*
een verkenning van het EU recht en daarbuiten"

Het verbod op mededingingsbeperkend unilateraal gedrag door ondernemingen met marktmacht is niet absoluut, maar staat uitzonderingen toe. Het Europese Hof van Justitie heeft bepaald dat het EU recht ruimte laat voor een 'objectieve rechtvaardiging' in het geval van een *prima facie* misbruik van een machtspositie. Dit is al jarenlang vaste rechtspraak, maar toch blijven er vele onzekerheden.

Het proefschrift bevat een gedetailleerd onderzoek naar dergelijke rechtvaardigingen, en richt zich in het bijzonder op de toepasselijke werkingssfeer en de juridische vereisten daarvan. Het proefschrift stelt dat 'objectieve rechtvaardiging' van groot belang is, aangezien het ruimte biedt voor een contextuele – in plaats van een formalistische – toepassing van artikel 102 VWEU. Het proefschrift roept op tot meer aandacht voor het onderwerp met het oog op rechtszekerheid, aangezien Europese rechtspraak en beschikkingspraktijk momenteel onvoldoende houvast bieden.

Hoewel het proefschrift zich met name richt op het EU recht, zoekt het tevens inspiratie in de aanpak van andere jurisdicties. Een rechtsvergelijkende studie bespreekt het toepasselijke recht in diverse EU lidstaten (Frankrijk, Duitsland, Ierland, Luxemburg, Nederland, Spanje en het VK) en overige jurisdicties (Australië, Canada, Hong Kong, Singapore, Zuid-Afrika en de VS). Al deze jurisdicties staan een beroep op een rechtvaardiging toe, en kennen opvallend veel parallellen in de toepassing van het concept. Ondanks dat er uiteraard vele verschillen bestaan, is de identificatie van dergelijke parallellen van groot belang om uiteenlopende interpretaties te vermijden.

Het proefschrift gebruikt de volgende onderverdeling van objectieve rechtvaardiging: (i) legitiem commercieel gedrag (als een uitdrukking van commerciële vrijheid of objectieve noodzakelijkheid), (ii) efficiënt gedrag met een positief welvaartseffect en (iii) gedrag dat een relevant publiek belang behartigt. Een onderneming zou dergelijk gedrag nog steeds mogen vertonen ondanks haar dominantie.

Deze categorisering is niet waterdicht, aangezien de typen rechtvaardiging kunnen overlappen. Het biedt niettemin een nuttig analytisch hulpmiddel ten behoeve van de juiste toepassing van objectieve rechtvaardiging. Het is hoog tijd dat wij het onderwerp op een gestructureerde manier gaan behandelen, en 'objectieve rechtvaardiging' de aandacht geven die het verdient.

E. FOREWORD

Prof. Tom Ottervanger and I met early 2010. I had started working at the Netherlands Competition Authority a couple of months earlier, and was contemplating writing a PhD dissertation on competition law. The person instrumental for bringing us together was prof. Rick Lawson, who had long encouraged me to further my academic interests at Leiden Law School.

The meeting with prof. Ottervanger invigorated me to go ahead. After discussing several potential topics, we finally opted for the concept of 'objective justification' of otherwise illegal unilateral conduct. We both felt that it was an intriguing topic. The subject is relatively well defined, but also touches upon many of the broader debates within competition law. In addition, we believed that the topic could be interesting both for academics and for competition practice.

Prof. Ottervanger provided invaluable guidance and support throughout the project. He gave me the liberty that I needed, and also intervened precisely at the moments that my research plans risked swaying too much away from the core. Prof. Ottervanger's influence on me does not cease after this PhD: his vast experience as a solicitor inspired me to further my career in the same field, which I have started in September 2013.

Prof. Marco Bronckers, who had already commented earlier upon my work, joined as a second supervisor in early 2013. Right from the start, he showed great commitment and enthusiasm. He read the materials that I had written up to that point with remarkable speed, and gave spot-on comments. Both prof. Bronckers and prof. Ottervanger helped me to make the dissertation interesting not only for academics, but also for practitioners.

My gratitude also goes out to prof. Stefaan Van den Bogaert, prof. Alison Jones, prof. Jacques Steenbergen and dr. Philip Marsden for their willingness to become a member of the PhD committee and for providing spot-on remarks.

Many thanks also to all others who gave me valuable comments in the process. In particular, I wish to name Kai Althaus, David Bailey, Berend Jan Drijber, Eleanor Fox, Kees Hellingman, Edward M. Iacobucci,

Luke Kelly, Erik Kloosterhuis, Oliver Lindop, Alexandra Timmer, Chris Townley, Michael J. Trebilcock, Stefan Vollering and Richard Whish. I also thank the anonymous referees and editorial boards for their comments: they sharpened my articles as well as my mind.

Another word of thanks goes out to all others who have not been mentioned above and who have made this work possible. I thank my former and current colleagues for teaching me what they did and for showing continued interest in my research. Thanks also to Kluwer Law International, Oxford University Press and Hart Publishing for permission to use earlier publications as a basis for this thesis. I am grateful to Allen & Overy that, from the moment they hired me, gave me time to finish my PhD before I started my life as a solicitor.

Of course I owe enormous gratitude to people in my personal life as well. Alexandra read practically all my work and never failed to provide incisive comments. She is the one who, quite literally, stands by me. I thank my parents for giving me the inspiration of always seeking to extend one's intellectual horizons. Alexandra, my parents, as well as my brothers Fedde and Feike, and my sister-in-law Charlotte gave me endless support. They never ceased to believe in the project and gave me the confidence that I needed. My nephews Nils and James inspired too, albeit in a different manner. Spending time with them put my feet back on the ground, by reminding me of the important things in life.

I also wish to thank the rest of my family and my friends. I hope to make up for my considerable absenteeism, both mentally and physically. My friends were understandably vocal in their disapproval when I was, yet again, the first one to leave the pub or – worse still – the one who drank mostly non-alcoholic beverages throughout the evening. I fear that my newly found identity as 'Mr. Sparkling Water' will stick to me for the rest of my life.

Tjarda van der Vijver
Amsterdam, April 2014

CHAPTER I INTRODUCTION

1 A FIRST ENCOUNTER WITH THE TOPIC

Few legal rules are absolute. Practically all prohibitions allow for derogation under certain circumstances. The scope and meaning of such derogations, or justifications, will often determine whether or not a prohibition applies. As a result, they are usually highly contentious.

Competition law is no stranger to this phenomenon. Cases involving anti-competitive agreements often boil down to the question whether a justification applies or not.[1] Similarly, a merger that appears to lessen competition at first sight may nonetheless be cleared because of its expected efficiencies.[2] Indeed, justifications and efficiencies often take centre stage in the debates on the appropriate scope of competition law.

So how does this work in terms of unilateral conduct by companies with market power? Unilateral conduct only enters the realm of competition law if it has some anti-competitive aspect; i.e. if it is *prima facie* anti-competitive.[3] However, conduct that is labelled *prima facie* anti-competitive is not necessarily illegal. Competition law jurisdictions around the world have accepted that companies can provide a justification plea for conduct that would otherwise be prohibited.[4]

[1] See e.g., under EU law, Article 101(3) TFEU. Under US federal antitrust law, the rule of reason has a similar

[2] See e.g., under EU law, Recital 29 and Article 2(1)(b) of the EU Merger Regulation. Under US federal antitrust law, see e.g. the merger test in the US Clayton Act, which requires courts to focus on the welfare effects of the merger. In Canada, Subsection 96(1) of the Competition Act provides that the Competition Tribunal may not prohibit a merger if has brought about or is likely to bring about efficiency gains that will offset any anti-competitive effects.

[3] In this thesis, I use *prima facie* anti-competitive unilateral conduct in the following way: unilateral behaviour by a dominant firm that appears to be contrary to the competition rules, but can still be justified.

[4] As will be shown in Chapters V (on EU Member States) and VI (on non-EU countries such as the US, Canada and South Africa).

Under EU law, the focal point of this thesis, that concept is known as 'objective justification'.[5] A dominant firm can only abuse its dominant position – contrary to Article 102 of the Treaty on the Functioning of the European Union ('TFEU') – if such an objective justification is absent. EU Member States have adopted the same terminology. Various non-EU jurisdictions have also acknowledged that a company with market power may invoke a justification for unilateral anti-competitive conduct that would otherwise be prohibited. References to this concept have included 'objective justification' (Singaporean and South African law), 'legitimate business justification' (Australian, South African and US law); 'business justification' (Canadian and US law) and 'valid business reason' (US law).

Notwithstanding the use of slightly divergent terminology, there is a clear red thread: unilateral conduct may be justified even if it seems to fall foul of the competition rules at first sight. This conceptual notion forms the gist of the thesis, as it examines all the main reasons why *prima facie* anti-competitive unilateral conduct should still be condoned.

Despite the widespread acceptance of this notion, there is little debate on how jurisdictions have interpreted and should interpret the concept. As a consequence, legal certainty and consistency – not least across borders – are at risk. This study examines how various jurisdictions deal with the scope and meaning of such a plea, and provide suggestions on what the plea should mean.

[5] The ECJ held in several cases that an abuse implies the absence of a justification, see e.g. Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039, para 52.

2 SITUATING THE RESEARCH IN A BROADER DEBATE

2.1 Justifications & Schools of thought

The issue of justifications vis-à-vis *prima facie* anti-competitive unilateral conduct does not stand in isolation, but is inextricably linked with broader debates in competition law. This is little surprise considering that such justifications are relevant in determining whether the law bans particular unilateral conduct. The following section examines these wider debates by juxtaposing US federal antitrust and EU competition law.[6]

Jurisdictions can have differing ideas about when competition law should intervene in the conduct of a company with market power. There are many reasons that explain the degree of commercial liberty that the law affords to such companies. For example, US antitrust case law appears sceptical of the ability of courts and regulators to steer, or dictate, a particular market outcome.[7] From such a perspective, government intervention can easily encroach excessively on commercial freedom,[8] contrary to the conception of the Sherman Act as the 'magna carta of free enterprise'.[9] The issue often boils down to the following question: is a jurisdiction more wary of false positives (i.e. false convictions) or false negatives (i.e. false acquittals)? US antitrust law appears to fall within the first category. In *Brooke*

---

[6] For a more thorough analysis, see e.g. Robert E. Bloch and Others, 'A Comparative Analysis of Article 82 and Section 2 of the Sherman Act', (2006) 7 Bus. L. Int'l 137.

[7] See e.g. *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 US 398, 408 (2004). The US Supreme Court held: '[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited'.

[8] *Byars v. Bluff City News Co*, 609 F 2d 843, 862 (6th Cir. 1979).

[9] *US v. Topco Assocs*., 405 US 596, 610 (1972). Note that this approach focuses mainly on the 'direct' commercial freedom of the company that has market power, rather than the 'indirect' harm that its conduct may have on the commercial freedom of others. At the same time, there is also US case law that seemed to protect competitors from injury, see e.g. *Utah Pie Co. v. Continental Baking Co.*, 386 US 685, 702-703 (1967).

Group, the US Supreme Court held: '[m]istaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect'.[10]

The greater one's faith in the self-correcting mechanisms of the market and the contestability of market power, the less reason there is to worry about the existence of monopoly rents. In the event that the monopolist's business prowess starts to slack, a more efficient competitor is expected to enter the market and dethrone the monopolist. In addition, supra-competitive profits may be seen as an apt reward for fierce competition or valuable innovation. In *Alcoa*, Judge Learned Hand observed that the successful competitor, having been urged to compete, must not be turned upon when he wins.[11] Indeed, monopoly rents may even be considered beneficial for competition. In *Trinko*, the US Supreme Court held that the opportunity to charge monopoly prices is precisely what attracts business acumen in the first place.[12]

Under such assumptions, there is little reason for forceful competition law enforcement, as market forces are expected to keep a company with market power in check. By contrast, EU law appears to place less faith in the contestability of a dominant position. It focuses more on the structure of the market, considering that the mere presence of a firm with a dominant position – although not prohibited as such – already weakens competition.[13] There also appears to be less emphasis on the possibility that a firm has achieved its dominance through superior competitiveness, as its 'special responsibility' applies 'irrespective' of how the company has obtained its dominant position.[14]

Another often-heard dichotomy between US antitrust and EU competition law – especially in its legal analysis of unilateral conduct – is that the US focuses more on the *effects* of the conduct under review,

---

[10] *Brooke Group v. Brown and Williamson Tobacco Corp*, 509 US 209, 222 (1993). Another case that warned for the competition chilling effect that false positives may have is *Matsushita Elec. Industrial Co. v Zenith Radio Corp.*, 475 U. S. 574, 594 (1986).

[11] *United States v. Alcoa*, 148 F.2d 416, 430 (2d Cir. 1945)

[12] *Trinko*, *supra* note 7.

[13] Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, para 91.

[14] Case 322/81 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 57. On the other hand, the scope of the special responsibility does depend on the circumstances of the case, see Case T-83/91 *Tetra Pak v Commission* ('*Tetra Pak II*') [1994] ECR II-755, para 115.

whereas the EU approach is more based on *form* (or, said differently, based on legal presumptions that consider a certain type of behaviour to be harmful).[15] The EU's approach aims to protect the structure of a market,[16] which in practice may boil down to insulating companies – perhaps even inefficient ones – that compete with the dominant firm. In its condensed version, the distinction is that the US protects competition, whereas the EU protects competitors.[17]

Although this expression of the EU-US divide does oversimplify matters,[18] it is far from baseless. EU competition law is often associated with Ordoliberalism, a School of thought that is sceptical of market power and attaches great weight to the commercial freedom of the non-dominant market participants.[19] Ordoliberalism seems to have left its marks on the case law by the European Court of Justice ('ECJ'). For example, an undertaking with a dominant position has a 'special responsibility not to allow its conduct to impair genuine undistorted competition'.[20] The special responsibility may not only entail refraining from certain conduct, but can – depending on the circumstances – also call for active steps in order to ensure that competition is not distorted.[21]

By contrast, US antitrust law does not contain such a 'special responsibility', as it takes the position that firms with market power are free to compete like any other firm.[22] The US approach is often associated

---

[15] See e.g. E.M. Fox, 'We protect competition, you protect competitors', (2003) 26 World Competition 149.

[16] *Hoffmann-La Roche*, *supra* note 13, para 91; Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, para 69.

[17] See e.g. Fox, *supra* note 15. See also the speech by J.B. McDonald (Deputy Assistant Attorney General, Antitrust Division, US Department of Justice), 'Section 2 and Article 82: Cowboys and Gentlemen', 16-17 June 2005, available at http://www.justice.gov/atr/public/speeches/210873.htm.

[18] For example, there is US case law that seems to protect competitors, see e.g. *Aspen Skiing Co. v Aspen Highlands Skiing Corp*., 472 US 585 (1985) and *FTC v Brown Shoe Co., Inc*., 384 US 316 (1966). At the same time, EU competition law has an increasingly effects-based approach, see e.g. Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7.

[19] See e.g. D.J. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (OUP: Oxford 1998). See, differently, P. Akman, 'Searching for the Long-Lost Soul of Article 82EC', (2007) CCP Working Paper 07-5. Akman argues that consumer welfare had always been the goal of Article 102 TFEU.

[20] *Michelin I*, supra note 14, para 57.

[21] Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, para 24.

[22] See *Olympia Equipment Leasing Company v Western Union Telegraph Company*, 797 F.2d 370 (7th Cir. 1987).

with the influential Chicago School of thought.[23] The Chicago School focuses on the welfare effects of conduct under review and stresses that overly intrusive antitrust rules risk stymying pro-competitive behaviour.[24] In refusal to deal cases, there may also be a fear that mandating supply may result in collusion, which the US Supreme Court considers 'the supreme evil of antitrust'.[25]

The approach by the Chicago School of thought clearly differs from some of the key ECJ competition cases. For example, the 1983 *Michelin I* judgment, on discounts on tyre purchases, showed particular concern with the commercial freedom by third parties. The ECJ found that the practice was an abuse, as it limited customers to switch supplier and made market access by competitors more difficult.[26] More recent ECJ case law, however, tends to focus more on the effects of the conduct, allowing greater consideration of the efficiencies that arise from the conduct under review.[27] The more the Commission

---

[23] Influential work included R.A. Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press: Chicago and London 1976), and R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (The Free Press: New York 1978). See, for a recent critical analysis of the Chicago School, Robert Pitofsky (ed.), *How the Chicago School Overshot The Mark: the Effect of Conservative Economic Analysis on US Antitrust* (OUP: Oxford 2008). However, for a defense of the Chicago School in reaction to this book, see J.D. Wright, 'Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust', (2009) George Mason Law & Economics Research Paper No. 09-23. Note that some commentators argue that it is in fact the Harvard School, instead of the Chicago School, that has had the greatest influence on US Antitrust. See e.g. E. Elhauge, 'Harvard, Not Chicago: Which Antitrust School Drives Recent US Supreme Court Decisions?', 3(2) (2007) Competition Policy International 59. The Harvard School attaches great importance to the 'structure' of the competitive landscape, and accordingly appears conceptually closer to the traditional EU approach that also seeks to protect the structure of competition 'and thus competition as such' (see e.g. Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, para 63).

[24] *Trinko*, *supra* note 7, at 879.

[25] *Ibid*.

[26] *Michelin I*, *supra* note 14, para 85. The ECJ also noted that the wish to sell more or to spread production more evenly cannot justify such a restriction.

[27] Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331; Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR nyr.

succeeds in its drive towards a more effects-based approach of Article 102 TFEU, the narrower the gap is likely to become between EU competition law and US antitrust.[28]

2.2 State intervention, private & public enforcement, *lex specialis*

2.2.1 Introduction

The discussion above has made clear that Schools of economic or political thought may have a considerable impact on the severity of unilateral conduct law. However, I believe that there are also other reasons explaining the divergent perspectives sometimes taken by EU competition law and US antitrust. I shall discuss a number of these, namely (i) the degree of State intervention, (ii) whether a competition law regime depends more on public or on private enforcement, (iii) the applicable hierarchy of norms, and (iv) the internal market imperative. These are all reasons why EU competition law is – or can be expected to be – more interventionist towards dominant companies compared to US antitrust.

2.2.2 Degree of State intervention

Dominance cases in the EU competition law have often revolved about undertakings that had acquired or maintained market power largely due to government intervention.[29] The degree of government influence should provide at least two important considerations for the competition law analysis. First, long-standing government support of a particular company can entrench a dominant position in such a far-reaching manner, that it persists even long after the government has pulled back its protection. This is particularly the case in network sectors, such as telecommunications and energy. In many EU Member States, the former incumbent still dominates the sector on which it formerly held a monopoly.[30]

---

[28] It is clear that a focus towards economic freedom and an effects-based focus towards consumer welfare do not necessarily lead to the same results. L. Lovdahl Gormsen, 'The conflict between economic freedom and consumer welfare in the modernization of Article 82 EC', (2007) 3 European Competition Journal 329.

[29] See e.g. *Post Danmark*, *supra* note 27; Case T-336/07 *Telefónica v Commission* [2012] ECR nyr; Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555; Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369; *British Airways, supra* note 27.

[30] This is the *raison d'être* for the EU legislation on the telecom sector, see e.g. Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, OJ [2002] L 108/33. As to the energy sector, see e.g. the conclusion in the Commission's 2006 energy sector inquiry, COM(2006)851 final.

Second, a company that achieves market power without any external help is likely to be more efficient than its competitors – whereas the same cannot be said for a company that owes its market power to the government. As a consequence, a position of market power is less clearly associated with efficiency if there has been a history of strong government involvement – making the application of competition law less liable to chill competition. Generally speaking, EU competition law is more clearly marked by cases arising from (former) State intervention compared to US Antitrust.

2.2.3 Private and public enforcement

Another relevant factor relates to the prevalent type of enforcement in a jurisdiction. The enforcement of US antitrust law typically takes place by private plaintiffs.[31] If the plaintiff does not succeed in explaining why endorsement of its monopolization claim also benefits some public interest (for example, through an increase of consumer welfare), it is little surprising that courts are reluctant to intervene. By contrast, the key abuse cases in the EU have been initiated by public enforcement bodies.[32] Even though public enforcement bodies are obviously not immune to the plights of private interests,[33] such bodies should – at the very least – be able to explain why their enforcement action is also beneficial to the

[31] For example, between 2007 and 2012 the DoJ Antitrust Division initiated on average less than 2 investigations per year based on Section 2 of the Sherman Act. In the same time period, it initiated more than 54 investigations per year based on Section 1 of the Sherman Act. See http://www.justice.gov/atr/public/workload-statistics.html.

[32] I.e. the European Commission and the National Competition Authorities (NCAs) of the EU Member States. Note that there is little data on private enforcement at the domestic level, which hampers a numerical comparison with public enforcement. Nevertheless, it is clear that EU public enforcement bodies have been quite active in the enforcement of Article 102 TFEU. This not only applies to the European Commission, but to NCAs as well. Between 1 May 2004 and 28 February 2014 NCAs have submitted an envisaged enforcement decision to the Commission in 721 cases. Although the statistics don't reveal how many of the total number of cases concerned Article 102 TFEU, annually the proportion of cases based on the abuse of dominance hovered between 21% and 36%. See http://ec.europa.eu/competition/ecn/statistics.html. Be that as it may, I consider the *legal impact* of public enforcement in the EU to be much greater than that of private enforcement. Most of the key ECJ judgments in the last few years arose from public enforcement. This not only applies to appeal rulings, but also to rulings on preliminary references. See e.g. *TeliaSonera* (2011, enforcement by the Swedish NCA), *Tele2 Polska* (2011, enforcement by the Polish NCA), Post Danmark (2012, enforcement by the Danish NCA) and *Slovenská* (2013, enforcement by the Slovakian NCA).

[33] For example, many cases are triggered by complaints by third parties that obviously seek to further their own interests.

public at large. In turn, that may result in stronger interventionism because it involves a broader public interest, rather than simply a private interest by a market participant.

2.2.4 The lex specialis *adage*

Another relevant perspective is a jurisdiction's treatment of the *lex specialis* adage. In the event of a clash between specific rules and rules of a more general nature, the adage implies that the specific rules take precedence.[34] The maxim is useful in regulated industries where there can be substantial overlap of detailed sector-specific regulations designed to foster competition, and the general provisions of the competition rules.

The *Trinko* judgment by the US Supreme Court is a case in point. It involved the question whether the Sherman Act required access to a telecommunications network, even though federal sector-specific rules had already established a detailed framework as to when such access should be granted. The facts of the case do not show that the regulatory scheme was inadequate in any way. The US Supreme Court rejected the application of the Sherman Act, relying to a large extent on the existence of the regulatory scheme, i.e. a *lex specialis*.[35]

EU law is likely to have dealt differently with such a case. In the EU, the competition rules are a matter of primary EU law (i.e. expressed in a Treaty), whereas most of the sector-specific rules are a matter of secondary EU law (expressed primarily in directives and regulations). As primary law takes precedence over secondary law, the competition rules cannot be set aside by a *lex specialis* in the event of a conflict.[36] Under such circumstances, the EU competition rules have a wider scope of application compared to the situation that the *lex specialis* maxim would have been applicable.

2.2.5 Internal market imperative

---

[34] Assuming that the rules themselves are hierarchically equivalent.

[35] For a thorough analysis from an economic point of view, see H.A. Shelanski, 'The case for rebalancing antitrust and regulation', (2011) 109 Michigan Law Review 683.

[36] See e.g. *Deutsche Telekom*, *supra* note 29. It should also be noted that, from the ECJ's perspective, there will not often be a conflict so long as the regulatory rules allow *any* possibility to still comply with the competition rules as provided by the Treaty.

Another particularity of EU competition law, that determines its scope of application, is the internal market perspective. The ECJ interprets EU competition law in such a way as to support the functioning of the internal market.[37] Conduct that creates divisions along national borders is highly suspect,[38] even if the dominant firm is able to show the efficiency of such conduct.[39] The link between the competition and internal market rules is understandable if one has regard to the underlying goals of the EU Treaties.[40] The TFEU seek to prohibit any restrictions that could hamper the attainment of the EU´s objectives, irrespective of whether the source of those restrictions is `public´ or ´private´. Generally speaking, public restrictions are targeted by the free movement rules, whereas private restrictions are targeted by the competition rules.[41] In sum, the ´internal market imperative´[42] is an understandable

[37] See, further, A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC', (2007) 44 CMLRev 1727, at 1734, noting that the competition rules need to balance economic efficiency as well as market integration. For an earlier critical analysis, see e.g. W. Bishop, 'Price discrimination under Article 86: Political economy in the European Court', (1981) 44 MLR 282. See, from the perspective of Article 101 TFEU, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para 20: the provision 'is essential for the accomplishment of the tasks entrusted to the [EU] and, in particular, for the functioning of the internal market'. See, similarly, Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 36. See, differently, K. Mortelmans, 'Towards convergence in the application of the rules on free movement and on competition', (2001) 38 CMLRev 613, at 631. He notes that: 'since the completion of the internal market, the emphasis of competition law lies less on the establishment of the Common Market and more on prohibiting restrictions of competition within the internal market [citations omitted by author].' I beg to differ: the internal market is not 'completed'. For example, cross-border integration is still far from perfect in network sectors and many services industries. As EU competition law is clearly part of a bigger whole (namely: the EU treaties), the internal market perspective should not be ignored. As a consequence, EU competition law can be more interventionist compared to US antitrust if such interventionism is necessary to preserve the internal market.

[38] For an example under Article 102 TFEU, see Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others v GlaxoSmithKline* [2008] ECR I-7139. The Court confirmed that there is an abuse if a dominant undertaking restricts supplies in order to limit parallel trade. For an example under Article 101 TFEU, see the classic judgment in Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

[39] Think for instance of a case where a dominant undertaking restricts parallel trading in order to protect its differentation in pricing. Such pricing behaviour could raise consumer welfare if it succeeds better in aligning supply and demand than a unitary price across the EU.

[40] I.e. the Treaty on the Functioning of the European Union, and the Treaty on European Union.

[41] The State aid rules are a hybrid: they are directed at States, but generally considered to be part of competition law.

concept within the context of EU law, but is also quite specific to that body of law. Jurisdictions whose economies are already integrated[43] seem to have little use for the concept,[44] which may give rise to divergent interpretations of the law.

2.2.6 Conclusion

The paragraphs above have shown that the question whether competition law must condone or prohibit certain unilateral conduct may depend on many underlying factors. Relevant factors include *inter alia* what School of economic or political thought one abides by, and what assumptions one makes about the contestability of market power. Justifications can play a key role in creating a legal distinction between conduct that should be allowed or not. The following paragraphs explain in more detail how this thesis seeks to examine such justifications.

2.3 Abuse of dominance and justifications from an ethical perspective

2.3.1 Introduction

This PhD dissertation examines to what extent justifications are – and should be – available for otherwise prohibited unilateral behaviour by companies with market power. Although this dissertation is based on a legal examination, one can also approach the topic from an ethical perspective (I use ethics and moral philosophy interchangeably). Considering how little fashionable it is to discuss moral philosophy in antitrust or economics,[45] why should we consider such an approach?

In my view, ethics is relevant in view of the mammoth fines that can be imposed for violating the competition rules. There is often talk about the sanctions being 'criminal' in nature. I do not see how conduct can be criminally sanctioned if there is no underlying societal belief that the conduct has indeed

---

[42] Derived from 'single market imperative'. See e.g. Richard Whish, *Competition Law* (OUP: Oxford 2009), at 22-23.

[43] Or, at least, considered to be integrated.

[44] See also Whish 2009, *supra* note 42, at 364. It would appear that the internal market perspective is a 'relevant difference' between UK and EU law for the purposes of Section 60 Competition Act 1998. The provision allows for divergent interpretation of the competition rules to the extent that there are relevant differences.

[45] T.J. Horton, 'The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses', (2010-2011) 42 Loy. U. Chi. L.J. 469, 514.

an unethical component. It also works the other way around: if we can consider specific conduct to be in line with ethics (in other words: if conduct has 'moral worth'), there may no longer be a solid basis for a legal prohibition.

Furthermore, the gap between these disciplines is perhaps smaller than one might imagine. The moral philosophical approach named 'consequentialism' examines the morality of conduct by focusing on its *effects*. Consequentialism has clear parallels with the effects-based economic theory that many consider to provide the theoretical cornerstone of competition law. Although – by contrast – the moral philosophical approach that focuses on the *intent/nature* of one's conduct (also referred to as a 'deontological' perspective) is conceptually further removed from competition law, it also offers a number of useful insights. The paragraphs below examine the two approaches in more detail.[46]

2.3.2 Consequentialism and utilitarianism

As mentioned above, consequentialism focuses on the effects of conduct to establish whether it has moral worth. A well-known type of consequentialism is utilitarianism. Utilitarianism gained particular popularity in the 19th century through the writings of Jeremy Bentham and John Stuart Mill. Their approach essentially condensed moral issues into one basic question: does an act lead to additional 'happiness' (i.e. utility) while it minimises 'pain', or not? If it does, the act has moral worth. The theory's apparent simplicity is one of its key attractive features.

Critics have argued that utilitarianism 'presupposes omniscience' of every individual's (potential) happiness and pain, whereas – in practice – their individual preferences are difficult to gauge.[47] In addition, utilitarianism does not consider intent or the intrinsic moral worth of an act. As a result, utilitarianism may attach moral worth to conduct that accidently led to a good result,[48] or to conduct that seems intrinsically unethical.

---

[46] For the description of consequentialism and deontology, I have relied on the highly interesting on-line lectures by prof. Sandel, available at http://www.justiceharvard.org/.

[47] R.A. Posner, 'Utilitarianism, economics and legal theory', (1979) 8 J. Legal Stud. 103, 113; referring to F. A. Hayek, Law, Legislation, and Liberty 17-23 (1976).

[48] For instance, think of a shooter who kills a person on a busy square because the latter has borrowed money without ever repaying. After the killing, the shooter finds out later that the debtor was a suicide bomber who intended to blow up all people on the square. From a utilitarian perspective, one could say that the killing was

For instance, what if a large group of individuals derives much pleasure out of lynching a single victim, whose pain is not great enough to 'compensate' for the pleasure of the group at large?[49] An uncompromising utilitarian would have to attribute moral worth to the actions of the lynch mob. This bizarre result is often referred to as 'moral monstrousness'.[50] As Posner has explained, this monstrousness basically stems from 'the utilitarian's refusal to make moral distinctions among types of pleasure'.[51]

From a dogmatic perspective, the criticism of moral monstrousness is highly persuasive. However, in practice, I believe that very few situations would actually lead to such an outcome. In the lynching example above, I consider it unlikely that the group's pleasure would indeed surpass the inflicted pain. The pain is long-lived and likely to impact many others as well (just think of the relatives of the victim),[52] whereas the pleasure – even to the extent that it is truly experienced – is likely to be transitory and superficial.[53]

Another – perhaps less extreme – example of 'moral monstrousness' essentially goes as follows. Suppose you are serving in a jury of a homicide case, and it is clear to you that the defendant is not guilty. The case has attracted much attention from the public, as the facts of the homicide were particularly grueling. Suppose that the general public believes the person to be guilty, and that violent riots are likely to take place if the defendant is found not guilty. Those riots may, in turn, lead to a

---

morally right, even though the shooter killed a man simply because of a debt (and was unaware of the lifes he would save).

[49] Similar examples are often raised when discussing (and criticizing) utilitarianism.

[50] Posner 1979, *supra* note 47, at 116-119. See also A.T. Kronman, 'Wealth maximization as a normative principle', (1980) 9 J. Legal Stud. 227, at 228 (referring to the 'utility monsters', 'which have always been an embarrassment to uncompromising utilitarians').

[51] Posner 1979, *supra* note 47, at 116.

[52] Others may also be negatively affected. For example, the society at large may suffer from an added sense of insecurity.

[53] Also consider that one has to take into account future loss of pleasure – or even pain – by the perpetrators as well, for example if they start feeling guilty for their actions.

number of casualties. Should you, as a member of the jury, find the defendant guilty to avoid even greater harm?

Although this example is often used to describe the inequitable results of utilitarianism, I doubt whether utilitarianism would truly require the jury member to find the defendant guilty. Utilitarianism provides no clear requirement to act in a particular way if there are many uncertainties related to the effects of the conduct. In this case, the *harm* following from a conviction would be certain. This not only includes the harm to the defendant and his immediate relatives, but also the harm to (people's faith in) the rule of law. By contrast, the resulting *benefits* would still be uncertain. A mere threat of riots does not mean that they would indeed materialise – even greater uncertainty exists as to the possibility that the riots would lead to casualties.[54]

To my mind, the previous paragraph also means that a correct interpretation of consequentialism should also have regard to possible alternatives as relevant context. The late 19th century English criminal case *R v Dudley and Stephens* provides a good example.[55] The case concerned a number of shipwrecked sailors who – facing starvation – killed and cannibalized Richard Parker, the cabin boy. The case is often remembered as setting the precedent that necessity is not a defence to a charge of

[54] See also the discussion as to the discussion on the former § 14.3 of the German Aviation Security Act German Act. The provision allowed the German military to shoot down a civilian aircraft if it was hijacked in order to prevent that the plane would be used to crash into a building, causing even more deaths. The reasoning behind the provision is consequentialist: it considers that the people in the aircraft will die anyway, and that shooting down the plane will avoid further harm. The *Bundesverfassungsgericht* annulled the Act due to its incompatibility with the German Basic Law (being a violation of the right to life and the right to human dignity), as the State may not use human beings as 'mere objects' in order to avoid a particular result from materializing (see e.g. para 122 of Bundesverfassungsricht 15 February 2006, 1 BvR 357/05, available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705en.html). The Court thus essentially relied on a Kantian line of reasoning, in the sense that we cannot use human beings as a means to an end. In my view, one could also have questioned the Act from a more utilitarian point of view if one factors in uncertainty: action would result in certain death of the people on board the aircraft, whereas there are many uncertainties as to whether one actually avoids any harm. For example, it may be the case that the plane has not been hijacked, or has been hijacked by people who simply want a payment of ransom (instead of torpedoing themselves into a building).

[55] *R v Dudley and Stephens* [1884] 14 QBD 273 DC.

murder. I take a somewhat different approach. In my view, there was no pressing moral (and legal) dilemma to begin with. One of the people on the shipwreck was bound to die of starvation before the others did, taking away the need for a pre-emptive kill (leaving only the – much less pressing – moral issue of whether one may consume human flesh in order to survive).

2.3.3 Consequentialism and competition law

The paragraphs above question to what extent we can use the insights of consequentialism for the purposes of competition law. In my view, these disciplines are not that far removed from each other. The introductory chapters of competition law handbooks often include a discussion of welfare economics. Welfare economics provides an answer as to why we prohibit anti-competitive conduct in the first place: such practices lead to higher prices and lower quantity compared to the equilibrium level. Apart from a wealth transfer from producers to consumers, anti-competitive conduct also results in a loss of total welfare: the so-called deadweight loss. Welfare economics is thus consequentialist in nature,[56] as it focuses on the welfare effects of potentially anti-competitive conduct.

Smith famously observed that the baker does not produce our daily bread out of benevolence, but out of his self-interest. Smith's observation can be easily misconstrued as leaving no room for ethics.[57] However, Smith did not argue that pursuing one's own self-interest has moral worth as such, but observed that the moral worth lies in the effects that such conduct has for society as a whole. Indeed, the wish to make profit triggers the baker to offer good products at an attractive price, thereby benefiting his customers.

Smith's theories are thus clearly rooted in the moral philosophy of consequentialism. This is sometimes overlooked by Antitrust commentators who base themselves on the free-market ideas advocated by Smith,[58] but who argue that Antitrust has no ethical component.[59]

---

[56] Note that Posner argues that the notion of 'welfare' should be clearly differentiated from the notion of 'utility'. See Posner 1979, *supra* note 47.

[57] Or, at least, an ethical approach that does not solely rely on one's own self-interest.

[58] Note that Smith did not always argue in favour of markets as opposed to government regulation. In *The Wealth Of Nations*, he primarily argues against barriers of trade between nations, such as the hefty tariffs that applied to the import and export of many commodities at the time. See in particular book IV of A. Smith, *The Wealth of Nations* (Bantam Classic: New York 2003).

2.3.4 Consequentialism and consumer welfare

Competition law is imbued with consequentialist logic. The oft-heard idea that competition law should strive for the maximization of consumer welfare is, essentially, a consequentialist notion. However, several criticisms can be leveled at attributing much weight to consumer welfare – and, more generally, of pursuing a consequentialist approach. The following paragraphs provide a short discussion of both theoretical and practical issues. The point is to show that, although an examination of effects can provide a meaningful analysis, a consequentialist approach that slavishly adopts a consumer welfare approach encounters several criticisms.

First, there is no clear consensus on what consumer welfare really means.[60] And even if we do manage to find a satisfactory definition, it remains unclear why we should strive towards consumer welfare. Is welfare a goal in itself, or should we consider it a means to an end (or a proxy for happiness – a goal that utilitarians argue we should strive for)? Is 'maximization' of welfare sufficient, or should we also consider distribution issues? And is the concept of welfare not much broader than wealth, even though the two are often used interchangeably? To the extent that we interpret welfare as 'wealth' in terms of monetary benefits, Dworkin has cautioned that money can only be useful so far as it enables us 'to lead a more valuable, successful, happier, or more moral life', warning that '[a]nyone who counts it for more than that is a fetishist of little green paper'.[61]

Second, the static price model – that can be considered the economic foundation for the (consumer) welfare approach – focuses on allocative efficiency and does not as such consider productive and dynamic efficiency. As a consequence, the model may undervalue the importance of cost-saving or

---

[59] Horton 2011, *supra* note 45, at 506 and 515, noting that neoclassical economics 'has nothing to say about fairness', except that a free market will lead to allocative efficiency and maximum utility. Also note the judgment by Dean J. of the Australian High Court in *Queensland Wire* (*infra* note 1020), who noted that the statutory concept of taking advantage of power does not require 'some distinct examination of the morality or social acceptability of the conduct involved'.

[60] K.J. Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3 The Competition Law Review 121, at 124. See also B.Y. Orbach, 'The Antitrust Consumer Welfare Paradox', (2010) 7 Journal of Competition Law & Economics 133–164.

[61] R.M. Dworkin, 'Is Wealth A Value?', (1980) 9 J. Legal Stud. 191, 201.

innovation-enhancing efficiencies that may raise the level of welfare. That means not all relevant consequences are being taken into account. The approach may also diverge from the original meaning of the Treaty's competition rules. To the extent that the original drafters of the EEC Treaty used efficiency-related language, they seemed to chiefly refer to *productive* efficiency. The drafters sought to ensure that European companies would be able to enjoy greater economies of scale, producing for a larger home market.[62] As a final remark, the static price model is unable to fully consider dynamic efficiencies, even though – if one agrees with the Schumpeterian model of 'creative destruction' – such efficiencies can often have the greatest welfare-enhancing effect.

Third, in an ideal world, where all effects can be easily quantified, a welfare analysis is simply a matter of assessing the net effect. In practice, however, it is difficult to know how reliable such quantifications are, in particular due to the uncertainties related to the assumptions needed as input for the quantification. In addition, one has to make a choice whether any welfare transfers compensating for a loss in welfare for particular individuals must take place in actual fact (Pareto efficiency) or must simply be able to be made hypothetically (Kaldor-Hicks efficiency).

Fourth, the 'consumer welfare' approach relies heavily on the assumption that the so-called 'deadweight loss' embodies the most serious aspect of anti-competitive behaviour. The deadweight loss reflects unsatisfied wants that the market no longer provides due to a supra-competitive price. A weakness of the deadweight loss concept, is that it does not answer the question how consumers have spent their money after 'leaving' the market. Perhaps they have spent it on goods that satisfy their wants almost to the same extent, and thus provide almost as much welfare as the situation in which the 'monopolized' good would have been available at a competitive price. Dogmatic consistency would require the loss in welfare to be compared with the gains that result from consumers turning to alternatives. In practice, this is likely to be highly difficult as such alternatives do not need to be actual substitutes for the monopolized good (customers can turn to *any* product that provides them with utility; that does not necessarily have to be an actual substitute of the good that they have stopped buying.

---

[62] As was noted e.g. in the 1956 Spaak report. See P. Akman, 'Searching for the Long-Lost Soul of Article 82 EC', (2009) 29 Oxford Journal of Legal Studies 267, 280.

Finally, it is not clear why we should necessarily favour consumer welfare over total welfare. If the goal is indeed to achieve the highest degree of efficiency, why don't we consider producer welfare as well? Besides: it not always evident why the consumer should receive protection, while the producer should not. Consider the dominant producer for radar systems only used for luxury private yachts. Should we, as a society, be troubled in the event that such a company charges 'excessive prices'? The dilemma becomes particularly compelling in a situation where the major shareholder (i.e. a recipient of dividend payments) of that dominant manufacturer happens to be a pension fund for cleaning staff. It is not apparent why we should, from a policy perspective, favour the welfare of millionaire jetsetters over the viability of a pension fund of people at the very bottom of the income scale.

Admittedly, the example in the previous paragraph is somewhat stylized. Normally, it makes political sense to protect consumers, as they can often be considered a relatively vulnerable group. This explains why so many countries have enacted consumer protection laws. Another argument in favour of consumer welfare is that we should consider welfare not only in absolute terms. An incremental euro may not produce the same additional welfare for every recipient. A consumer is likely to have a higher valuation of that incremental euro than, say, a multi-billion euro company. So what could seem benign in a total welfare perspective – it does not matter whether a consumer or producer receives the incremental euro – could indeed influence the utility that such an increment would produce.

2.3.5 Consequentialism and justifications

A consequentialist perspective can provide a theoretical basis for justifications of otherwise illegal unilateral conduct to the extent that they rely on the beneficial *effects* of the practice under review. The clearest example is an efficiency plea. Such a plea acknowledges that an act can have both pro- and anti-competitive effects. An efficiency plea will succeed if the net effect of the conduct under review is pro-competitive. As discussed in the paragraphs above, there are many difficulties associated with establishing a reliable quantification of the relevant welfare effect. Nevertheless, if a company manages to overcome these issues and show that there is a net beneficial effect, the practice under review can also be considered to have moral worth from a consequentialist perspective.

Another justification that may be based on consequentialism is a public interest plea. A successful public interest plea connotes that benefits to the public interest outweigh the anti-competitive effects of the conduct under review. From a dogmatic perspective, it is irrelevant that public interest benefits are

usually difficult to quantify in monetary terms (indeed, efficiencies are often difficult to quantify, too). As long as the act under review avoids 'pain' and contributes to 'pleasure', it shall be condoned under a utilitarian approach.

A broad approach towards consequentialism (which I favour) may also accommodate legitimate business behaviour, encompassing both commercial freedom and objective necessity. As to commercial freedom, allowing companies with market power a certain degree of leeway has – generally speaking – a beneficial effect to the economy as a whole. In addition, consequentialism may provide a basis for objective necessity, as the harmful effect would have resulted in any case. Consequentialism should only *actual* conduct. Compare it to a situation where somebody throws you through a window. Only an overly strict interpretation of consequentialism would consider the breaking of the window as an immoral act of the one being thrown, rather than the thrower.

2.3.6 Deontology

Although consequentialism has more obvious parallels with competition law, one can also draw lessons from deontology. Deontology focuses on the intrinsic moral worth of actions themselves, deriving moral worth from the character of the conduct rather than its outcome.

2.3.7 Kantian ethics and competition law

Immanuel Kant developed a deontological approach that led to his formulation of the 'categorical imperative'. The categorical imperative states that actions can only be considered ethical if they are performed out of a duty to abide by the moral law.[63] This is a duty that one willfully and freely places upon one self. Accordingly, Kant suggested that only actions that are adopted *autonomously*, and thus independent of the actions of others, can have moral worth. Note that this does not mean that, reversely, autonomous acts will by definition have moral worth. Kant simply considers autonomous action as a pre-condition for morally sound behaviour.

One can interpret this principle in different ways while transposing Kant's ideas to the realm of competition law. On the one hand, Kant's views may provide an argument why we should not impinge

[63] See e.g. M.D. White, 'A Kantian Critique of Antitrust: On Morality and Microsoft', (2007) 22 Journal of Private Enterprise 161-190.

on the autonomy of the dominant firm. Under EU competition law, unilateral conduct can only be prohibited if the firm is dominant, which the ECJ interprets as being in an autonomous position. This case law thus appears to take a fundamentally different approach than Kant, who takes autonomy to be a key condition for attributing moral worth to conduct. In addition, Kantian thought is difficult to reconcile with the basic logic of punishing certain unilateral conduct because of the (anti-competitive) consequences that it may have.[64] For Kant, the moral worth – or lack thereof – is inherent in the act itself.

From a different perspective, however, Kantian thought may also require us to consider the autonomy of others. Kant's concept of morality considers that it is wrong to use human beings as a means to an end.[65] Consumers – as human beings – may thus not be used as an involuntary instrument to achieve a certain objective. It is unclear if Kant's views can be extended to other market participants, such as suppliers or wholesale customers.

Such an extension does seem to follow from Ordoliberal thought, that appears to have many parallels with Kantian logic. Ordoliberalism considers the economic freedom of all market participants as a goal in itself.[66] As a consequence, no one may restrain the economic freedom of others as a means to achieve more wealth. Ordoliberals cherish economic freedom by all market participants, and draw an analogy with the exercise of 'public' (i.e. political) power. In their view, absolute economic power – just like absolute political power – is subject to abuse and harmful to the public at large.[67] This explains the Ordoliberal's distrust of market power: by its very nature, a monopoly involves a more limited choice, and thus less economic freedom, compared to a more competitive market environment.[68]

Turning back to Kant's categorical imperative, we may also draw lessons from his formulation of the 'universal law'. The maxim demands that one should act only according to a rule to the extent that you can 'will' that it becomes a universal law. An example is lying: as you cannot will that telling untruths

[64] White 2007 (*ibid*.).

[65] Kronman 1980, *supra* note 50, at 233. Also consider the example of the German Act that allowed hijacked planes to be shot down, as given in supra note 54.

[66] Akman 2009, *supra* note 62, at 276.

[67] M.E. Stucke, 'Reconsidering Antitrust's goals', (2012) 53 B.C. L. Rev. 551, 564.

[68] M.E. Stucke, 'Should the government prosecute monopolies?', (2009) U. Ill. L. Rev. 497, 528-529.

would become a universal law (as this would be highly disruptive for society), lying does not abide by the universal law. Accordingly, lying does not have moral worth.

2.3.8 Kantian ethics and justifications

Kantian ethics does not have a clear-cut application for justifications of otherwise prohibited unilateral conduct. If one stresses the autonomy of the dominant firm, its actions are unlikely to lead to a *prima facie* abuse, which means there is no need to examine justifications. However, if one stresses the autonomy of other market participants, two elements of Kantian ethics may provide a possible foundation for a justification.

First, the universal law offers a theoretical underpinning of what this PhD thesis discusses as legitimate commercial conduct (or competition on the merits). If conduct meets the law of universality, it connotes that one can 'will' that everyone should abide by such conduct. For example, one can definitely will that all businesses should pay their bills and that no further supply will take place if they don't.

Second, Kantian ethics may provide a theoretical foundation for a 'public interest' justification to the extent that the underlying conduct is consistent with the categorical imperative. For example, a dominant firm may refuse to do business with a company that engages in ill treatment of its employees. Such a refusal is likely to be line with Kant's strict demands on human dignity.

As a final remark, Kantian ethics does not seem to allow a theoretical underpinning for a justification based on 'objective necessity'. Such a justification assumes that one acts out of necessity – whereas Kant would only ascribe moral worth to actions that are adopted autonomously. Nevertheless, it is still conceivable that other deontological approaches do allow for an ethical foundation of objective necessity, for example if such an approach focuses on the actor's *intent* (note that such an approach is far less demanding than Kantian ethics). As an anti-competitive act that arises from objective necessity is not pursued intentionally, it can still be considered to have moral worth.

2.3.9 Conclusion

The paragraphs above have examined to what extent we can draw lessons from moral philosophy for the purposes of competition law – and more particularly for justifications of otherwise illegal unilateral conduct.

To my mind, consequentialism is a relatively good fit with competition law, as it has many parallels with the economic theory associated with competition law (even though, as I have noted, one can level many criticisms against a slavish adoption of the consumer welfare standard). Consequentialism provides a theoretical basis for considering an efficiency plea and a public interest plea, as these pleas connote that the beneficial effects outweigh the detrimental effects. In my view, a more inclusive interpretation of consequentialism also provides an underpinning for commercial freedom and objective necessity.

Theoretically, a disadvantage of consequentialism is that it may lead to inequitable situations due to 'moral monstrousness'. However, I have argued that these criticisms are largely mistaken. They seem to overstate the benefits and understate the harm caused by seemingly undesirable conduct (remember the lynching example). Critics also seem to take little account of the *likelihood* that the relevant effects will arise, and may overlook potential alternatives that could have avoided the moral dilemma (remember the untimely death of cabin boy Richard Parker).

By contrast, it appears that lessons from Kantian ethics are more difficult to transpose to competition law. Kant requires actions to be *autonomous* if they are to have moral worth, whereas competition law seems more circumspect of autonomy to the extent that it expresses market failure. Indeed, the rules on abuse of dominance *only* apply when a company can act autonomously to a sufficient degree. More generally, competition law should not rely too much to intent as this could easily lead to false positives. The mere wish by companies to beat their competitors should only be applauded (for a more detailed examination, see Section 4.5 of Chapter III). Another disadvantage of a Kantian approach is that it relies on strict pre-set rules, and thus insufficiently accommodates for the relevant context.

However, to the extent that one does adopt a Kantian approach, it could provide a foundation for legitimate commercial conduct (to the extent that it conforms to the universal law), and public interest (to the extent that it protects human dignity). A deontological perspective that focuses on an actor's intent may provide a theoretical underpinning for a justification based on objective necessity.

3 PROBLEM DEFINITION, AIM AND SCOPE OF THIS STUDY

As said, competition law regimes throughout the world have acknowledged the availability of a justification plea vis-à-vis unilateral conduct that the competition rules would otherwise prohibit. However, the topic remains highly under-theorized, both in the case law and in the academic literature. The exact scope of this concept and the applicable legal conditions remain shrouded in mystery.

This leads to various problems. *Within* the competition law jurisdictions under review, justifications should work as an important counterbalance, and thus as a quality check, to a prohibition that may otherwise be overly strict. The less pronounced its contours, the more difficult it will be to fulfil this important function. Legal certainty is another notable issue, as it remains unclear how a firm with market power may – or may not – justify its conduct. Only with a proper understanding of the scope and substance of such justifications is it possible to know what constitutes illegal unilateral conduct under competition law. The current opacity is particularly troublesome in those jurisdictions (such as the EU) where a breach of the competition rules can lead to severe penalties. It is in the interest of companies to know how they can abide by the law. Other entities, such as National Competition Authorities (NCAs) and potential complainants or plaintiffs, may also be hampered if the law is insufficiently clear.[69] Finally, the uncertainty regarding the applicable rules risks leading to inconsistencies, as NCAs and courts have little guidance to base their decisions on.

Consistency is also an issue *between* the various competition law jurisdictions. The more these jurisdictions diverge in terms of the type of justifications they will allow, the more difficult it becomes for cross-border companies to comply with the law. This is problematic in a world where businesses increasingly operate on an international level, but may be confronted with very different international rules. Comparative studies such as these can thus contribute to the gradual global convergence of competition rules, as advocated by bodies such as the International Competition Network.[70]

---

[69] EU competition law cases are often triggered by a complainant that lodges a case at the European Commission. US antitrust cases usually involve a plaintiff lodging a case before a Federal court.

[70] The ICN's mission statement is to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide. See http://www.internationalcompetitionnetwork.org/.

These issues warrant further study of the subject-matter of this thesis, and have led me to formulate the following research question: *What is, and what should be, the appropriate scope of justifications of otherwise prohibited unilateral conduct, and what should be the applicable legal conditions?*

I have subdivided the principal research question into a number of more bite-sized queries. These sub-questions aim to shed light on the issue mainly from the perspective of EU law, but also from the laws of EU Member States and several non-EU jurisdictions. They are as follows:

- What is, and what should be, the appropriate scope of the concept of objective justification within the framework of Article 102 TFEU, and what are – and should be – the applicable legal conditions? These questions are examined in chapter III and chapter IV.
- What lessons can be drawn from other areas of EU law, notably internal market law and other competition law provisions, for the understanding of justifications vis-à-vis Article 102 TFEU? This question is examined in chapter II.
- How do the EU rules of procedure on the burden and standard of proof function vis-à-vis an objective justification plea within Article 102 TFEU? This question is examined in chapter IV.
- How is the concept of 'objective justification' interpreted at the level of EU Member States? What promising practices can be identified? This question is examined in chapter V.
- In what way can *prima facie* anti-competitive unilateral conduct be justified in a number of major competition law jurisdictions outside of the EU? What lessons can be drawn from these jurisdictions? This question is examined in chapter VI.

Chapter VII, containing the main conclusions of the thesis, brings together the answers to the sub-questions in an endeavour to answer the principal research question.

The principal aim of this study is to provide more clarity on the scope and interpretation of justifications vis-à-vis unilateral conduct that would otherwise be contrary to the competition rules. It seeks to further the understanding of the concept and provides suggestions to improve the way it is used.

The study also seeks to identify commonalities and differences between jurisdictions in their interpretation of the concept. Hopefully the unveiling of such (in-)consistencies provides an impetus for more cross-border dialogue on this issue, both in the academic literature and in institutional fora such as the International Competition Network (ICN).

As the concept of objective justification holds so many question marks, I have chosen to cast the net wide. The examination includes all the main types of justification pleas and examines a multitude of jurisdictions. This approach undoubtedly means that I cannot venture as much in-depth compared to the situation where I would have chosen to single out one particular type of justification plea or jurisdiction.

However, I believe that this method presents the best way to illuminate the existing interpretation on justifications and to strengthen future ones. Although the focus of the thesis is on EU law, it also examines the laws of EU Member States and those of various non-EU jurisdictions. It includes an assessment of the law as it is (*lex lata*) and how the law, in my view, ought to be (*lex ferenda*). The study seeks to identify the full breadth of what may constitute a justification. In addition, the examination is not restricted to specific types of conduct (such as 'predation' or 'refusal to supply'), but encompasses the full breadth of what is traditionally considered as anti-competitive unilateral conduct. In the context of US law, for example, the study thus aims to cover conduct prohibited by §2 of the 1890 Sherman Act (the key US federal antitrust statute),[71] but does not discuss the specific prohibition of certain forms of price discrimination as contained by the 1936 Robinson-Patman Act.[72]

The broad scope of this study undoubtedly has some disadvantages, too. A wide scope of inquiry calls for tough choices in what *not* to discuss. For example, in the comparative analysis in chapters V and VI, I solely discuss the elements that are directly related to my research question. However, as the cases under review are usually highly fact-specific, leaving out various elements entails the risk of an imbalanced discussion. This issue is exacerbated by the fact that the justification plea was often simply one of the many relevant elements in the cases under review. Notwithstanding these difficulties, I still believe this approach is warranted. A comprehensive examination of all the intricacies of the domestic cases would have lead to an excessively long study, with a considerable risk of missing the forest for the trees. In addition, I think that a refusal to examine the topic from a cross-border perspective entails risks of its own: namely that we remain in the dark on how jurisdictions across the globe deal with this topic.

[71] Ch. 647, 26 Stat. 209, 15 USC. §§ 1–7.

[72] Pub. L. No. 74-692, 49 Stat. 1526, 15 USC. § 13. Similarly, I exclude the separate prohibition of price discrimination in Section 9 of the South African Competition Act.

As a final remark, the study focuses almost exclusively on the public enforcement of competition law. Fully incorporating private enforcement as well would simply have made the scope of the study excessively wide. Still, Chapter IV does make a number of comments on the procedural issues related to objective justification in a private enforcement setting.

4 ROAD MAP

I shall keep this road map short, as the section on research methodology provides a more extensive treatment of the structure of the thesis.

The Section above has provided a basic explanation of objective justification within Article 102 TFEU. Chapter II examines the topic from a wider EU legal perspective, distilling lessons on justifications that arise from internal market law, Article 101 TFEU and merger control. The subsequent four chapters are based on articles that have been published or accepted for publication.

Chapter III provides a more in-depth examination of objective justification within the framework of Article 102 TFEU, focusing primarily on its scope of and the applicable legal conditions.[73] Chapter IV discusses various procedural issues of objective justification within EU law, notably the applicable burden and standard of proof.[74] Chapter V provides an account of the laws of various EU Member States, such as France, Germany and the United Kingdom.[75] Chapter VI analyses the laws of various non-EU countries, such as Australia, Canada and the United States.[76]

---

[73] The chapter is a revised version of T. van der Vijver, 'Objective Justification and Article 102 TFEU', (2012) 35 World Competition 55.

[74] The chapter is a revised version of T. van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?', (2012) 4 Journal of European Competition Law & Practice 121.

[75] This chapter is a revised version of T. van der Vijver, 'Benighted we stand: justifications of prima facie dominance abuses in EU Member States', (2013) 9 European Competition Journal 465.

[76] This chapter is a revised version of T. van der Vijver, 'Justification and Anti-competitive Unilateral Conduct: An International Analysis' (2014) 37 World Competition 27.

The concluding chapter aims to bring together the observations and lessons learned in the preceding chapters.

5 RESEARCH METHODOLOGY

The research methodology of this thesis relies mainly on an analysis and interpretation of academic literature, Treaty and legislative provisions, case law and decisional practice as well as guidance documents by competition law enforcement agencies. The thesis puts particular emphasis on an examination of cases, as they reveal many lessons on this topic.

The analysis contains both descriptive and normative elements. The thesis relies to a large extent on a descriptive examination of the applicable case law, as there are few existing studies to build on. In particular, there have been few comparatives studies on this topic. The descriptive examination provides invaluable input for the normative claims that I make, for example the identification of promising practices.

A key normative aspect of this study is my subdivision of the justification plea into a number of categories. These categories are based on a conceptual analysis of the objectives that I think competition law should take into account (relevant for the efficiency and the public interest pleas) or from the areas where competition should not intervene (relevant for the legitimate commercial conduct plea). I have found various indications in the descriptive part that support the categorization as proposed by this thesis.

In Chapter II, I attempt to put the subject matter of this thesis in a wider EU legal perspective. I discuss how derogations may apply vis-à-vis the internal market provisions (notably the free movement of goods) or the competition rules other than Article 102 TFEU (notably Article 101 TFEU and the merger provisions). Although these areas obviously differ from one another in several ways, they do hold useful lessons for Article 102 TFEU on the scope of justifications and the applicable legal conditions. This chapter primarily examines case law and legal literature to the extent that they provide insight into the scope of justifications and their applicable legal conditions.

Chapters III and IV – that comprise the first and second articles respectively – discuss the main substantive and procedural elements of objective justification for the purposes of EU competition law. These chapters rely mainly on an analysis of academic literature and of ECJ case law. For the search of relevant literature, I have used search engines such as Westlaw, Hein Online and the website of the Peace Palace Library.[77] I have searched for relevant case law on the official website of the ECJ.[78] Important search terms were 'objective justification' and 'justif*' in combination with '102', '82' (the former Article 102), 'abuse' or 'dominant position'.

Chapter III examines objective justification for the purposes of EU law, relying *inter alia* on a conceptual analysis what constitutes, or should constitute, an abuse. It builds upon a number of excellent articles written by Loewenthal,[79] Albors-Llorens,[80] Rousseva[81] and Østerud.[82] The chapter proposes a subdivision of the concept of objective justification that is used throughout the thesis: (i) legitimate business behaviour, (ii) efficiencies and (iii) public interest. A publication by Philip Lowe, erstwhile Director-General of Competition at the European Commission, provided the inspiration for the categorization.[83] I illustrate the attractiveness of this subdivision, and argue that the subdivision should also affect the legal test that determines whether a justification plea should be accepted.

Chapter IV, which includes an examination of EU procedural law applicable to objective justification, has

[77] www.ppl.nl.

[78] www.curia.eu.

[79] P.-J. Loewenthal, 'The Defence of 'objective justification' in the application of Article 82 EC', (2005) 28 World Competition 455.

[80] A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC', (2007) 44 CMLRev 1727.

[81] E. Rousseva, 'The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?', (2006) 2 The Competition Law Review 27. See also her book *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing: Oxford and Portland, Oregon 2010).

[82] See the chapter 'The Concept of Objective Justification' in: E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Kluwer Law International: Alphen aan den Rijn 2010), at 245.

[83] P. Lowe, 'DG Competition's Review of the Policy on Abuse of Dominance', in: Hawk (ed.), *International Antitrust & Policy, Annual Proceedings of the Fordham Corporate Law Institute 2003* (Juris Publishing: New York 2004), at 170-171.

benefited from the *European Competition Law Annual 2009*.[84] The book shows the fundamental principles that apply to the applicable standard and burden of proof. Apart from examining relevant Article 102 TFEU cases (notably *Microsoft*), I have also relied on several cases related to Article 101 TFEU as they often contain a particularly clear enunciation of procedural issues. A normative element of this chapter is my contention that the difficulty with which the evidentiary burden and the standard of proof can be satisfied should depend on the type of justification that is at play.

Next to the analysis of EU law, the thesis also includes two comparative studies. Chapter V examines domestic competition law in EU Member States; whereas chapter VI explores various key competition law jurisdictions outside the EU.

Before discussing these two chapters separately, some general comments are warranted. The primary focus of these studies is how courts have dealt with justifications of otherwise illegal unilateral conduct. Notwithstanding the many differences between competition law regimes, I think that such a cross-border comparison *can* be made. A conceptual red thread runs through all the jurisdictions under review: namely that unilateral conduct may be condoned, even though it appears to fall foul of the prohibition of anti-competitive behaviour at first sight. I also think that such a comparative analysis *should* be made. Only a comparison can show to what extent there are cross-border (in-)consistencies in the way that jurisdictions deal with this topic, and reveal strengths and weaknesses.

As to chapter V (the first comparative study), I made a selection of EU Member States according to the following process. The study sought to present a broad overview of Member State competition practice, which explains why I have selected more than just a few Member States. I have chosen Member States where I found relevant decisions or case law on objective justification, and whose languages I sufficiently understand. These criteria led to the selection of the following Member States: France, Germany, Ireland, Luxembourg, the Netherlands, Spain and the United Kingdom.

I have used a number of resources for the examination of these countries. I started with the examination of relevant legislative acts as found on the official government websites. Competition law

[84] C.-D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing: Oxford and Portland, Oregon 2011).

textbooks sometimes offered a first selection of potentially relevant cases, even though their sections on objective justification of *prima facie* dominance abuses are often meagre. Several online resources, such as the website of the *Institut de droit de la concurrence*, offered more food for thought.[85] The websites of the National Competition Authorities (NCAs) also proved valuable online resources, particularly those of France,[86] Germany,[87] Ireland,[88] the Netherlands[89] and Spain.[90] For the analysis of UK law, my main online sources were the websites of the OFT[91] and the CAT.[92] I used the website of the British and Irish Legal Information Institute for case law by non-specialized courts.[93]

The NCA websites contain valuable information on the public enforcement cases in that particular Member State,[94] including those that have not been highly publicized. I have usually searched these websites using the Google search engine, as the search engines of the websites themselves are often inadequate. I have also explored the NCA's annual reports as well as their guidance documents and submissions to questionnaires from the International Competition Network.

Irrespective of the source, I have mainly searched for terms such as 'justify' and 'justification', or their equivalents in the national language, within cases on the abuse of dominance. I have devoted particular attention to cases where the NCA rejected a complaint related to abuse, or where the domestic courts upheld an appeal vis-à-vis an infringement decision. It is not unusual for such cases to rely, at least partly, on the concept of objective justification.

Chapter V concludes with a normative part, discussing a number of promising practices. I have used several parameters to identify such practices. The most important ones are as follows:

---

[85] http://www.concurrences.com/?lang=fr.

[86] http://www.autoritedelaconcurrence.fr/user/index.php.

[87] http://www.bundeskartellamt.de.

[88] http://www.tca.ie/

[89] www.acm.nl; previously www.nma.nl.

[90] http://www.cncompetencia.es/.

[91] http://www.oft.gov.uk/.

[92] http://www.catribunal.org.uk/.

[93] http://www.bailii.org/.

[94] Mostly the public enforcement actions.

- Transparency: a clear and separate examination of a justification plea. This will provide an understanding what types of considerations should be subsumed under the finding of *prima facie* anti-competitive conduct, and what should be subsumed under a justification heading.
- Context-driven: a proper examination of a justification plea implies due account for the specific circumstances of the case. Only a contextual analysis can reveal whether conduct under review has a net pro-competitive effect or whether it should be condoned otherwise. Relevant context also includes the ease with which conduct is subsumed under *prima facie* anti-competitive conduct. The more formalistic this assessment, the more a justification plea should function as a counterbalance to avoid an overly stringent interpretation of the prohibition.
- Legal conditions: a clear enumeration of the applicable legal conditions. Even where NCAs and courts engage in a context-specific examination of the case, they should still offer guidance on the applicable legal framework. This is highly important to protect the interests of legal certainty and predictability. At the same time, the legal conditions should also be dependent on the surrounding context: for example, an efficiency plea requires a different legal analysis than a plea based on *force majeure*.

Chapter VI focuses on countries *outside* the EU. The jurisdictions under review are Australia, Canada, Hong Kong, Singapore, South Africa and the United States. The selection has been done according to the following process. Similar to the first comparative analysis in the previous chapter, my aim was to provide a broad overview of the prevailing competition practice. I wanted to include both countries that have an established competition law tradition (such as Canada and the United States) as well as countries where competition law is relatively new (such as Singapore and Hong Kong). Australia and South Africa were included because they are important jurisdictions in their region and also boast thought-provoking judgments on justifications of unilateral conduct. All the jurisdictions under review have considerable economic and political clout beyond their borders, making the lessons for other jurisdictions all the more pertinent. In addition, the selected countries all share – in a greater or lesser degree – a common law tradition[95] and use the English language, facilitating a comparison.

For the examination of these competition regimes, I have relied in great part on online resources. Although perhaps atypical for common law countries, I again used the relevant legislative acts as a

[95] For example, South Africa has a combined system of common law and civil law.

starting point.[96] I believe this to be an acceptable method. The study focuses on the 'regular' competition law prohibitions that have been enacted in legislation in all the countries under review, rather than the common law concept of restraint of trade.[97]

Other resources that I have used include the following. For the examination of Australian law, I have used the commendable website by Julia Clarke[98] and the website of the Australasian Legal Information Institute.[99] The latter website is particularly noteworthy for its inclusion of case law as well as a wide range of relevant literature. For the analysis of Canadian and South African competition law, I have mainly relied on the informative websites of their respective Competition Tribunals.[100] These websites also include relevant case law by other courts. The analysis of Hong Kong competition law focuses on the Competition Bill enacted by the Legislative Council, as there has been no enforcement action in that jurisdiction as of yet.[101] For the examination of Singaporean law, I have mainly used the website by the Competition Commission of Singapore.[102]

The most extensive analysis of non-EU jurisdictions deals with US federal antitrust law. I have used Westlaw to identify relevant cases, focusing mainly on the US Supreme Court and the Circuit Courts (even though the study contains some District Court judgments as well). The main search terms that I have used are '(valid) business reason' and '(legitimate) business justif*', as US federal courts ordinarily use such terms when referring to a possible justification of behaviour that would otherwise be prohibited under Section 2 of the Sherman Act.

The chapter concludes with some comparative notes, and also identifies lessons for EU law. I deliberately make fewer normative claims than the 'promising practices' identified in the previous chapter, largely because the substantial differences between the jurisdictions merit careful treatment.

---

[96] As found on the official government websites.

[97] This common law concept appears to have had a limited role in the development of the interpretation of the competition laws, at least for the interpretation of what may constitute justification.

[98] http://www.australiancompetitionlaw.org/.

[99] http://www.austlii.edu.au/.

[100] http://www.ct-tc.gc.ca/Home.asp and http://www.comptrib.co.za/.

[101] http://www.legco.gov.hk/yr09-10/english/bills/b201007022.pdf.

[102] http://www.ccs.gov.sg/content/ccs/en.html.

In addition, there is less impetus to achieve the level of convergence that would be desirable with regard to the EU Member States. In my view, the descriptive analysis of justifications in non-EU jurisdictions already provides useful observations, as a broad comparative study of this kind has – to my knowledge – not yet been undertaken. To the extent that I do make normative claims, I again make use of the parameters mentioned in the preceding chapter. The parameters include whether the interpretation of the justification plea is transparent, context-driven, and is subject to a clear and adaptive use of legal conditions.

Chapter VII offers a general conclusion of this thesis, drawing on the findings in the preceding chapters. It aims to bring together the most important findings of my research in order to answer my main research question, both its descriptive element (what are justifications?) and its normative component (what they should be?).

CHAPTER II JUSTIFICATIONS IN EU LAW – A WIDER PERSPECTIVE

1 INTRODUCTION

Chapters III and IV spend ample attention on justifications within the framework of Article 102 TFEU. This chapter seeks to put that examination in a wider EU law perspective. It examines justifications of otherwise prohibited conduct in the law on the free movement of goods, Article 101 TFEU and merger control. It seeks to identify lessons that can be transposed to objective justification in the context of dominance abuses.

2 JUSTIFICATIONS IN EU INTERNAL MARKET LAW – EXPLORING THE FREE MOVEMENT OF GOODS

2.1 Introduction

Justifications have played a prominent role in the EU internal market law case law. This section examines what lessons these cases hold for the 'objective justification' concept in Article 102 TFEU. Of course there are several differences between these two legal areas. For example, the internal market provisions are primarily directed at the rules enacted by EU Member States, whereas Article 102 TFEU is directed at the conduct of undertakings. Their focus is different as well. The internal market rules primarily seek to ascertain whether a national measure may have a discriminatory effect, while the competition rules essentially focus on the effect on competition. More specifically, the ECJ has held that justifications in the realm of the free movement provisions may not serve economic ends, reflecting that they identify broadly with the *non*-economic interests of the State.[103] This does not mean that economic considerations are irrelevant, but rather that 'aims of a purely economic nature cannot justify a barrier

[103] See Albors-Llorens 2007, *supra* note 80, at 1734 (discussing mandatory requirements). She refers to Case 95/81 *Commission v Italy* [1982] ECR 2187, para 27 (free movement of goods); Case C-398/95 *Ypourgos Ergasias* [1997] ECR I-3091, para 23 (free movement of persons). See also Case C-153/08 *Commission v Spain* [2009] ECR I-9735, para 43. The ECJ refers to Case C-388/01 *Commission v Italy* [2003] ECR I-721, paras 19 and 22, and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, para 61.

to the fundamental principle of freedom to provide services.'[104] By contrast, the justifications in Article 102 TFEU do allow for considerations of an economic nature.[105]

Despite these differences,[106] I do think it is useful to draw parallels between these areas of EU law. There is no strict boundary between the prohibitions themselves. For example, the free movement rules may – under certain circumstances – also affect private actors, connoting that their scope of application is wider than simply applying to Member States.[107] In addition, both sets of rules may apply to conduct by an undertaking in the (quasi-)public sphere.[108] The possibility of parallel application is a reason to conceptually bring these areas closer together.[109] In addition, from the perspective of the Treaty, EU internal market law and competition law jointly strive for the same goal, namely to establish an internal market with undistorted competition.[110] Indeed, it could be argued that the provisions on the fundamental freedoms and competition should all have the same basic legality standard.[111]

---

[104] *Ypourgos Ergasias* (*ibid*), para 23; Case C-158/96 *Kohll v Union des caisses de maladie* [1998] ECR I-1931, para 41. At the same time, there may be an overriding reason in the general interest capable of justifying a barrier if there is a risk that the financial balance of the social security system may be seriously undermined.

[105] Albors-Llorens 2007, *supra* note 80, at 1734-1735. See e.g. Case 27/76 *United Brands v Commission* [1978] ECR 207, para 189.

[106] Mortelmans (2001, *infra* note 109, at 649) notes that: '[t]he magic line between public and private interests should […] only be crossed cautiously'. I have serious doubts whether such a neat division between public and private interests can be made, as they will often have a substantial overlap.

[107] This is the so-called 'horizontal' application of the free movement rules. See e.g. Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139 (on free movement of persons). The ECJ held that the free movement rules preclude an employer from requiring job applicants to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State.

[108] See, for instance, the activities of football bodies as examined in Case C-415/93 *Bosman* [1995] ECR I-4921.

[109] See also K. Mortelmans, 'Towards convergence in the application of the rules on free movement and on competition', (2001) 38 CMLRev 613.

[110] See Protocol (No 27) on the internal market and competition, referring to the 'internal market' objective set out in Article 3 Treaty on European Union. For criticism on the internal market objectives of competition law, see e.g. see B. Hawk, 'System failure: Vertical Restraints and EC competition law', (1995) 32 CMLRev 973; W. Bishop, 'Price discrimination under Article 86: Political economy in the European Court', (1981) 44 MLR 282.

[111] See Mortelmans 2001, *supra* note 109, at 622, fn 45, referring to a publication by Gyselen.

I also think that the combination of these fields serves a particularly useful purpose for objective justifications under Article 102 TFEU. The examination of justifications and derogations from the internal market provisions shows what kind of interests may be taken into account, and how they are examined.[112] Craig & de Búrca confirm that objective justification under Article 102 TFEU and justifications within the free movement of goods are essentially 'similar ideas'.[113] Mortelmans views the proportionality requirement as common ground between the two sets of provisions.[114] Competition law is no stranger to the type of interests that are also relevant in internal market law.[115] Indeed, recent competition law judgments such as *AstraZeneca* (on Article 102 TFEU)[116] and *Pierre Fabre* (on Article 101 TFEU)[117] have, in their reasoning on justifications, explicitly relied on internal market case law.

The following sections explain how the case law on the internal market deals with justifications or derogations, and mentions what lessons might be transposed to Article 102 TFEU.[118] The focus will mainly be on the free movement of goods, as this area has produced a particularly rich body of case law.

---

[112] Albors-Llorens (2007, *supra* note 80, at 1729-1736) also examines the lessons of EU internal market law.

[113] P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials* (OUP: Oxford 2003), at 1030.

[114] Mortelmans 2001, *supra* note 109, at 636.

[115] G. Monti, 'Article 81 EC and Public Policy', (2002) 39 CMLRev 1057, at 1071-1078, referring to interests such as consumer protection and environmental protection. Of course, not all agree that such interests *should* be taken into account.

[116] Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para 842. The Court refers to Case C-15/01 *Paranova Läkemedel and Others* [2003] ECR I-4175, paras 25 to 28 and 33; Case C-113/01 *Paranova* [2003] ECR I-4243, paras 26 to 29 and 34; and Case C-172/00 *Ferring* [2002] ECR I-6891, paras 38 to 40.

[117] Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419, para 44. The Court refers to Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paras 106, 107 and 112; as well as Case C-108/09 *Ker-Optika* [2010] ECR I-12213, para 76.

[118] For example, Article 45(1) TFEU determines that the free movement for workers within the EU shall be secured. The provision aims for the 'abolition of any discrimination based on nationality between workers', see Article 45(2) TFEU. However, Member States still have the right to impose 'limitations justified on grounds of public policy, public security or public health', see Article 45(3) TFEU. See also Article 65(1)(b) TFEU, that provides a derogation from the free movement of capital, for example to prevent infringements of the tax rules or to take measures which are justified on grounds of public policy or public security.

2.2 Justifications under the free movement of goods – Article 36 TFEU

Article 34 and 35 TFEU provide that quantitative restrictions on imports and exports,[119] as well as all measures having an equivalent effect, shall be prohibited as they affect trade between Member States. However, not every restriction is prohibited. Article 36 TFEU lists a number of grounds that a Member State may invoke to justify such restrictions.[120] As Horspool and Humphreys have noted, these grounds are as follows:[121]

- Public morality. The ECJ has given a relatively wide margin of discretion to Member States to decide what public morality means.[122] For example, a UK ban on the import of pornographic films and magazines was considered justified.[123] However, if a ban only affects importers while leaving domestic trade unaffected, the ECJ is likely to reject the justification plea.[124]
- Public policy. The concept of public policy must be interpreted strictly,[125] which is perhaps better conveyed by the French term *ordre public*. Public policy may only be invoked 'if there is a genuine and sufficiently serious threat to a fundamental interest of society'.[126] At the same time, the ECJ does allow a certain margin of discretion to the competent national authorities, as

[119] This section only deals with Article 34 TFEU (import restrictions), as such restrictions have been far more prevalent in the case law than Article 35 TFEU (export restrictions).

[120] Also note Case 5/77 *Tedeschi v Denkavit Commerciale* [1977] ECR 1555, para 35. If a directive provides for the complete harmonization of a particular interest (in that case: the protection of animal and human health), the national measure must be examined in light of that directive.

[121] The following enumeration relies to a large extent on M. Horspool & M. Humphreys, *European Union Law* (OUP: Oxford 2008), at 320 *et seq*.

[122] Horspool & Humphreys 2008 (*ibid*.), at 321.

[123] Case 34/79 *R v. Henn and Darby* [1979] ECR 3795.

[124] Case 121/85 *Conegate* [1986] ECR 1007.

[125] See e.g. Case 177/83 *Kohl v. Ringelhan & Rennet* [1984] ECR 3651, para 19. On the free movement of workers, see Case 41/74 *Van Duyn* [1974] ECR 1337, para 18 as well as Case 30/77 *Bouchereau* [1977] ECR 1999, para 33.

[126] See, *inter alia*, Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, para 17 (on the free movement of services). For a rare example where the ECJ accepted a public policy plea, see Case 7/78 *R v Thompson* [1978] ECR 2247. The case concerned a UK ban on exporting silver coins in order to prevent them from being melted down or destroyed in another Member State. The ECJ considered the ban to be justified on grounds of public policy, because 'it stems from the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the State.' (para 34).

the circumstances that may justify application of the concept of public policy may vary from one country to another.[127] The need to observe human rights may be considered under the heading of public policy.[128]

- Public security. This concept is similar to public policy. It should thus be interpreted restrictively,[129] but also allows the Member State leeway to act according to the specific circumstances of the case. For example, the *Campus Oil* case concerned an Irish rule requiring oil companies to buy part of their supplies from a State-owned installation at a price determined by the State. The ECJ found that the rule was justified as it supported the security of petroleum supply.[130] However, such a measure will not be justified if it is based purely on economic grounds rather than the protection of public security;[131] an understandable criterion given the desire to prohibit any disguised restrictions of trade.
- The protection of health and life of humans, animals or plants.[132] The protection of human health is a regularly invoked argument,[133] but often fails because of the disproportionate scope or effect of the relevant measure.[134] However, the ECJ does *not* require agreement between Member States about the health implications of a certain good. In the absence of harmonisation, it is already sufficient if the Member State can show that there is *bona fide*

[127] *Van Duyn*, *supra* note 125, para 18; *Bouchereau*, *supra* note 125, para 34.

[128] Case C-112/00 *Schmidberger v Austria* [2003] I-5659, para 74. The case concerned a decision by Austria not to prohibit a demonstration, which resulted in a lengthy closure of a motorway that allegedly restricted the free movement of goods. Indeed, measures that do not observe human rights are 'not acceptable' in the EU, see Case C-260/89 *ERT* [1991] ECR I-2925, para 41, and Case C-299/95 *Kremzow* [1997] ECR I-2629, para 14. See also Case C-36/02 *Omega* [2004] ECR I-9609, paras 34-35.

[129] See e.g. Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219, para 28; Case C-348/96 *Criminal Proceedings Against Donatella Calfa* [1999] ECR I-11, para 21.

[130] Case 72/83 *Campus Oil* [1984] ECR 2727, paras 41 and 51.

[131] *Ibid*., para 35. See also *Rutili*, *supra* note 126, para 30 and Case C-398/98 *Commission v Greece* [2001] I-7915, para 30.

[132] It appears that, more generally, the protection of the environment can also be relevant. See Case C-379/98 *PreussenElektra v Schleswag* [2001] ECR I-2099, para 76: 'environmental protection requirements must be integrated into the definition and implementation of other [EU] policies'.

[133] Horspool & Humphreys 2008, at 323-324.

[134] See e.g. Case 178/84 *Commission v Germany* [1987] ECR 1227, paras 28, 39, 44-45 and Case C-24/00 *Commission v France* [2004] I-1277, para 52.

scientific doubt on its health effects, also known as the 'precautionary principle'.[135] A Member State is then allowed to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated.[136] As the necessity test in this vein is highly dependent on context,[137] a prohibition in one Member State may be condoned even where similar bans do not exist in other Member States.

- The protection of national treasures possessing artistic, historic or archaeological value. The lessons arising from this derogation provision do not seem particularly relevant for Article 102 TFEU.
- The protection of industrial and commercial property. Case law on this derogation provision does not seem to offer much additional insight considering the case law that already exists on the interplay between Intellectual Property rights and Article 102 TFEU.[138]

Although the ECJ has repeatedly held that 'all derogations from a fundamental principle of the Treaty' (such as the free movement of goods) must be interpreted restrictively,[139] it is clear from the enumeration above that various cases have accepted such derogations. The reader may wonder, however, to what extent these cases can hold lessons for Article 102 TFEU. Do they not refer mainly to non-economic interests[140] that are the prerogative of the State, and thus unavailable for private actors?

---

[135] Case 174/82 *Sandoz* [1983] 2445, para 16. However, the measure must conform to the proportionality principle (*ibid*., para 18). See also Case C-42/90 *Bellon* [1990] ECR I-4863, paragraph 11; Case C-192/01 *Commission v Denmark* [2003] ECR I-9693; Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375; Case C-286/02 *Bellio Fratelli Srl v Prefettura di Treviso* [2004] ECR I-3465. An example where the Member State was unable to produce sufficient evidence as to health risks, is Case 270/02 *Commission v Italy* [2004] I-1559.

[136] Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, para 63. However, such a risk assessment cannot be based purely on hypothetical grounds, see Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, para 106.

[137] *Sandoz*, *supra* note 135, para 22. See also Case C-228/91 *Commission v Italy* [1993] ECR I-2701, para 27.

[138] See Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* ('*Magill*') [1995] I-743; Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039.

[139] *Calfa*, *supra* note 129, para 23. See also, *inter alia*, *Omega*, *supra* note 128, para 30 and *Église de Scientologie*, *supra* note 126, para 17.

[140] See e.g. Case 7/61 *Commission v Italy* [1961] ECR 317, at 329.

I think that such a position relies too much on a watertight separation between the private and public spheres; a separation that, in practice, is usually difficult to make. Indeed, even though the free movement rules traditionally only address measures by Member States, they may also affect conduct by private actors in the semi-public sphere.[141] The *Bosman* judgment makes clear such private actors may indeed invoke the derogations based on Article 36 TFEU as well.[142] There is thus no conceptual impossibility that a private actor can invoke derogations based on public policy (even though, as Mortelmans argues, there may be additional reason for a stricter proportionality test).[143]

This finding is relevant for Article 102 TFEU cases where the dominant undertaking wishes to invoke a justification plea based on an objective that is traditionally protected by the State. Although there is reason to examine such pleas with additional circumspection, they should not be rejected as a matter of law. I think that the grounds in Article 36 TFEU could provide particular insight for the examination of a refusal to deal.

For example, think of a dominant healthcare insurer that refuses to refund a particular medical device, as *bona fide* indications emerge that the device has detrimental health effects. The device manufacturer may challenge the refusal, stating that it needs the refunds to keep competing for sales to healthcare providers. It may also argue that it is not the job of a private party to make decisions of a 'public' nature, suggesting it should be for the legislator to enact a ban.

I believe that this example aptly shows that even private companies may be confronted with genuine public interest issues. Indeed, there could be different *rationales* for the health insurer's refusal. It may be primarily by actual health concerns, or perhaps by more mundane reputation issues. Be that as it

---

[141] See e.g. *Bosman*, *supra* note 108.

[142] *Bosman (ibid.)*, para 86: '[t]here is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.' This approach was confirmed in *Angonese*, *supra* note 107.

[143] Mortelmans 2001, *supra* note 109, at 642. Often the test involved, in practice, just suitability and necessity (see e.g. Case 66/82 *Fromançais v Forma* [1983] ECR 395). Sometimes it also included a test of proportionality *stricto sensu* (see e.g. Case C-331/88 *Fedesa* [1990] ECR I-4023). See, as regards the free movement of persons, e.g. *Bosman*, *supra* note 108, para 104; Case C-55/94 *Gebhard* [1995] ECR I-4165, para 37.

may, it simply seems desirable to shield the public from medical devices that are likely to harm their health – even if the legislator has not yet enacted a formal ban. It appears that the ECJ's internal market case law can provide useful guidance to assess such a case, in particular those cases that have shed light on the precautionary principle and the proportionality test.

A key hurdle of the proportionality assessment is the necessity test. The measure will be illegitimate if less restrictive measures could also have achieved the proffered objective. This criterion seems highly stringent at first sight. One can often imagine alternative routes that may have affected trade in a lesser degree. However, the case law shows that the necessity test depends to a large extent on the overall context of the case. For example, a measure is not automatically incompatible with EU law if other Member States have less restrictive measures in force.[144] According to the ECJ, 'the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another'.[145] The lack of similar restrictions in other Member States may, of course, be relevant while assessing the proportionality *stricto sensu* of the justification.[146] A lesson for Article 102 TFEU is that context matters when applying the necessity test.

2.3 Justifications under the free movement of goods – The 'mandatory requirements'

Article 36 TFEU provides a seemingly exhaustive list of derogations. Combined with the ECJ's stance that derogations of the free movement rules must be interpreted 'strictly', one would be forgiven in thinking that no other justification pleas are open to Member States. However, the case law has shown that it *is* indeed possible to justify measures that affect trade outside the scope of Article 36 TFEU. The situation is best described by first explaining the development in the ECJ's case law on the scope of Article 34 TFEU.

---

[144] *Omega*, *supra* note 128, para 37. The ECJ distances itself from a reading of the earlier *Schindler* judgment that the proportionality test fails if another Member State protects the same legitimate aim with a less restrictive measure. See Case C-275/92 *Schindler* [1994] ECR I-1039, para 60.

[145] *Omega* (*ibid*.), para 31. Member States thus have a margin of discretion, see *Van Duyn*, *supra* note 125, para 18, and *Bouchereau*, *supra* note 125, para 34.

[146] Case C-333/08 *Commission v France* [2010] I-757, para 105. The ECJ noted that the strict French rules were absent in 'all or nearly all of the other Member States'. See, similarly, Case C-421/09 *Humanplasma v Austria* [2010] ECR I-12869, para 41; and Case C-514/03 *Commission v Spain* [2006] ECR I-963, para 49.

The landmark *Dassonville* case concerned a national provision that prohibited the import of certain alcoholic goods where such goods did not have an official government certificate issued by the government of origin certifying their right to be exported.[147] The ECJ put forward an expansive view of Article 34 TFEU: the provision applies to *all* domestic measures that are capable of affecting trade between Member States, even if they are not directly discriminatory (so even if they are 'indistinctly applicable').[148]

The *Dassonville* formula is so broad, that it could conceivably cover almost any national measure that regulates trade. In an apparent attempt to cushion the judgment's far-reaching implications, the ECJ hinted that Member States may be able to justify such trade restrictions *outside* of the explicit derogations mentioned in Article 36 TFEU. As there was no EU harmonisation guaranteeing consumers the authenticity of a product's designation of origin,[149] the ECJ held that Member States may take measures to prevent unfair practices. Such measures must be 'reasonable' and should not act as a hindrance to inter-State trade.[150] The measures may equally not constitute a means of 'arbitrary discrimination' or 'a disguised restriction on trade between Member States'.[151] Finally, the proportionality principle applies as well, including a suitability and necessity test.[152]

The ECJ expanded upon the possibility to provide justifications for rules restrictive of trade in *Cassis de Dijon*, another internal market classic.[153] The ECJ confirmed that obstacles to the free movement

---

[147] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* ('*Dassonville*') 1974 [ECR] 837, para 2. In many ways, the impact of *Dassonville* can be compared to the impact of *Consten and Grundig* for the development of EU competition law; see Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299.

[148] *Dassonville* (*ibid*.), para 5. Note that Article 36 TFEU may also apply to directly discriminatory measures.

[149] Note that, if there *is* such harmonization the analytical framework should be the harmonized rule. See *Tedeschi, supra* note 120; and Mortelmans 2001, *supra* note 109, at 615.

[150] *Dassonville*, *supra* note 147, para 6.

[151] *Dassonville*, (*ibid*.), para 7. I.e. the mandatory requirements may only be invoked with the aim to justify indistinctly applicable measures, see Craig & de Búrca 2003, *supra* note 113, at 636.

[152] Case C-154/89 *Commission v France* [1991] ECR I-659, paras 14 and 15; Case C-180/89 *Commission v Italy* [1991] I-709, para 17; *Commission v France*, *supra* note 134, para 52.

[153] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*'), [1979] ECR 649.

provisions resulting from disparities between national laws must be accepted if they are necessary to satisfy overriding public interest concerns, also referred to as 'mandatory requirements' or the 'rule or reason'. [154] The judgment enumerates four such mandatory requirements: the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and consumer protection.[155]

Subsequent case law has made clear that the enumeration in *Cassis de Dijon* is by no means exhaustive.[156] Other mandatory requirements include the protection of workers,[157] the protection of the environment,[158] and the diversity of the press.[159] These cases suggest that a mandatory requirement plea is particularly persuasive if it is in line with a stated EU Treaty or policy objective. An aim will also be legitimate if it conforms to one of the (unwritten) general principles of EU law. For example, the *Omega* case (on the free movement of services) concerned a municipal ban of a laser game. The prohibition was based on the idea that firing on human targets was contrary to human dignity.[160] The ECJ accepted the restriction, holding that the protection of human dignity is a legitimate objective that can be regarded as a general principle of EU law.[161]

The case law on mandatory requirements holds a number of lessons for Article 102 TFEU. First, the ECJ has relied on unwritten derogations to compensate for an otherwise overly stringent prohibition in

---

[154] The concept is also referred to as overriding interests or reasons in the general interest.

[155] *Cassis de Dijon*, *supra* note 153, para 8.

[156] Craig & de Búrca 2003, *supra* note 113, at 638.

[157] Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18.

[158] Case 302/86 *Commission v Denmark* [1988] ECR 4607, para 9. The ECJ rejected the plea, because the measure failed the proportionality test. However, the ECJ accepted a plea based on environmental protection in Case C-2/90 *Commission v Belgium* [1992] ECR I-4431, para 30-32. The case concerned restrictions on the inflow of waste into Wallonia from other Member States. Also note, more generally, Case 240/83 *Procureur de la République v Association de défense des brûleurs d' huiles usagées* [1985] ECR 531, noting that the protection of the environment is 'one of the [EU's] essential objectives'.

[159] Case C-368/95 *Familiapress v Bauer Verlag* [1997] ECR I-3689, para 18. The ECJ reasons that press diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights.

[160] *Omega*, *supra* note 128.

[161] *Ibid*., para 34.

Article 34 TFEU. This is relevant for Article 102 TFEU, as the scope of that prohibition is similarly narrowed down by the unwritten plea of objective justification.

Second, a *prima facie* restriction is likely to be condoned if it clearly seeks to achieve an objective that conforms to a stated EU objective or general principle of EU law. I see no ground why private entities should be *a priori* banned to invoke such broader EU goals and values. For example, it may e.g. provide a justification for a dominant online platform to ban certain content providers from its network, if the platform considers the content to be harmful to human dignity.

Third, the case law on mandatory requirements also shows the importance of a contextual approach, suggesting that a minor restriction of trade will be more easily condoned by a mandatory requirement. For example, the restriction in *Omega* seemed trivial, whereas the protection of human dignity was afforded particular weight.[162] I think that a similar analysis is possible under Article 102 TFEU, where one has regard to the significance of the restriction of competition combined with the weight of the proffered justification.

Finally, the examination above also shows how we can consider justifications in a more holistic way.[163] The distinction between the justifications of Article 36 TFEU and the mandatory requirements has slowly obfuscated.[164] For example, justifications related to environmental protection and public health can be considered both under Article 36 TFEU as well as under the mandatory requirements.[165] It is submitted that we should focus more on what justifications do (i.e. balancing a prohibition that would otherwise be too strict) rather than where they originate (e.g. an explicit Treaty provision or a general principle of EU law).

---

[162] Such as *Omega*, *supra* note 128, at 34. The ECJ appeared to make a specific reference to Germany's history as relevant context why the protection of human dignity was specifically important (even though, in that case, human dignity was already considered as a general principle of EU law).

[163] Craig & de Búrca 2003, *supra* note 113, p. 661.

[164] Albors-Llorens 2007, *supra* note 80, at 1731. See also Craig & de Búrca (*ibid*.), at 660.

[165] *PreussenElektra*, *supra* note 132 (Article 36 TFEU); *Commission v Denmark*, *supra* note 158 and *Commission v. Belgium*, *supra* note 158 (mandatory requirements).

2.4 Other derogations under the free movement of goods

The paragraphs above have made clear how Article 36 TFEU and the unwritten 'mandatory requirements' may justify a restriction of the free movement of goods. However, many commentators have argued that the scope of Article 34 TFEU was still too wide and unjustifiably caught measures that had no real bearing on inter-State trade.[166]

The Court seemed receptive of this criticism, and has developed case law to limit *Dassonville*'s wide scope of application.[167] In a number of cases, starting with *Krantz*, the ECJ has confirmed that Article 34 TFEU does not apply to national measures if their effect on trade is 'too uncertain and indirect'.[168] The *Krantz* judgment does not seem to require a *de minimis* test.[169] Instead, the 'indirect' limb calls for an examination of the causal link between the conduct under review and the impact on trade,[170] filtering out those cases where the link is too weak or, in other words, too remote. This explains why the examination is often called the 'remoteness' test.[171] In addition, I think that the 'uncertain' limb acknowledges that, even though a *potential* restriction of trade may already be prohibited, it must go beyond being merely hypothetical.

Apart from *Krantz*, a different category of derogations developed from the so-called 'Sunday trading' cases;[172] a string of case law that drew particular ire. The ECJ found that Article 34 TFEU extended to

[166] E. White, 'In search of the limits to Article 30 of the EEC Treaty', (1989) 26 CMLRev 235.

[167] T. Horsely, 'Unearthing buried treasure: art.34 TFEU and the exclusionary rules', (2012) 37 ELRev 734, at 742.

[168] See e.g. Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* [1990] E.C.R. I-583, para 11; Case C-291/09 *Francesco Guarnieri & Cie v Vandevelde Eddy* [2011] ECR I-2685, para 17. See also Horsely 2012 (*ibid*.), at 737.

[169] Such a *de minimis* criterion had already been rejected in Case 177 and 178/82 *Officier van Justitie v Van de Haar* [1984] ECR 1797, para 13.

[170] *Guarnieri & Cie*, *supra* note 168, para 17. For a debate whether this test can be equated with a causation test, see e.g. Horsely 2012, *supra* note 167, at 741 *et seq*.

[171] See e.g. E. Spaventa, 'The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of Keck, Remoteness and Deliège', in C. Barnard and O. Odudu (eds), *The Outer Limits of European Law* (Hart Publishing: Oxford 2009), at 245.

[172] Craig & de Búrca 2003, *supra* note 113, at 645.

domestic prohibitions on retail shops from selling on Sundays,[173] suggesting that such a measure might affect the number of goods sold from other Member States. This reasoning is notoriously shaky, because such a rule does not, in itself,[174] affect the sale of goods from other Member States any more than it affects domestic goods. As Weatherill noted, not all limits on commercial freedom can be connected to a cross-border aspect of the activity.[175]

Later, the ECJ seemed cognisant that it had taken a bridge too far, and introduced a category under which a national measure, even if it may have *some* effect on trade, may fall outside of the scope of Article 34 TFEU altogether. In *Keck*, the ECJ had to decide whether a French rule prohibiting retailers to resell at a loss was contrary to Article 34 TFEU, as the rule may restrict the volume of sales (including sales from other Member States).[176] The case clearly sought to temper the 'increasing tendency' by traders to invoke Article 34 TFEU to challenge 'any' rule that may limit their commercial freedom.[177] The ECJ held that so-called 'selling arrangements' by Member States – as opposed to 'product requirements' – fall outside the scope of Article 34 TFEU.[178] The *Keck* derogation does require that the measure may not affect, in law and in fact, domestic products differently compared to those from other Member States.[179]

Although many agreed with the final outcome in *Keck*, the ruling was subject to hefty criticism.[180] Commentators felt that the judgment was overly formalistic, and that it would be difficult, in practice, to draw a clear line between 'selling arrangements' and 'product requirements'.[181]

---

[173] Case C-145/88 *Torfaen v B&Q* [1989] ECR 3851; Case C-169/91 *Stoke-on-Trent* [1992] ECR I-6635.

[174] Of course there may be a context where such rules do hinder the market access of goods from other EU Member States more than they do domestic goods. The ECJ took into account this possibility in various cases, such as *De Agostini*, *infra* note 184.

[175] S. Weatherill, 'After Keck: Some Thoughts on how the Clarify the Clarification', (1996) 33 CMLRev 885, 904-906: 'the limit on commercial freedom could not be directly connected to any cross-border aspect of the activity'.

[176] Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* ('*Keck*') [1993] ECR I-6097.

[177] *Ibid*., para 14.

[178] *Ibid*., para 17.

[179] *Ibid*., para 16.

[180] Craig & de Búrca 2003, *supra* note 113, at 656.

However, apart from the distinction that *Keck* made, the judgment also provides a clue about its underlying goal. The ECJ sought to condone a measure that, even though it may affect the sale of products from other Member States, does not 'prevent their access to the market or […] impede access any more than it impedes the access of domestic products'.[182] Several commentators, including Weatherill, have argued that the impact on market access should be the key focal point (instead of labelling the measure based on its 'nature').[183] The criticism did not fall on deaf ears. Subsequent case law did indeed shift the focus more towards the degree in which the measure affected market access.[184] In the 2009 *Motorcycle trailers* judgment, the ECJ held that Article 34 TFEU applies to '[a]ny […] measure which hinders access of products originating in other Member States to the market of a Member State'.[185]

So despite VerLoren van Themaat's warning that *Keck* could herald divergence between the internal market rules and the competition rules, the case law seems to have come full circle.[186] The cases examined above show that one must take into account the context and the effects of a measure before labelling it as a 'selling arrangement'. Even though the term 'selling arrangement' is still unfamiliar to competition law, the underlying conceptual analysis seems much the same. Indeed, Craig & de Búrca have suggested that the 'market access' perspective allows the internal market rules to strive for the

---

[181] Horsely 2012, *supra* note 167, at 745; and the articles cited by Horsely at fn 69.

[182] *Keck*, supra note 176, para 17.

[183] Weatherill, *supra* note 175. See also N. Reich, 'The 'November Revolution' of the European Court of Justice: Keck, Meng and Audi Revisited', (1994) 31 CML Rev 459. See, differently, S. Enchelmaier, 'The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck', (2003) 22 YEL 249.

[184] See, in particular, Case C-405/98 *Konsumentombudsmannen v Gourmet International* [2001] ECR I-1795, paras 21 and 24. Earlier cases include Case C-412/93 *Leclerc-Siplec v TF1 and M6* [1995] ECR I-179, para 22; Case C-418/93 *Semeraro Casa Uno* [1996] I-2975, para 24; and Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen v De Agostini and TV-Shop* [1997] ECR I-3843, paras 39 and 44.

[185] Case C-110/05 *Commission v Italy* ('*Motorcycle Trailers*') [2009] ECR I-519, paras 36-37.

[186] See P. VerLoren van Themaat, 'Gaat de Luxemburgse rechtspraak over de vier vrijheden en die over het mededingingsbeleid uiteenlopen?', (1998) SEW 398.

maximisation of sales, an optimal allocation of resources and free choice for consumers.[187] These objectives are clearly in line with the aims of competition law.

Taking the previous paragraphs together, the *Krantz* and *Keck* lines of case law clearly differ in their approach. The first is essentially about a lack of causation, whereas the second is a rule-oriented approach that has gradually developed in a market access test. At the same time, their aims are strongly related. According to Horsely, both doctrines seek to adopt the principle of subsidiarity, which means that the Treaty should only prohibit measures if there is a sufficiently strong nexus with intra-EU trade.[188] I agree that there should be a sufficiently strong connection between the relevant conduct and the interest that the Treaty seeks to protect – in this case the internal market. This reasoning can clearly be transposed to the prohibition of Article 102 TFEU. Dominant undertakings still have a degree of commercial leeway; a degree of freedom that cannot be set aside simply because of a hypothetical restriction of competition.

3 JUSTIFICATIONS IN EU COMPETITION LAW

3.1 Introduction

Apart from EU internal market law, justifications are also highly relevant in EU competition law. This thesis mainly deals with the role of justifications for the purposes of Article 102 TFEU. However, other parts of EU competition law also offer valuable insights on how justifications may exonerate a practice that would otherwise be prohibited. The following sections examine lessons for Article 102 TFEU by discussing Article 101 TFEU and the EU rules on merger control.[189]

---

[187] Craig & de Búrca, supra note 113, at 656.

[188] Horsely 2012, *supra* note 167, at 752-753. Horsely refers to G. Bermann, 'Taking Subsidiarity Seriously', (1994) 94 Columbia Law Rev 331, 400. See also Spaventa 2009, *supra* note 171, at 264. Spaventa puts more emphasis on the absence of a sufficiently strong effect on intra-EU trade.

[189] Other segments of EU competition law, such as the State aid rules, shall not be discussed.

3.2 Justifications under Article 101(3) TFEU

3.2.1 The relationship between Article 101 TFEU and Article 102 TFEU

Article 101(1) TFEU prohibits anti-competitive agreements which may affect trade between Member States.[190] Acknowledging that there may be reasons to condone such agreements nonetheless, Article 101(3) TFEU provides a number of conditions for an exemption. Before turning to its substance, it is apt to discuss why lessons from Article 101 TFEU are relevant for Article 102 TFEU in the first place.

Articles 101 and 102 TFEU clearly have a different scope of application.[191] It is thus little surprise that the ECJ held in *Società Italiana Vetro* that it is not sufficient for the Commission to 'recycle' the arguments for Article 101 TFEU when it seeks to establish an infringement of Article 102 TFEU.[192] In addition, guidelines by the Commission confirm that 'not all restrictive agreements concluded by a dominant undertaking constitute an abuse of a dominant position'.[193]

At the same time, Articles 101 and 102 TFEU do share important commonalities. Both provisions 'seek to achieve the same aim',[194] namely 'the maintenance of effective competition'.[195] This calls for a degree of

---

[190] In full: agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

[191] Case 6/72 *Europemballage Corporation and Continental Can Company v Commission* ('*Continental Can*') [1973] ECR 215, para 25, noting that the provisions function at different levels. Nazzini argues that the lack of codification of objective justification within the context of Article 102 TFEU means that there should be no full consistency between Article 101 and 102 TFEU. See R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford: OUP, 2011), p.305.

[192] Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro and Others v Commission* [1992] ECR II-1403, para 360.

[193] See the Article 101(3) guidelines, *supra* note 198, para 106. The Commission gives the example of a situation 'where a dominant undertaking is party to a non-full function joint venture, which is found to be restrictive of competition but at the same time involves a substantial integration of assets'.

[194] Continental Can (*ibid.*), para 25. Confusingly, the ECJ held in *Compagnie Maritime Belge* that the objectives of the provisions 'must be distinguished'. See Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge and Dafra-Lines v Commission* [2000] ECR I-1365, para 33. I think this refers to the different types of conduct that the provisions target, rather than an actual distinction in their underlying goals.

'logical coherence',[196] but it is unclear how far such coherence goes. It is little controversial that the application of Articles 101 TFEU does not preclude application of 102 TFEU if all their conditions have been met.[197] But can Article 102 TFEU still be applied to an agreement that is exempted under Article 101(3) TFEU? The case law seems little consistent on this point. Some judgments suggest that Article 102 TFEU can still be applied under such circumstances,[198] whereas other judgments suggest it cannot.[199]

The first category of cases displays judicial reluctance to transpose an exemption based on Article 101(3) to 102 TFEU. This hesitation is particularly understandable under the 'old' competition regime, under

---

[195] Continental Can (*ibid.*), para 25. See also Case T-51/89 *Tetra Pak Rausing v Commission* ('*Tetra Pak I*') [1990] ECR II-309, para 22. The General Court held that the provisions 'pursue a common general objective', but nonetheless constitute 'two independent legal instruments addressing different situations'.

[196] *Tetra Pak I (ibid.)*, para 21. In the earlier *Continental Can* (*ibid.*), para 25, the ECJ held that the provisions 'cannot be interpreted in such a way that they contradict each other'. The ECJ also held that 'a diverse legal treatment would make a breach in the entire competition law which could jeopardize the proper functioning of the common market'.

[197] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para 116; Case 66/86 *Ahmed Saeed* 1989 ECR 803, para 37. *Tetra Pak I (ibid.)*, para 21; *Compagnie maritime belge*, *supra* note 194, paras 33 and 130.

[198] Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, para 75: 'an exemption under Article [101](3) of the Treaty does not prevent the application of Article [102 TFEU]'. See also *Tetra Pak I (ibid.)*, para 25: 'the grant of exemption, whether individual or block exemption, under Article [101](3) cannot be such as to render inapplicable the prohibition set out in Article [102 TFEU]'. See, further, Case T-66/01 *ICI v Commission* [2010] ECR II-2631, para 25. See also Communication from the Commission, Guidelines on the application of Article [101](3) of the Treaty, OJ [2004] C 101/97, para 106 and Commission's guidelines on vertical restraints, *infra* note 201, para 127.

[199] See Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line v Commission* [2003] ECR II-3275, para 1456: 'where the Commission grants an individual exemption pursuant to Article [101](3) of the Treaty in respect of agreements notified by undertakings holding a dominant position it indirectly bars itself, in the absence of a change in the facts or the law, from considering that the same agreements constitute abuses contrary to Article [102] of the Treaty'. See also Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209, paragraphs 117 and 119. As the Commission held that the license system under review could be exempted under Article 101(3) TFEU, this 'would accordingly lead to the conclusion that there was no infringement under Article [102 TFEU]'. The ECJ rejected an appeal, see Case C-171/05 P *Laurent Piau v Commission* [2006] ECR I-37. See, further, P.-J. Slot & A. Johnston, *An Introduction to Competition Law* (Hart Publishing: Oxford and Portland, Oregon 2006), at 134 et seq.

which agreements had to be notified and examined *ex ante*, whereas the abuse of dominance was examined *ex post*. Since the abolishment of the notification system,[200] both provisions are examined *ex post*. There is currently more ground to uphold consistency between these provisions, and reduce the interpretative gap between Article 101(3) TFEU and 'objective justification' for the purposes of Article 102 TFEU.[201]

Indeed, the gap between these two forms of derogation appears to be getting smaller. The conditions of Article 101(3) TFEU are increasingly finding their way into the 'objective justification' concept within Article 102 TFEU. This Commission relies on these conditions in its guidance document on its Article 102 TFEU enforcement priorities.[202] Similarly, in its recent *Post Danmark* judgment, the ECJ introduced a test for pro-competitive effects that is strikingly similar to the wording of Article 101(3) TFEU.[203] I welcome the endeavour towards conceptual coherence between Article 101(3) TFEU and objective justification under Article 102 TFEU. Although Article 102 TFEU has no paragraph (3), there is no clear reason to label conduct as an abuse if its pro-competitive gains outweigh its anti-competitive effects.

3.2.2 The substance of Article 101(3) TFEU

Having established the conceptual relevance of Article 101 TFEU for Article 102 TFEU, it is apt to examine its exemption framework in more detail. The prohibition of Article 101(1) TFEU does not apply to agreements that meet the conditions of Article 101(3) TFEU. These requirements are as follows.

1. The agreement should contribute to improving the production or distribution of goods or to promoting technical or economic progress. The alleged benefit must entail 'appreciable objective advantages', rather than simply represent a private benefit to the parties

---

[200] Under Regulation 1/2003.

[201] See the Commission guidelines for the assessment of vertical restraints, OJ [2010] C 130/1, para 127. The Commission argues that 'since Articles 101 and 102 both pursue the aim of maintaining effective competition on the market, consistency requires that Article 101(3) be interpreted as precluding any application of the exception rule to restrictive agreements that constitute an abuse of a dominant position'.

[202] Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7, para 30. It should be noted here that I do think that the Commission puts too much focus on efficiencies, as shall be discussed in more detail below.

[203] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] nyr, para 42.

themselves.[204] The benefits must be able to offset the competition issues identified under Article 101(1) TFEU.[205]

2. The agreement should allow consumers a fair share of the resulting benefits. According to the Commission, the notion of 'consumers' should include both end consumers and intermediate customers.[206]
3. The agreement may not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives. The Commission has suggested that the condition requires a test of (i) whether the restrictive agreement is itself necessary in order to achieve the pro-competitive effect; and (ii) whether the individual restrictions of competition flowing from the agreement are reasonably necessary for the attainment of the efficiencies.[207] Although this does not require undertakings to consider 'hypothetical and theoretical alternatives', they do need to show 'why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient'.[208]
4. The agreement may not afford the contracting parties the possibility of eliminating competition in respect of a substantial part of the products in question.[209] The condition asks for an analysis of the remaining competitive pressures on the market still left by the agreement under review.[210] In the Commission's view, the test allows for a sliding scale approach: '[t]he more

[204] See *Consten and Grundig*, *supra* note 147, at 348-349. See also Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, para 247. See also Guidelines on Vertical Restraints, OJ [2010], C 130/01, para 124. Such advantages may arise not only on the relevant market, but also on other markets. See Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011, para 343.

[205] Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, paras 183 to 185.

[206] I.e. all 'direct or indirect users'. See Commission guidelines on Article 101(3), *supra* note 198, para 84.

[207] Commission guidelines on Article 101(3), *supra* note 198, para 73. The Court did not consider the indispensability criterion to be met e.g. in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole television and Others v Commission* [1996] ECR II-649, para 93.

[208] Commission guidelines on vertical restraints, *supra* note 204, para 125.

[209] The Court did not consider this criterion to be met e.g. in Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and Others v Commission* [2002] ECR II-3805, para 86. See also *GlaxoSmithKline Services* (GC), supra note 204, para 233.

[210] Commission guidelines on vertical restraints, *supra* note 204, para 127.

competition is already weakened in the market concerned, the slighter the further reduction required for competition to be eliminated within the meaning of Article [101](3)'.[211]

It is clear that the conditions of Article 101(3) TFEU, as enumerated above, seek to balance an agreement's pro- and anti-competitive effects. The *European Night Services* ('*ENS*') judgment provides an example of how a balancing test can be done.[212] The case concerned agreements between various incumbent European rail operators to provide joint overnight rail services through the Channel Tunnel.[213] The General Court considered that the duration of the exemption granted under Article 101(3) TFEU should be sufficient to achieve the relevant benefits,[214] and to allow the parties to achieve a satisfactory return on their investments.[215] This reasoning is clearly transplantable to Article 102 TFEU, as Slot and Johnston have noted.[216]

The balancing test may raise the question to what extent the beneficiairies of efficiencies must be the same as those who 'suffer' from the anti-competitive effects. In my view, the 'fair share' criterion implies that, overall, consumers must at least be compensated for the negative effects of the agreement.[217] This does not necessarily require that consumers benefit in exactly the same degree as other market participants, as long as their share is still fair. A proportionality test, *stricto sensu*, will be able to examine whether there is still an equitable balance in terms of how the benefits accrue to different market participants. In addition, the 'fair share' test does not require that benefits must accrue to each and every consumer individually.[218] Any other approach would be highly impractical. It is

[211] Commission guidelines on Article 101(3), *supra* note 198, para 107.

[212] Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141.

[213] Case IV/34.600 *Night Services* [1994] OJ L 259/ 20.

[214] *ENS*, *supra* note 212, para 230. Note that the GC did not find the agreement contrary to Article 101(1) TFEU in the first place. However, it did examine how Article 101(3) TFEU would have been applied to this case.

[215] *ENS*, *supra* note 212, para 231.

[216] Slot and Johnston 2006, *supra* note 199, at 133-134.

[217] See also Guidelines on vertical restraints, supra note 204, para 126, and the Guidelines on Article 101(3) TFEU, *supra* note 198, para 85.

[218] Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paras 70 and 72.

virtually impossible to prove that the conduct under review does not leave any consumer worse off.[219] As a final remark, there may be very limited overlap in the groups of 'beneficiaries' and (involuntary) 'benefactors' if they are present in different levels of the value chain. A restriction of competition in a procurement market may be particularly harmful to upstream suppliers, even though it may be beneficial to downstream customers due to better buying conditions that are subsequently passed on. In such a situation, it is not evident that the upstream suppliers must receive compensation of the adverse effects that they suffer.

3.2.3 Article 101(3) TFEU – efficiencies and beyond?

The balancing test of Article 101(3) TFEU clearly allows efficiencies to be taken into account. A more difficult question, however, is to what extent the provision can and should *only* be responsive to efficiencies.[220] The Commission currently seems to view the role of Article 101(3) TFEU as solely confined to matters of efficiency.[221]

I disagree with this approach, to the extent that efficiency is strictly defined as the maximisation of (consumer) welfare.[222] First, competition concerns may be broader than efficiency issues. Second,

---

[219] Remember that a loss in consumer welfare due to anti-competitive practices largely follows from the deadweight loss. Deadweight loss implies that certain transactions are no longer made. I fail to see how one could reverse-engineer the competitive outcome for each and every consumer, and thus be able to balance pro- and anti-competitive effects on an individual basis.

[220] For two diverging views on this topic, see O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP: Oxford 2006) and C. Townley, *Article 81 EC and Public Policy* (Hart Publishing: Oxford 2009). This debate essentially boils down to the view one holds about the objectives that competition law strives for, or should strive for.

[221] See e.g. the Commission guidelines on horizontal agreements, OJ [2011] C 11/1, section 2.3.1; as well as the Guidelines on vertical restraints, supra note 204.

[222] It should be noted, however, that the wider one's interpretation of efficiency is, the more the conclusion is warranted that Article 101(3) TFEU only accommodates such considerations.

although 'welfare' can arguably be subsumed under the objectives pursued by the Treaty,[223] that does not mean that efficiency is the *only* relevant concern while applying the competition rules.[224]

Several ECJ judgments and Commission decisions have confirmed that the analysis of Article 101 TFEU is *not* restricted to a mere efficiency analysis.[225] For example, the protection of the internal market plays a key role in the interpretation of Article 101 TFEU.[226] As a consequence, agreements that segment markets along national borders are likely to be prohibited.[227] The ECJ considers that such agreements obstruct the economic interpenetration of national markets, contrary to the internal market objective of the Treaty.[228] It is submitted that this internal market goal, even though it may often lead to efficiency (e.g. through economies of scale), is not the same as an efficiency standard.

Think of a case of price discrimination. A particular type of content (e.g. broadcasting rights of the domestic football league) may be particularly valuable in its home Member State, and less so in other Member States.[229] This may be due to a lower willingness to pay for the license, for example because the foreign football league is considered less interesting than the domestic league. It may also be due to a lower ability to pay, for example because of the Member State's small population or low GDP *per capita*. Either way, it makes perfect economic sense for the rights holder to adjust the price according to

---

[223] Article 3(1) TEU states that the EU aims to promote 'the well-being of its peoples'. Article 3(3) TEU provides that the EU shall 'work for the sustainable development of Europe based on balanced economic growth'. It is submitted that these provisions are an apt basis for policies that support (consumer) welfare.

[224] See also P. Lugard & L. Hancher, 'Honey, I Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty', (2004) 25 ECLR 410.

[225] G. Monti, 'Article 81 EC and Public Policy', (2002) 39 CMLRev 1057. See, further, R. Whish, *Competition Law* (OUP: Oxford 2009), at 152-155. Whish refers, *inter alia*, Case IV/33.814 *Ford/Volkswagen* [1993] OJ L 20/14, where the Commission took note of the economic benefits the agreement under review would have for one of the poorest regions in the EU.

[226] See e.g. *Consten and Grundig*, *supra* note 147, showing the importance of internal market considerations.

[227] For an early case law example, see e.g. Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, para 22.

[228] Joined Cases C-403/08 and C-429/08 *FAPL* [2011] ECR I-9083, para 139. See also e.g. Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I-7139, paragraph 65. Such agreements are considered as a restriction 'by object' under Article 101(1) TFEU.

[229] These facts are inspired by *FAPL* (*ibid*.).

the prospective customer's valuation.[230] And to ensure the price differentiation's effectiveness, it also makes sense if the rights holder does not allow parallel trading across borders.[231] If competition law prohibits such a system, it may well lead to inefficient results. The price mechanism will be less flexible in matching supply and demand. In addition, it may lead to substantial reduction in output. If the rights holder is faced with net losses due to parallel trading, it may well choose to raise the price to such a level that exceeds the willingness or ability to pay in many Member States. Stringent application of the internal market prerogative may thus, ironically, lead to less cross-border content being shown and a sub-optimal market result.[232]

Even apart from the internal market, EU competition law may attach relevance to issues that do not fit neatly into an efficiency analysis. The early *Metro* judgment made clear that: 'the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible'.[233] Indeed, the General Court confirmed in *Métropole télévision* that 'considerations connected with the pursuit of the public interest' may indeed be taken into account as relevant context while assessing whether an agreement can be subsumed under Article 101(3) TFEU.[234]

This inclusive approach has prompted a broad interpretation of the conditions stipulated by Article 101(3) TFEU. For example, the *Metro* and *Remia* judgments show that the improvement in the 'production […] of goods' may include benefits to the provision of employment – even though strict application of an efficiency test is unlikely to attach must weight to such considerations.[235] In *Laurent*

---

[230] This was clearly not the outcome in *FAPL* (*ibid*.).

[231] The ECJ seems not to agree: in *Sot. Lélos* (supra note 228, at 65), it referred specifically to agreements 'aimed at preventing or restricting parallel exports' as a restriction by object under Article 101(1) TFEU.

[232] In *Sot. Lélos* (supra note 228, at 68), the ECJ seemed aware of such a risk in the pharmaceutical sector: 'the [EU] rules on competition are also incapable of being interpreted in such a way that, in order to defend its own commercial interests, the only choice left for a pharmaceuticals company in a dominant position is not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level'. However, the same fear does not feature as prominently in *FAPL* (*supra* note 228).

[233] Case 26/76 *Metro v Commission* [1977] ECR 1875, para 65.

[234] *Métropole télévision, supra* note 207, para 118.

[235] *Metro*, *supra* note 233, para 43; Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, para 42.

Piau, the General Court held that 'economic progress' may include a beneficial effect to the professional and ethical standards for a certain group of professionals.[236]

Apart from these cases, the fact that Article 101(3) TFEU accommodates other interests than simply efficiency benefits is already clear from a plain reading of the text. The requirement that consumers should receive a 'fair share' of the benefits resulting from the agreement finds no basis in a standard that simply focuses on efficiencies. From an efficiency perspective, it is merely relevant whether the *net* effect on welfare is beneficial or not, and accordingly provides no answer as to whether the allocation of those benefits is 'fair' or not.

Notwithstanding these precedents, Whish has noted that a more recent ruling, namely *GlaxoSmithKline Services*,[237] suggested that the General Court was comfortable in adopting the Commission's efficiency-based approach towards Article 101(3) TFEU.[238] I disagree with this interpretation. In its judgment, the General Court examined whether the Commission had provided sufficient evidence and reasoning in its rejection of GlaxoSmithKline's plea based Article 101(3) TFEU.[239] As GlaxoSmithKline relied on an efficiency plea, it makes sense that the General Court also couched its ruling in these terms[240] – few would contend that efficiency *cannot* be a part of Article 101(3) TFEU. However, this does not mean, *a contrario*, that non-efficiency arguments have no place anymore within Article 101(3) TFEU.

In my opinion, neither the Treaty nor the case law provides a solid basis to interpret Article 101(3) TFEU in such a way that it can only accommodate efficiency considerations. As the case law has acknowledged the importance of many non-efficiency factors that the Commission also seems to hold dear,[241] one

---

[236] Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209. The case concerned a mandatory license system for the agents of football players.

[237] See *GlaxoSmithKline Services* (GC), *supra* note 204. The ECJ dismissed an appeal in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission* [2009] I-9291.

[238] Whish 2009, *supra* note 225, at 156.

[239] The General Court concluded that the Commission had not provided sufficient reasoning.

[240] *GlaxoSmithKline Services* (GC), *supra* note 204, para 280. The General Court noted that Article 101(3) TFEU 'allows the exemption of agreements producing a gain in efficiency'.

[241] Such as the protection of the internal market. Even though this may indirectly strive towards efficiency, it is not an efficiency-based interest itself.

could wonder why the Commission appears so eager to narrow the scope of Article 101(3) TFEU. Perhaps the Commission feared that the decentralization of competition law enforcement, brought about by Regulation 1/2003, would lead to inconsistencies if NCAs and domestic courts were to include non-efficiency considerations in their decisions. Or perhaps the Commission wanted its enforcement to be more in line with the efficiency-focused approach in the US. Whatever the reason, my contention is that non-efficiency factors can – and should – still matter for the purposes of Article 101(3) TFEU.

3.2.4 Lessons from Article 101(3) TFEU

The examination above contains, in my view, several lessons for objective justification within the meaning of Article 102 TFEU. Article 101(3) TFEU acknowledges that seemingly restrictive conduct by undertakings may have different facets and conflicting effects, and provides a legal framework for the assessment thereof. The paragraphs above have shown that the remit of Article 101(3) TFEU is wide and can encapsulate efficiency as well as non-efficiency considerations.

The interpretation of the conditions of Article 101(3) TFEU also provides food for thought for Article 102 TFEU. Benefits must have a wider remit than simply accruing to the undertakings themselves. Consumers, as a group, must at least be compensated for the anti-competitive effects of the conduct. The conduct must also be necessary for the benefits to arise – but that does not require undertakings to consider a course of action that is unrealistic in the specific circumstances of that market. Finally, as regards the condition that the restriction may not eliminate residual competition, it is relevant that the Commission proposes a sliding scale approach that takes into account that the competition is 'already weakened' by the restrictive agreement. There is an obvious parallel with Article 102 TFEU, as the case law on that provision considers competition to be weakened due to the existence of a dominant position. The 'weakened' level of competition is a matter of degree, again underlining the importance of context.

3.3 Derogations under Article 101(1) TFEU

3.3.1 Introduction

Apart from Article 101(3) TFEU, the ECJ has also considered several other grounds to remove conduct from the ambit of Article 101 TFEU. If such a ground applies, an agreement does not fall within the

scope of Article 101(1) TFEU in the first place – thus removing the need to consider an exemption under Article 101(3) TFEU.[242]

3.3.2 Ancillary restraints

There is a wealth of case law on agreements that may look like restrictions at first sight,[243] but have escaped the application of Article 101(1) TFEU nonetheless. These restrictions are often ancillary to otherwise legitimate practices. In *Société Technique Minière*, the ECJ found that an exclusivity provision laid upon a distributor may not infringe Article 101(1) TFEU if it 'seems really necessary for the penetration of a new area by an undertaking'.[244] In *Pronuptia*, the ECJ held that Article 101(1) TFEU does not apply to the provisions of franchise agreements for the distribution of goods which are 'strictly necessary' for the franchise system to function.[245] Such agreements must, however, be limited in terms of their duration and scope in order to meet the proportionality test.[246]

Seemingly restrictive provisions in selective distribution schemes may also escape application by Article 101(1) TFEU. In *Metro*, the ECJ held that the prohibition does not apply to a selective distribution network to the extent that resellers are chosen on the basis of objective and non-discriminatory criteria of a qualitative nature, that such a network is needed to maintain the quality and proper use of the relevant product and, finally, that the criteria laid down do not go beyond what is necessary.[247] In *AEG-Telefunken*, the ECJ made clear that there are 'legitimate requirements' which may justify a reduction of competition on price in favour of other types of competition. [248] It provided the example of 'the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products'.[249] Such selective distribution systems, insofar as they aim to improve competition

---

[242] It is often referred to as the 'rule of reason'. However, Whish has aptly explained why this qualification, which originates from US antitrust law, should be avoided. Whish 2009, *supra* note 225, at 133.

[243] Otherwise Article 101(1) TFEU would not come into view.

[244] Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, at 250.

[245] Case 161/84 *Pronuptia* [1986] ECR 353, paras 27 and 33.

[246] *Remia*, *supra* note 235. The case concerned a non-competition clause related to a transfer of an undertaking.

[247] *Metro*, *supra* note 233, paragraph 20; Case 31/80 *L'Oréal* [1980] ECR 3775, paragraphs 15 and 16.

[248] Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, para 33. See also *Pierre Fabre*, *supra* note 116, para 40.

[249] *Ibid*.

in relation to factors other than price, are considered in conformity with Article 101(1) TFEU. The underlying *rationale* is that such restrictions are seen as restraint ancillary to secure the implementation of a lawful agreement, also dubbed an 'inherent restriction'.[250] In sum, such agreements should be accepted as they seek to achieve a legitimate commercial purpose.[251]

A recent case on a selective distribution scheme is *Pierre Fabre*. The case, triggered by a Paris Court of Appeal reference for a preliminary ruling, concerned a *de facto* ban by Pierre Fabre on the sale of its cosmetics via the Internet.[252] The ECJ reiterated that such a selective distribution scheme is a restriction by object within the meaning of Article 101(1) TFEU, but *only* 'in the absence of objective justification'.[253] It is up to the referring court to decide whether the restrictions of competition pursue legitimate aims in a proportionate manner.[254] Interestingly, the ECJ based its judgment on earlier case law related to the free movement of services,[255] suggesting that it seeks to bring these areas of EU law closer together.

The *Pierre Fabre* ruling is worthy of note for a different reason as well. Earlier judgments, such as *IAZ International*, have held that a restriction by object *cannot* escape the application of Article 101(1) TFEU on the basis that the agreement under review also pursued other, legitimate, objectives.[256] Is this consistent with the 'objective justification' approach by *Pierre Fabre*?[257]

---

[250] Mortelmans 2001, *supra* note 109, at 628.

[251] Whish 2009, *supra* note 225, at 126.

[252] *Pierre Fabre*, *supra* note 116, paras 2 and 14.

[253] *Ibid*., para 39. At para 46, the ECJ did note that the aim of 'maintaining a prestigious image' is not a legitimate aim that can remove an agreement from the ambit of Article 101(1) TFEU. See also the Opinion as regards *Pierre Fabre*. AG Mazák noted that a legitimate objective 'must be of a public law nature and therefore aimed at protecting a public good' (see para 35).

[254] *Pierre Fabre*, *supra* note 116, para 43.

[255] Case C-322/01 *Deutscher Apothekerverband v DocMorris* [2003] ECR I-14887, paras 106, 107 and 112; Case C-108/09 *Ker-Optika* [2010] I-12213, para 76. In the latter case, the ECJ found that legislation prohibiting the online sale of contact lenses was a disproportionate means to protect public health.

[256] *Consten & Grundig, supra* note 147, at 342; Joined Cases 96 to 102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and Others v Commission* [1983] ECR 3369, paras 23-25. See also; Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, para 122; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-

It is submitted that these approaches can indeed be reconciled. Judgments such as *T-Mobile* confirm that a restriction by object can only be found after an analysis of the content and the objectives of the agreement as well as the relevant economic and legal context.[258] This means that legitimate objectives *can* be taken into account to the extent that they provide relevant context to explain the agreement's purpose.[259] Importantly, such reasons ('objective justification', in the *parlance* of *Pierre Fabre*) should be examined *before* being able to label the agreement as a restriction by object.[260] However, once an agreement has indeed been labelled as a restriction by object, it can no longer be removed from the

8375, para 491. See also Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, para 64: 'an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives'.

[257] Bailey reconciles these two strands of case law as follows: 'the Court in *Pierre Fabre* was considering whether certain types of *prima facie* restrictive conduct fall outside Article 101(1), as opposed to whether a restriction by object can be saved by a legitimate objective under Article 101(1): a subtle, but important, difference'. See D. Bailey, 'Restrictions of competition by object under Article 101 TFEU', (2012) 49 CMLRev 559, at 581.

[258] Case C-8/08 *T-Mobile and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 27. See also *GlaxoSmithKline Services* (ECJ), *supra* note 237, para 58; Case C-209/07 *Beef Industry Development Society and Barry Brothers ('BIDS')* [2008] ECR I- 8637, paras 16 and 21. More recently, see Case C-226/11 *Expedia v Autorité de la concurrence and Others* [2012] nyr, para 21.

[259] Relevant context in *Pierre Fabre* included that it concerned a vertical agreement. The Commission guidelines on vertical restraints (*supra* note 201) note that *prima facie* anti-competitive agreements may be objectively justified. At para 60, the guidelines provide the example of a public prohibition on the sale of dangerous substances. In its Article 101(3) guidelines (*supra* note 198, para 18), the Commission holds that: 'certain restraints may in certain cases not be caught by Article [101](1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature'.

[260] Indeed, the Court held in *IAZ International Belgium* (*supra* note 256, para 25) that, in order to establish the 'purpose' of the agreement, regard must be had to its entire legal and economic context. See also Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa* ('*Slovenská*') [2013] ECR nyr, para 19-21. The ECJ rejected an 'illegality defense' vis-à-vis an agreement that could already be seen as a restriction by object.

ambit of Article 101(1) TFEU:[261] the provision clearly applies to any such restriction. The only way that such a restriction can be condoned if through application of Article 101(3) TFEU.[262]

3.3.3 State compulsion

The cases above mainly concern situations where the agreement constitutes legitimate commercial conduct, and accordingly does not merit application of Article 101(1) TFEU. Activities may also escape that provision if State compulsion restricts undertakings from actually competing.[263] The most obvious example is where a State regulates all aspects of supply and demand, and substantially limits the ability to negotiate on price.[264] The defence will not easily be accepted, however. It will only succeed if the following three conditions have been met:[265]

(i) the State actually compels undertakings to act in a particular way; it is not sufficient if the State merely facilitates or encourages that conduct;

(ii) there is a legal basis for the State's compulsion; otherwise there is no clear reason why an undertaking could 'set aside' its obligations under the Treaty;

(iii) in the implementation of the governmental policy, the undertakings have no leeway to compete.

The underlying *rationale* is that conduct cannot be attributed to an undertaking if it acts out of compulsion. The reasoning is clearly transposable to Article 102 TFEU, where State compulsion should

---

[261] Joined Cases T-49 to 51/02 *Brasserie nationale and Others v Commission* [2005] ECR II-3033, para 85. I assume here that the agreement affects trade between Member States.

[262] Even a restriction by object can escape qualify for exemption under Article 101(3) TFEU, see Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, para 85. See also *Consten and Grundig*, *supra* note 147, pp. 342, 343 and 347.

[263] It should be noted that the national legislation itself may be contrary to EU law, according to the doctrine in Case C-198/01 *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato* ('*CIF*') [2003] I-8055; Case 267/86 *Van Eycke v ASPA* [1988] ECR 4769.

[264] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663, paras 63-68.

[265] Whish 2009, *supra* note 225, at 135.

offer a forceful justification under the heading of 'objective necessity' – connoting that the undertaking under review could not have acted differently.[266]

*3.3.4 Influence by (*quasi*) public bodies*

Apart from actual compulsion by the State, there may also be regulation by (*quasi*) public bodies that restricts competition but nevertheless falls outside the scope of Article 101(1) TFEU. The *Wouters* case provides a thought-provoking example.[267] The case concerned a prohibition by the Dutch Bar association of multi-disciplinary partnerships between members of the Bar and accountants. The question was whether this rule violated Article 101(1) TFEU. The ECJ first notes that such a blanket prohibition may indeed adversely affect competition, as it disallows the creation of a service for which there is possible demand and which may lower costs.[268]

However, the Court held that not every agreement between undertakings (or every decision by an association of undertakings) which restricts freedom of action necessarily falls within the scope of the Article 101(1) TFEU prohibition.[269] The ECJ noted that one must take into account the overall context of the conduct under review and, subsequently, whether the restrictions at play are inherent to those objectives.[270] The ECJ examined, in particular, the rule's legal framework (observing that no EU rules applied in the specific field) and its objectives (holding that the Dutch rule seeks to protect standards, such as strict professional secrecy, that do not apply vis-à-vis accountants).[271] It concluded that the rule

---

[266] See Commission guidance on Article 102 TFEU enforcement priorities, *supra* note 202, para 28-29 (noting the possibility for dominant undertakings to rely on objective necessity).

[267] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577. In the terminology of some commentators, the *Wouters* case is an example of the rule of reason: M. Schechter, 'The Rule of Reason in European Competition Law'. (1982) 2 LIEI 1; V. Korah, 'EEC Competition Policy – Legal Form or Economic Efficiency', (1986) 39 CLP 85. However, for forceful arguments why there should not be a US-style rule of reason in EU competition law, see R. Whish and B. Sufrin, 'Article 85 and the Rule of Reason', (1987) 7 YBEL 1, at 12-20.

[268] *Wouters* (*ibid*.), para 87-90.

[269] *Ibid*., para 97.

[270] *Ibid*.

[271] *Ibid*., paras 99-106.

under review did not infringe Article 101(1) TFEU,[272] as it was necessary for the proper functioning of the legal profession in the Netherlands.[273] Even though other Member States did not have such prohibitions, the ECJ did find the rule necessary *in the particular context* of the case. The ruling shows that the necessity test requires more than simply assessing whether similar actors have less restrictive practices in place.

The *Meca-Medina* judgment follows the line of reasoning in *Wouters*. The case concerned two swimming athletes who argued that certain anti-doping rules adopted by the International Olympic Committee were contrary to Article 101 TFEU. The Commission rejected their complaint.[274] On appeal, the General Court held that Article 101(1) TFEU did not apply to the relevant rules, as they pertained to a 'purely sporting interest' and, accordingly, had nothing to do with the 'economic relationships of competition'.[275] In a further appeal, the ECJ took a different tack.[276] It disagreed that rules that purely pertain to sports are, as such, outside the ambit of Article 101(1) TFEU.[277] However, the ECJ did consider that the relevant rules intended to conduct fair competitive sports, with the 'need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical

---

[272] Note that the ECJ was unable to apply Article 101(3) TFEU, because – at the time – this competence was a prerogative of the Commission upon a notification by the relevant undertakings. The *Wouters* case did not involve such a notification, but a ruling upon a preliminary reference arising from domestic litigation.

[273] *Wouters*, *supra* note 267, paras 109-110. The ECJ held that the rule did *not* go 'beyond what is necessary in order to ensure the proper practice of the legal profession', even though other Member States did allow partnerships between members of the Bar and accountants.

[274] Case COMP/38158, *Meca-Medina and Majcen/IOC* (1 August 2002).

[275] Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] II-3291, para 40-42. The General Court thus applied the case law on the freedom of movement of persons and services; see in particular Case 36/74 *Walrave and Koch* [1974] ECR 1405, para 8.

[276] Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.

[277] *Ibid*., paras 27 and 33. At para 42, the ECJ confirmed that '[n]ot every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101](1) [TFEU]'. See, more recently, *OTOC*, *infra* note 281, para 93. This finding applies even though the Treaty's system of undistorted competition 'can be guaranteed only if equality of opportunity is secured as between the various economic operators' (*OTOC*, para 88; Case C-49/07 *MOTOE* [2008] ECR I-4863.

values in sport'.[278] So even where such rules limit the appellants' freedom of action, they may fall outside the scope of Article 101(1) TFEU as they are 'justified by a legitimate objective'.[279] On the facts, the ECJ did not consider that the anti-doping rules were disproportionate and dismissed the actions brought by the appellants.[280]

Recent cases involving professional training for Portuguese chartered accountants[281] and the remuneration for Italian geologists[282] show that *Wouters* is still standing case law.[283] In both cases, the ECJ considered that the restrictions at issue were not necessary to reach their respective objectives.

3.3.5 Lessons from Article 101(1) TFEU

The cases above provide a number of lessons for the concept of objective justification for the purposes of Article 102 TFEU. If an undertaking engages in legitimate commercial conduct, its conduct shall not be caught by the prohibition in Article 101(1) TFEU. Such derogation exists even though Article 101(1) TFEU does not mention it, and despite the fact that another provision (Article 101(3) TFEU) exists to accommodate justifications. Apparently the ECJ saw an added value in considering that certain agreements, even though they involve *some* restriction of competition, are not sufficiently restrictive to fall within the ambit of Article 101(1) TFEU. This is clearly relevant for Article 102 TFEU, that lacks an exemption provision altogether.

---

[278] *Ibid*., para 43.

[279] *Ibid*., para 45. The Court added that such rules are 'inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes'.

[280] *Ibid*., paras 55 and 60.

[281] Case C-1/12 *Ordem dos Técnicos Oficias de Contas ('OTOC') v Autoridade da Concorrência* [2013] nyr, para 40: the Treaty rules on competition 'do not apply to an activity which, by its nature, its aim and the rules to which it is subject, does not belong to the sphere of economic activity'.

[282] Case C-136/12 *Consiglio nazionale dei geologi v AGCM* [2013] nyr.

[283] Note that it was not evident that the ECJ would continue to allow some sort of balancing act within Article 101(1) TFEU. Before the adoption of Regulation 1/2003, courts were unable to directly apply Article 101(3) TFEU, which may explain *Wouters* as a need to deploy a balancing act somewhere else – namely within Article 101(1) TFEU. However, the cases mentioned in *supra* notes 281 and 282 show that *Wouters* is still applicable after the adoption of Regulation 1/2003 (note that the *Meca-Medina* decision was pre-Regulation 1/2003, too).

Another lesson is that many reasons may be invoked on the basis of which ostensible restrictions can still escape application of Article 101(1) TFEU. Sometimes the anti-competitive elements under review were, in their context, simply not grave enough to merit application of Article 101(1) TFEU.[284] Or perhaps the restrictions were considered 'ancillary' to otherwise efficient business conduct (such as in *Pronuptia*) or legitimate aims pursued by bodies with a distinct regulatory competence (such as in *Wouters* and *Meca-Medina*). In any case, the case law appears to afford undertakings with a certain degree of 'commercial freedom' to run their business, taking in the realities of business practice and the relevant context in which the agreement under review has been set up. Conversely, the *Wouters* judgment confirms that not all activities restricting the freedoms of others come within the ambit of Article 101(1) TFEU. Only an in-depth analysis of the relevant context can reveal whether the agreement under review is not anti-competitive within the meaning of Article 101(1) TFEU.

Finally, the case law makes clear that a justification plea requires an analysis of both the proportionality and the necessity tests. As to the latter, *Wouters* shows that the context is highly relevant to determine whether it was necessary to attain a certain goal. The necessity test, in particular, is not always as strict as it may seem.

3.4 Merger control

3.4.1 The legislative framework

EU merger control entails the *ex ante* assessment of a proposed concentration of formerly independent undertakings. The merger provisions and Article 102 TFEU are not applied simultaneously, as the latter involves an *ex post* examination. However, merger control and Article 102 TFEU do share a number of analytical characteristics. Under the 'old' Merger Regulation, the test focused on whether the notified merger created or strengthened a dominant position –[285] which has obvious parallels with an assessment under Article 102 TFEU.

[284] See e.g. Case 27/87 *Erauw-Jacquery v La Hesbignonne* [1988] ECR 1919.

[285] See Article 2 of Regulation No 4064/89, OJ [1989] L 395/1.

The present-day test is different, as it examines whether a concentration significantly impedes effective competition.[286] However, the test still takes into account whether the merger creates or strengthens a dominant position.[287] It should include an examination whether the merged entity has the capacity and the incentive to abuse a possible dominant position. Considering these analytical parallels with Article 102 TFEU, it is worthwhile to assess what type of substantive claims merging parties may invoke.

According to the Merger Regulation, the Commission should consider whether the concentration is beneficial to 'the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition'.[288] This provision leaves scope for a plea holding that the merger has a net pro-competitive effect.

More specifically, the preamble of the Merger Regulation clearly allows for an efficiency plea,[289] stipulating that 'it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned'.[290] The Merger Regulation demands that the merger-related efficiencies should be able to 'counteract the effects on competition', referring in particular to 'the potential harm to consumers'.[291] Otherwise the Merger Regulation gives no delineation of the types of efficiencies that may be taken into account, suggesting that no efficiency plea will be *a priori* inadmissible.

The Merger Regulation requires the Commission to publish guidance on how it shall take efficiencies into account in its assessments.[292] In its horizontal mergers guidelines,[293] the Commission confirms that

[286] Article 2(2) and 2(3) of Regulation No 139/2004 ('Merger Regulation'), OJ [2004] L 24/1. The test seeks to examine whether a merger is compatible with the common market, see Article 2(1) of the Merger Regulation.

[287] *Ibid*. See also recitals 26 and 29 of the Merger Regulation.

[288] Article 2(1)(b) of the Merger Regulation.

[289] I shall not use the term 'efficiency defence', as efficiencies should be an integral part of the Commission's assessment. See e.g. Whish 2009, *supra* note 225, at 863.

[290] Recital 29 of the Merger Regulation.

[291] *Ibid*.

[292] *Ibid*.

[293] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ [2004] C 31/5.

it will consider any substantiated efficiency put forward by the parties.[294] The efficiencies need to (i) benefit consumers, (ii) be merger-specific and (iii) be verifiable.[295]

Relevant considerations regarding these three cumulative conditions include the following:

- Consumers may not be worse off as a result of the merger. Efficiencies should be substantial and timely, and should benefit consumers in those markets where competition concerns would otherwise arise.[296] A key element is whether the merged entity will have an incentive to pass efficiency gains on to consumers, in particular resulting from the competitive pressure still left after completion of the merger.
- The efficiencies should be a direct consequence of the merger.[297] Although it makes perfect sense not to allow efficiencies that would have materialized anyway, the Commission also takes from this criterion that the merging parties will have to show that there are no less anti-competitive, realistic and attainable alternatives that would also have produced the claimed efficiencies.[298]
- Finally, the efficiencies have to be verifiable so that the Commission 'can be reasonably certain that the efficiencies are likely to materialise, and be substantial enough to counteract a merger's potential harm to consumers'.[299] Efficiencies should preferably be quantified.[300] If such quantification is impossible, there must nonetheless be a 'clearly identifiable positive impact on consumers'.[301]

---

[294] *Ibid*., paras 12 and 77.

[295] *Ibid*., para 78.

[296] *Ibid*., para 79.

[297] *Ibid*., para 85. An example where the Commission rejected an efficiency plea as it did not find the gains merger specific is Case COMP/M.3099, *Areva/Urenco/ETC* (6 October 2004), para 220.

[298] See e.g. Case COMP/M.4000, *Inco/Falconbridge* (4 July 2006), paras 529-550. The Commission noted that the parties had failed to demonstrate that the efficiencies were not attainable by less anti-competitive means.

[299] Horizontal merger guidelines, *supra* note 293, para 86. For an example where the Commission rejected an efficiency plea (partly) partly because the efficiencies were not verifiable, see Case COMP/M.4439, *Ryanair/Aer Lingus*, (27 June 2007), para 1135.

[300] Horizontal merger guidelines (*ibid*.), para 86.

[301] *Ibid*.

The Commission has made clear that it will use these conditions are relevant for the assessment of non-horizontal mergers as well.[302] The conditions imply that the Commission will use a 'sliding scale' approach when examining the supposed benefits: the more 'immediate' and 'direct' the benefits are, the more likely the Commission is to find that they counteract the anti-competitive effects.[303] The guidelines suggest that efficiencies may be particularly pressing vis-à-vis non-horizontal mergers, as they provide 'substantial scope for efficiencies'.[304]

3.4.2 Efficiencies in merger decisions

Under the former Merger Regulation, the Commission's decisional practice on how to deal with efficiencies was, at best, ambivalent. The early *Aerospatiale-Alenia/DeHavilland* decision suggested that efficiencies could indeed be relevant in the decision to clear a merger.[305] However, several other decisions suggested that efficiencies may even be seen as a harmful effect of the merger, as they may contribute to the creation or strengthening of a dominant position.[306] In *Danish Crown/Vestjyske Slagterier*,[307] the Commission held that once it has been found that a merger creates a dominant position, efficiencies can no longer be taken into account.[308] This formalistic approach may have made some sense under the former merger test, but should not be transposed to the current test. Indeed, efficiencies should be duly considered *befor*e one can conclude whether or not a merger entails a significant impediment to effective competition.

---

[302] See paras 21 and 53 of the Commission Guidelines on the assessment of non-horizontal mergers, OJ [2008] C 265/6; referring to the Section VII of the horizontal guidelines (*ibid*.), that deals with efficiencies.

[303] *Ibid*., para 21.

[304] *Ibid*., para 31.

[305] Case IV/M.53, *Aerospatiale-Alenia /DeHavilland* (2 October 1991), para 65. Although the Commission did reject the efficiency claims on the facts, it did remain open to the possibility that cost savings may be relevant.

[306] See e.g. Case IV/M.50, *AT&T/NCR* (18 January 1991), para 30; Case COMP/M.2333, *De Beers/LVMH* (25 July 2001), paras 102-105. See also Case T-114/02 *BaByliss v Commission* [2003] ECR II-1279, para 360. The concentration would enable the merging parties 'to make economies of scale and implement various rationalisation measures, thus generating a reduction in costs of which it could take advantage to reduce prices or allow retailers a bigger margin in order to increase its market share'.

[307] Case IV/M.1313, *Danish Crown/Vestjyske Slagterier* (9 March 1999).

[308] *Ibid*., para 198. Conversely, in Case COMP/M.3108, *Office Depot/Guilbert* (23 May 2003), the Commission did not consider efficiencies as it had already concluded that the merger was unlikely to create or strengthen a dominant position, see para 69.

Later Commission decisions often appear more accommodating for efficiencies. In its *Korsnäs/Assidomän Cartonboard* decision, the Commission took into account various efficiency benefits, such as better capacity utilization.[309] The Commission considered it likely that the efficiencies would enable the merged entity to act pro-competitively for the benefit of consumers.[310] Other merger decisions confirm that the Commission has increasing regard to efficiencies.[311]

Although several recent cases provide some guidance on the assessment of efficiencies, surprisingly few cases contain an intricate analysis of the pro- and anti-competitive effects involved – let alone a clear balancing test.[312] Apart from the obvious difficulties in quantifying future effects, it may be caused by the fact that a balancing act of efficiencies is rarely considered decisive. Often the Commission does not consider that the merger has an anti-competitive effect, thus taking away the need for a precise quantification of effects.[313] In addition, the need to quantify efficiencies may be little pressing if there are also other reasons to clear the merger. Indeed, the author is unaware of any EU merger case that has been cleared solely on the basis of efficiencies.[314] This makes it difficult to describe with precision

[309] Case COMP/M.4057, *Korsnäs/Assidomän Cartonboard* (12 May 2006), para 63. See, similarly, Case COMP/M.2502, *Cargill/Cerestar* (18 January 2002), para 19.

[310] *Ibid*., para 64.

[311] Case COMP/M.4854, *TomTom/TeleAtlas* (14 May 2008), paras 238-250; Case COMP/M.4942, *Nokia/Navteq* (2 July 2008), para 364-367. In the latter case, the Commission observed that the vertical integration of the merged entities would eliminate a double mark-up. At the same time, the Commission (at para 367) observed that a precise estimation of efficiencies was unnecessary, as the merger did not have an anti-competitive effect (apart from the potential efficiencies).

[312] R.J. van den Bergh & P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Sweet & Maxwell: London 2006), at 370.

[313] See e.g. *TomTom/TeleAtlas* and *Nokia/Navteq, supra* note 311.

[314] Note that there have been such cases at the domestic level. In the UK, see e.g. the OFT Case ME/3638/08, *Global Radio UK/GCap Media* (8 August 2008). It appears that efficiencies were decisive for the OFT's clearance, even though there were other reasons to clear the merger as well. In the Netherlands, there have also been mergers that have been cleared because of efficiency benefits. See NMa (currently ACM) decision in Case 6424/*Ziekenhuis Walcheren/Oosterscheldeziekenhuizen* (25 March 2009), para 173. Based on the remedies offered by the merging parties, the NMa concluded that the efficiencies were sufficient to offset the anti-competitive effects.

what the independent role of efficiencies in merger control is. Nevertheless, we can draw the lesson that efficiencies are becoming ever more important in European merger control; and that certain activities (such as creating economies of scale) are often considered a proxy for efficiencies without the need to enter into a reliable and precise quantification.

3.4.3 The failing firm plea

Another plea of interest is the 'failing firm' plea. In essence, the plea attempts to justify the anti-competitive effects of a merger as (one of) the merger parties would not survive anyway, producing even greater competitive issues. As a result, the plea implies that any loss in competition is not attributable to the concentration.[315] In its *Kali+Salz* decision, the Commission acknowledged that a failing firm plea may be accepted if there is no link of causality between the merger and the merger's anti-competitive aspects.[316] The ECJ confirmed the Commission's approach, holding that such a plea can be accepted if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration had been prohibited.[317]

The Commission further developed the concept of the failing firm defense in the *BASF/Eurodiol* decision,[318] noting that the merger could be cleared as the following conditions were satisfied:[319]

- the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking;
- there is no alternative that would be less anti-competitive;
- the assets to be purchased would inevitably disappear from the market in the absence of the merger.

---

[315] See V. Baccaro, 'Failing Firm Defence and Lack of Causality: Doctrine in Europe of Two Closely Related Concepts', (2004) 25 ECLR 11.

[316] Case IV/M.308, *Kali+Salz/MDK/Treuhand* (14 December 1993), para 136.

[317] Joined Cases C-68/94 and C-30/95 *France v Commission* [1998] ECR I-1375, paras 112 to 116. The ECJ upheld the Commission's analysis of whether the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market. The Commission, however, abandoned this criterion in its *BASF/Eurodiol/Pantochim* decision (*infra* note 318).

[318] Case COMP/M.2314 *BASF/Eurodiol/Pantochim* (11 July 2001).

[319] *Ibid*., paras 140 and 141, 144, 147, 151, 152 and 163

3.4.4 Public interest concerns in merger control

As a final matter, the Merger Regulation allows some room to consider public interest concerns in mergers with a EU dimension. [320] The Commission then continues to deal with the competition analysis, but the Member State involved may carry out a separate examination of the legitimate interests at play. Such interests include, in any case, matters of public security, plurality of the media and prudential supervision. [321] If a Member State considers that there are strong reasons of public interest at play, it may request a reference of the case to examine all the aspects of the merger.[322] A final possibility is that the merger has no EU dimension but does fall within the scope of Member State merger control. In that case, the Merger Regulation does not apply and cannot preclude Member States to let public interest interests prevail over competition concerns.

The UK has a particularly detailed framework how to consider public interest issues in a relevant merger situation. Sections 42 and 59 Enterprise Act 2002 allow the competent Secretary of State to intervene in public interest cases by giving a notice to the OFT. An example is the intervention notice on public interest grounds to ensure 'the stability of the UK financial system' related to the 2008 takeover of HBOS by Lloyds TSB.[323] The OFT submitted a report in which it observed, *inter alia*, a realistic prospect that the anticipated merger will result in a substantial lessening of competition in relation to personal current accounts, banking services for small and medium sized enterprises and mortgages.[324] The Secretary of State considered, however, that the stability of the UK financial system outweighed the competition

---

[320] Recital 19 and Article 21(4) of the Merger Regulation. Of course such measures must be compatible with EU law.

[321] Article 21(4) of the Merger Regulation. Any other public interest must be communicated by the Member State to the Commission according to the procedure set out by Article 21(4) of the Merger Regulation.

[322] Article 9 of the Merger Regulation, also known as the 'German clause'.

[323] See the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (S.I. 2008 No. 2645).

[324] OFT report to the Secretary of State, Case ME/3862/08, *Lloyds/HBOS* (31 October 2008), available at http://oft.gov.uk/shared_oft/press_release_attachments/LLloydstsb.pdf.

concerns identified by the OFT, and decided not to refer the case to the Competition Commission.[325] The Competition Appeal Tribunal rejected an application for review against this decision.[326]

3.4.5 Lessons for Article 102 TFEU

Merger control clearly has relevant lessons for the concept of objective justification within the framework of Article 102 TFEU. First, it is clear that efficiencies can be highly relevant when determining whether a merger is anti-competitive or not. The efficiencies should be merger-specific. There is no reason to uphold an efficiency plea in the absence of a clear causal link between the merger and the stated efficiencies. In addition, efficiencies shall only be accepted if they cannot be achieved through other, less anti-competitive, means. Perhaps this rule should be seen in connection to the fact that no full balancing test is required – and may thus function as an escape valve if the effects on efficiency remain unclear. Another lesson is that the Commission does not preclude companies to invoke any particular type of efficiency, showing the wide possible scope of the efficiency plea.[327] Finally, an efficiency claim requires that consumers are, on the whole, better off – although there is no explicit requirement that consumers must receive a 'fair share' as required by Article 101(3) TFEU.[328]

Second, merger control allows a 'failing firm' defense. The plea acknowledges that there must be a causal link between the merger and the alleged impediment to competition. The plea also shows the importance of the counterfactual: even if the merger were to lessen competition to some extent, the situation *absent* the merger would be even worse. In a way, the plea can be compared to a situation of

---

[325] Intervention Notice of 18 September 2008, Department for Business Enterprise and Regulatory Reform http://www.berr.gov.uk/files/file47995.pdf.

[326] *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36. The CAT rejected the applicants' contention that the Secretary of State had failed to exercise his discretion independently.

[327] Admittedly, it may be that – generally speaking – some types of efficiency may be easier to prove than others. For instance, the resulting benefits are clearly more tangible if the merging parties propose to combine production capacity, thus cutting costs by raising the rate of utility, compared to the situation where they refer to potential future benefits of shared research and development.

[328] Note that Article 101(3) TFEU is often referred to as an efficiency defense as well, even though the provision appears to be broader than that (see section 3.2.3 in chapter II).

objective necessity, as there is no viable alternative that is less anti-competitive. For those purposes, the examination understandably makes use of a necessity test.

Third, the Merger Regulation allows Member States to examine public interest concerns that may follow from a merger with a EU dimension. Formally speaking,[329] such a domestic examination cannot alter the outcome of the Commission's competition assessment. However, it does show that this area of EU law acknowledges that non-competition interests may be 'legitimate' as well, and may be affected by the outcome of a competition assessment.

4 CONCLUSION

As each sub-topic has already concluded with lessons for Article 102 TFEU, there is little need for an extensive final conclusion. The central tenet of this chapter is that prohibitions in EU law have often been interpreted expansively, but have – at the same time – allowed ample scope for derogations. Unwritten justifications can play an important role – crucial for Article 102 TFEU, which does not have an explicit derogation clause. The examination has shown that a prohibition only applies if it has a sufficiently strong impact upon an interest that the Treaty seeks to protect. Finally, the study has clarified that the examination of derogations is crucial in order to consider the conduct under review in its proper context.

[329] A Member State may wish to exert political pressure to influence the outcome of the case. It is obviously impossible to deduce from publicly available sources how often the latter scenario unfolds. If the Member State wishes to decide the full case, it should request a referral of the case based on Article 9 of the Merger Regulation.

CHAPTER III OBJECTIVE JUSTIFICATION AND ARTICLE 102 TFEU*

1 INTRODUCTION

Article 102 TFEU of the Treaty on the Functioning of the European Union ('TFEU') prohibits the abuse of a dominant position. The European Commission ('the Commission') and the EU courts[330] have examined the scope of the prohibition in numerous cases. Legal doctrine has also analysed the provision to the hilt.

Nevertheless, there is still a fundamental lacuna in our understanding of Article 102 TFEU. It is clear that an abuse will only exist in the absence of a so-called 'objective justification'.[331] However, the case law leaves unanswered most of the questions about the scope and substance of objective justification. Although several authors have published highly valuable contributions in this field,[332] many uncertainties on the topic remain.

---

* This Chapter is a revised version of T. van der Vijver, 'Objective Justification and Article 102 TFEU', (2012) 35 World Competition 55. Elements of this paper have also been used in T. van der Vijver, 'Objectieve rechtvaardiging & misbruik economische machtspositie: analyse van een known unknown' [*Objective justification & abuse of a dominant position: analysis of a known unknown*], (2013) 16 Markt en Mededinging [*Market and Competition*] 3.

[330] This encompasses both the General Court as well as the European Court of Justice ('ECJ').

[331] See e.g. Case C-457/10 P *AstraZeneca v Commission* [2012] nyr, para 130; Case C-260/89 *ERT* [1991] ECR I-2925, para 37; Case 311/84 *CBEM v CLT and IPB* ('*Télémarketing*') [1985] ECR 3261, para 26. See, further, the Opinion of AG Poiares Maduro in Case C-109/03 *KPN v OPTA* [2004] ECR I-11273, paras 53-54; and the Opinion of AG Cosmas in Case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11369, para 101. Cosmas noted, quite rightly, that 'it would be difficult to accept that an objectively justified business measure was also an abuse'. See, further, R. Whish, *Competition Law* (OUP: Oxford 2009), at 206; R. O'Donoghue & A.J. Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing: Oxford and Portland, Oregon 2006), at 227 *et seq*; F.E. Gonzáles & J. Temple Lang, 'The Concept of Abuse', in F.E. Gonzáles & R. Snelders (eds.), EU Competition Law: Abuse of Dominance under Article 102 TFEU (Claeys & Casteels: Deventer 2013), in particular paragraph 3.116 *et seq*.

[332] Important publications in the field include P.-J. Loewenthal, 'The Defence of "objective justification" in the application of Article 82 EC', W.Comp. 28 (2005), at 455; A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC', (2007) 44 CMLRev 1727; E. Rousseva, 'The Concept of "Objective Justification" of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?',

This chapter examines the concept in more detail. It proposes the use of different categories of objective justification to create more clarity on its interpretation and application. Paragraph 2 sets the general framework, discussing the background and *rationale* of Article 102 TFEU. In paragraph 3, I shall introduce the concept of 'objective justification'. Paragraph 3.4 expands upon the three headings under which an objective justification may be accepted. Paragraph 4 analyses the common legal requirements and tries to differentiate between elements that should or should not be relevant. Paragraph 5 assesses how objective justification may function as regards various kinds of *prima facie* abuses. A short conclusion in paragraph 6 wraps up the Chapter.

2 ARTICLE 102 TFEU

2.1 The background and objectives of Article 102 TFEU

Article 102 TFEU prohibits unilateral behaviour of a dominant undertaking that amounts to an abuse.[333] According to established ECJ case law, a firm should be considered dominant if it has the economic strength to hinder effective competition, allowing it to behave independently of its competitors, customers and consumers.[334] As a counterweight to its strong market position, a dominant firm has a 'special responsibility' not to allow its conduct to impair undistorted competition.[335] The *rationale* for this doctrine is that the mere presence of a dominant firm on the market already means that

---

(2006) 2 The Competition Law Review 27; E. Østerud, 'The Concept of Objective Justification' in: E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Alphen aan den Rijn: Kluwer Law International 2010), at 245. See also E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing: Oxford and Portland, Oregon 2010).

[333] For a general explanation, see Whish 2009, *supra* note 331, at 170 *et seq*. Of course, there might not only be dominance by one undertaking but also 'collective dominance' enjoyed by multiple undertakings. The ECJ laid down the legal test for collective dominance in Case T-342/99 *Airtours v Commission* [2002] ECR II-2585.

[334] Case 322/81 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461. See also Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para 38.

[335] *Michelin I* (*ibid*.), para 57.

competition is weakened.[336] Competition law should thus prevent dominant undertakings from further reducing the feeble level of competition on the market.[337] According to the ECJ, The special responsibility may entail quite onerous requirements. For example, it may prevent a dominant undertaking from providing a discount that tends to remove or restrict a customer's freedom to choose its sources of supply.[338]

The main objective of Article 102 TFEU is said to be the protection of consumers and the competitive process.[339] The prohibition's rationale stems from the belief that dominant firms are capable of unilaterally harming other market participants and consumers. These firms are able to do so either (i) directly by imposing unreasonable terms and conditions (exploitative abuses) or (ii) indirectly by altering the structure of the market to their advantage (exclusionary abuses). According to Protocol No 27 attached to the TFEU and the Treaty on European Union ('TEU'), the EU strives for an internal market with undistorted competition.[340] The Protocol mirrors the former Article 3(1)(g) of the EC Treaty. The ECJ often referred to this latter provision as a key principle to be observed in competition cases.[341] As Protocols have the same legal standing as Treaty provisions, the basic principles embodied in early case law on the abuse of dominance still hold.[342]

---

[336] Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, para 182.

[337] *Ibid*.

[338] *Michelin I*, *supra* note 334, para 73. The case also provides an example of how the freedom is taken into account of the market participants that somehow depend on the dominant firm. See, similarly, Case 77/77 *BP v Commission* [1978] ECR 1513. At para 32, the ECJ made a distinction between 'traditional' and 'occasional' customers. In my perspective, the underlying *rationale* is that the former group is more dependent upon the dominant firm than the latter.

[339] See T. Eilmansberger, 'How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses', (2005) 42 CMLRev 129, at 133-137. See also Whish 2009 (*supra* note 331, at 192-193), suggesting that efficiency (and therefore: consumer welfare) is the underlying objective of Article 102 TFEU.

[340] Protocol (No 27) to the TFEU and the TEU on the internal market and competition.

[341] See e.g. Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para 106.

[342] See, for a different perspective, N. Petit & N. Neyrinck, 'A Review of the Competition Law Implications of the Treaty on the Functioning of the European Union', available via https://www.competitionpolicyinternational.com.

Another relevant aspect for the interpretation of Article 102 TFEU is its relationship with Article 101 TFEU (as also examined in Section 2 of Chapter II). In *Continental Can* the ECJ made clear that both provisions pursue the same aim of maintaining competition, albeit on a different level. As a result of this parallelism, the ECJ held that: 'Articles [101 TFEU] and [102 TFEU] cannot be interpreted in such a way that they contradict each other'.[343] The *meta* norm of both provisions therefore focuses against trade practices that distort competition in the internal market. To achieve this goal both prohibitions are designed to curtail the undesirable ramifications of market power; market power exercised either by individual companies (Article 102 TFEU)[344] or by multiple companies that have agreed to group together (Article 101 TFEU).

2.2 The sliding scale of market power

Article 102 TFEU has only two ways to define the position of an undertaking: it is either dominant or it is not. However, it seems too simplistic to regard the *legal consequences* of dominance[345] in such black-and-white terms. Dominance is a legal translation of the economic concept of market power, a concept that exists as a matter of degree.[346] In my view this merits a 'sliding scale' approach, in which the scope of the special responsibility requirement depends on the level of dominance. Indeed, Advocate-General ('AG') Fennelly argued in *Compagnie maritime belge* that behaviour by an undertaking that approaches a monopoly (also known as a 'super-dominant' firm)[347] merits particularly close scrutiny.[348] Such an

[343] Case 6/72 *Continental Can v Commission* [1973] ECR 215, para 25. In my view, this precedent should still be regarded as relevant as the ECJ has never vacated its position that Articles 101 and 102 TFEU must be interpreted in light of the principle of undistorted competition. This principle is currently embodied by Protocol No 27 (*supra* note 340).

[344] Or, in case of a situation of collective dominance, by the group of undertakings that holds a dominant position.

[345] The legal consequences include e.g. the scope of the 'special responsibility' incumbent upon a dominant firm.

[346] See J. Kavanagh, N. Marshall and G. Niels, 'Reform of Article 82 EC – Can the Law and Economics be Reconciled?', in: A. Ezrachi (ed.), *Article 82 EC: Reflections on its Recent Evolution* (Hart Publishing: Oxford and Portland, Oregon, 2009), at 3. See also the succinct description in *BBM* by the Australian High Court, per Gleeson CJ and Callinan J, at 121: '[t]he essence of power is absence of constraint'. It is clear that constraint is no black and white concept either, but also exists as a matter of degree.

[347] Note that the ECJ has not often referred to the concept of 'super-dominance'. An exception is Case C-52/09 *TeliaSonera* [2011] ECR I-527, para 81. However, early case law already referred to the concept of 'quasi-monopoly'; see e.g. *Hoffmann-La Roche* (*supra* note 349, para 39).

approach can be reconciled with the ECJ's classic formulation of a 'dominant position' in *Hoffmann-La Roche.*[349] The judgment held that dominant undertakings are able, to an appreciable extent, to behave independently of other market participants.[350] This formulation reflects the idea that competitive constraints are insufficiently strong to keep a dominant undertaking in check. If the weakness of competitive constraints is the underlying *rationale* for competition law intervention, there should also be regard as to *how weak* these constraints actually are. If the position of the dominant undertaking is virtually incontestable (for instance because of high entry barriers), its behaviour is more likely to restrict competition.

Undoubtedly, a sliding scale approach entails less *ex ante* legal certainty than a rigid application of precisely the same rules irrespective of the degree of dominance. However, I prefer the law to be sufficiently flexible in order to be applied in tune with the prevalent context. Taking due account of the level of dominance also appeals to common sense. Just consider the hypothetical example of a fizzy drinks producer that holds 51% of the market. The firm can be presumed to be dominant,[351] even though it may have a powerful adversary with a market share of 49%.[352] This is a marked difference from, say, a postal company that has a 100% market share as it enjoys a statutory monopoly on the collection and delivery of certain categories of mail. In the former case, it is likely that there are still ample competitive constraints – and thus little need for competition enforcement. By contrast, the absence of any competitive constraints in the second example means that the role for competition law becomes much more obvious.

The EU courts have been slightly ambiguous on the relevance of the degree of market power for assessing whether conduct conforms to Article 102 TFEU. Several judgments have indeed relied on the

---

[348] Opinion of AG Fennelly (para 136) in Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others v Commission* [2000] ECR I-1365. See also Fennely J, at 86, in the Irish Supreme Court judgment in *Irish League of Credit Unions* [2005] No. 077.

[349] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

[350] *Ibid*., para 38-39.

[351] Undertakings with a market share of more than 50% can be presumed to be dominant; see Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, para 60.

[352] Of course an examination may reveal that, despite the market share of over 50%, the undertaking does not hold a dominant position.

dominant undertaking's particularly strong market position as part of the reasoning why the conduct under review should be prohibited.[353] AG Mazák took a different stance in his Opinion in the *TeliaSonera* case. Mazák held that 'the degree of market power […] should not be decisive for the existence of the abuse', arguing that 'the concept of a dominant position arguably already implies a high threshold'. [354] The subsequent judgment by the ECJ in *TeliaSonera* appears to take the middle ground.[355] On the one hand, the judgment acknowledged that the undertaking's market strength may be relevant while assessing the compatibility of conduct with Article 102 TFEU. On the other hand, the ECJ held that market strength is generally speaking relevant in relation to the *effects* of the conduct, rather than the question whether or not there has been an abuse.

It is submitted that the ECJ has been too cautious in *TeliaSonera* in its consideration of the degree of dominance. First, its distinction between an abuse as such and the effects of the conduct may be difficult to make, especially if competition law takes an increasingly effects-based approach. In addition, the level of market power can provide a vital element of context to show whether there has been an abuse or not. For example, Fox noted – based on the facts of *Hugin* – that a dominant undertaking has more leeway in an intensely and increasingly competitive market.[356] I agree with the suggestion by Fox. There is ample case law confirming that the scope of the special responsibility depends on the

---

[353] See e.g. Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 186. Case C-333/94 P *Tetra Pak v Commission* ('*Tetra Pak II*') [1996] ECR I-5951, paragraph 31 (referring to the 'quasi-monopoly enjoyed by Tetra Pak'); *Compagnie maritime belge*, *supra* note 348, para 119 (referring to the fact that the liner conference at issue had a market share of over 90% and faced only 1 competitor). A narrow reading of these cases is that they simply referred to the likelihood that the practice under review would lead to a restriction of competition.

[354] *TeliaSonera* (Opinion AG Mazák), *supra* note 347, para 41. I disagree with the position taken by Mazák, as the 50% market share (at which the presumption of dominance begins) is not such a high threshold. As said in the main text, a firm may be presumed dominant with a 51% market share even though it faces stiff competition from a company that holds the other 49%. Mazák further notes that Article 102 TFEU does not explicitly refer to 'super-dominance'. I disagree with this argument, too, as there are many important elements of Article 102 TFEU (such as objective justification) that do not feature explicitly in the text.

[355] *TeliaSonera*, *supra* note 347, para 81. It noted the possible relevance of a situation where the undertaking holds a position of super-dominance or a quasi-monopoly.

[356] See e.g. Case 22/78 *Hugin v Commission* [1979] ECR 1869. Fox noted that 'it is hard to imagine that Hugin lacked an objective justification'. See Eleanor M. Fox, 'Eastman Kodak Company v. Image Technical Services, Inc. – Information Failure As Soul or Hook?', (1993-1994) 62 Antitrust Law Journal 759, at 766.

circumstances of the case – of which the degree of dominance is clearly part.[357] The likelihood of harm to competition will depend to a large extent on the strength of the dominant firm's market position and the type of conduct that is under review. In this way, the degree of market power may also feed into the acceptability of an objective justification plea. For example, an efficiency plea may be less persuasive if invoked by a firm with a (quasi-)monopoly.[358]

The previous paragraphs do not mean that the prevalent degree of market power will necessarily take centre stage. One should examine to what extent there is a link of causality between the conduct or justification under review and the firm's market power. The case law does not always do so. In *Irish Sugar*, the dominant firm attempted to justify its selective and differentiated rebates on the basis of its insufficient financial resources.[359] The General Court rejected this plea partly based on Irish Sugar's particularly strong market position, having a market share of more than 88%.[360] Although I understand the Court's overall wariness towards such a plea, I do think it should have explained in more detail why Irish Sugar's strong market position automatically disqualified its plea referring to insufficient financial resources. Undertakings with a high market share do not necessarily have unlimited cash to burn.

3 OBJECTIVE JUSTIFICATION UNDER EXAMINATION

3.1 Introduction

This chapter examines the meaning of 'objective justification' within the framework of Article 102 TFEU. But before turning to the legal examination of the concept of objective justification, it seems

---

[357] See e.g. Case T-83/91 *Tetra Pak v Commission* ('*Tetra Pak II*') [1994] ECR II-755, para 115. The General Court stated that the scope of the special responsibility imposed on a dominant firm depends on the specific circumstances of the case. In this case, the circumstances included the dominant firm's 'quasi-monopoly' (see para 31). For confirmation of the General Court's approach, see e.g. *Tetra Pak II* (ECJ), *supra* note 353, para 24; and *Compagnie maritime belge*, *supra* note 348, para 114. See also Whish 2009, *supra* note 331, at 184.

[358] Or, alternatively, more persuasive. In a market with particularly high fixed costs, having just a single firm on the market may be beneficial to productive efficiency.

[359] *Irish Sugar* (General Court), *supra* note 353.

[360] *Ibid*, para 186.

appropriate to spend a few words on its linguistic meaning. The Oxford Dictionary describes 'justification' as 'the action of showing something to be right or reasonable'.[361] Similarly, the Merriam Webster Dictionary describes the verb 'to justify' as an act 'to prove or show to be just, right, or reasonable'.[362] It may also be seen as showing 'a sufficient legal reason'. [363] Another dictionary defines justification as 'a reason, fact, circumstance, or explanation that justifies or defends.'[364] Because of these superior qualities, a justification can trump the finding that conduct under review is illegal.

The other part of the concept examined by this PhD is 'objective', connoting that the concept is 'not influenced by personal feelings, interpretations, or prejudice'.[365] Accordingly, a justification will not be accepted if it merely exists as a subjective intention by the firm; there must be some 'objective' benefit. This reasoning corresponds to the case law on Article 102 TFEU. As the abuse of dominance is an objective concept,[366] it would be inconsistent to condone behaviour simply because the firm can show that its conduct served a pro-competitive intent. For all the dominant firm's good intentions, there may still be a restriction of competition. However, subjective intent is not irrelevant as it can be a relevant factor in the overall assessment of a potential abuse.[367] Section 4.5 shall further examine the legal significance of benign or pro-competitive subjective intent.

3.2 'Objective justification' and Article 102 TFEU

Few legal rules are absolute. Almost every legal prohibition can, under certain circumstances, be derogated from. Chapter II has examined such derogations vis-à-vis the internal market rules, the merger rules and Article 101 TFEU.

---

[361] See http://oxforddictionaries.com/.

[362] See http://www.merriam-webster.com/.

[363] *Ibid*.

[364] http://dictionary.reference.com/browse/justification.

[365] http://dictionary.reference.com/browse/objective?s=t.

[366] I.e. a finding of a *prima facie* abuse requires no anti-competitive intent. *Hoffmann-La Roche*, *supra* note 349, para 91.

[367] The relevance of intent depends, *inter alia*, on the type of abuse that is under review. For instance, under EU law, below-cost prices between average variable costs and average total costs are only abusive in the presence of evidence showing an anti-competitive plan. See *AKZO*, *supra* note 351.

This chapter focuses on the available derogations within the framework of Article 102 TFEU. It will examine EU case law on objective justification of behaviour that would otherwise be an abuse. An 'abuse' can be considered as the use of dominance in a way that cannot be justified.[368] When an objective justification is accepted, the Article 102 TFEU prohibition does not apply to the conduct under review. The concept of 'objective justification' thus makes a vital distinction between illegal and permissible *prima facie* abusive behaviour under Article 102 TFEU.

It is true that ECJ case law has largely stayed clear of an in-depth application of objective justification to the facts of the cases before it.[369] To my mind, a greater emphasis on objective justification would have several advantages. If the plea is interpreted in a consistent, well-structured and practicable manner, it can enhance legal certainty.[370] This means it serves as a compliance check for dominant firms. It is also a quality check for (domestic) courts and competition authorities, as it is able to increase clarity and coherence in abuse analysis.[371]

In addition, the objective justification plea has the notable advantage of attaching due weight to the prevalent context. Such a plea may provide invaluable information as to the precise background of the conduct and the effects that it may have.[372] Taking in this context can contribute towards a

[368] Cf. Australian competition law, which distinguishes between the 'use' and the 'misuse' of market power. See also M. Dolmans & M. Bennett, 'Refusal to Deal', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 502): 'The possibility of a justification defence is inherent in the very notion of an "abuse", which does not cover justified use'.

[369] This has prompted Albors-Llorens (*supra* note 332, at 1742) to observe that the examination of objective justification 'seemed to be a fairly notional exercise.'

[370] For the importance of legal certainty and legitimate expectations, see Østerud 2010, *supra* note 332, at 14. He refers e.g. to Case T-51/89 *Tetra Pak Rausing v Commission* ('*Tetra Pak I*') [1990] ECR II-309, para 36 and to Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, para 192.

[371] Eilmansberger 2005, *supra* note 339, at 131.

[372] Cf. the relevance attached to context in Article 101 TFEU. See e.g. Case C-8/08 *T-Mobile and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 27: 'With regard to the assessment as to whether a concerted practice is anti-competitive, *close regard must be paid* in particular to the objectives which it is intended to attain and *to its economic and legal context* [italics added by author]'.

comprehensive examination of all relevant interests,[373] and thus substantially improve the competition analysis.

A contextual approach would be particularly helpful in areas where the Commission and the EU courts have throughout the years relied on a rather formalistic reasoning – for instance in the fields of predatory pricing, exclusive supply agreements and pricing practices having the same effect.[374] For example, an objective justification plea may call for an examination of whether the practice has a pro-competitive effect – rather than simply denouncing a practice on the basis of its form.

By emphasising the importance of context, objective justification can be used to reject the notion that certain types of conduct are considered *per se* abusive under Article 102 TFEU.[375] A *per se* abuse implies that the conduct can never be justified, whatever the countervailing arguments. A *per se* approach is inconsistent with a proper competition analysis under Article 102 TFEU.[376] It pays insufficient attention to context and relies excessively on assumptions that may be mistaken in the specific circumstances of that case. For example, the conduct under review may boast *some* anti-competitive elements, but can still have a net pro-competitive effect due to the particularities of the sector in which that conduct takes place.

---

[373] See e.g. Case 127/73 *BRT v SABAM and Fonior* [1974] ECR 313, para 8. The ECJ underlined the importance of a balancing test taking 'all the relevant interests' into account – suggesting that only a balancing test can determine whether or not conduct should be prohibited. See, similarly, M. Dolmans & M. Bennett, 'Refusal to Deal', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331) at 504.

[374] D. Bailey, 'Presumptions in EU Competition Law', (2010) 31 ECLR 362, at 365. Bailey refers to *AKZO*, *supra* note 351, para 71 and *Hoffmann-La Roche*, *supra* note 349, para 89.

[375] Østerud (2010, *supra* note 332, at 247) argues that there should be no *per se* prohibitions under Article 102 TFEU. See also AG Colomer in Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia v GlaxoSmithKline* [2008] ECR I-7139, paras 62-75. Colomer holds that there are both legal and economic reasons not to consider conduct *per se* abusive.

[376] Even though some types of conduct will be easier to justify than others.

The Commission has given various indications that it wishes to move away from a *per se* approach towards certain abuses.[377] The Commission's guidance on enforcement priorities clearly takes an effects-based approach, which is difficult to reconcile with a *per se* approach based on form.[378] The Commission has already used this approach in practice. In its *Intel* decision, the Commission included an economic analysis of the effects of the alleged abuse next to its more traditional (and formalistic) abuse analysis.[379]

Moreover, there seems to be a shift in the ECJ's case law. In *Sot. Lélos*, AG Colomer opined that Article 102 TFEU provides no basis for the existence of *per se* abuses.[380] The ECJ seems to have followed his advice. The *Post Danmark* judgment makes clear that a dominant undertaking can rely on efficiency benefits or objective necessity to justify its behaviour – even if such behaviour would previously have been struck down on the basis of its form.[381] The ECJ's attitude towards prices below Average Variable Costs perhaps provides the clearest indication of the development in the case law. Whereas the *AKZO* judgment held that such prices are abusive *per se*,[382] more recent case law merely considers them

---

[377] This is different from the Commission's continued reliance on restrictions 'by object' under Article 101(1) TFEU. It makes sense that the Commission still uses this concept, as it is clearly part of the provision. Note that restrictions 'by object' under Article 101(1) TFEU differ from *per se* abuses under Article 102 TFEU, in the sense that the former can still be condoned under Article 101(3) TFEU (see Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, para 85), whereas the latter connotes that no justification can be accepted. Also note the case law that one must duly examine the economic and legal context of the relevant agreement before being able to label it as a restriction 'by object'. See e.g. Case C-209/07 *Beef Industry Development Society and Barry Brothers* ('*BIDS*'), [2008] ECR I- 8637, paras 16 and 21.

[378] Commission guidance on Article [102] enforcement priorities, OJ [2009] C 45/7.

[379] See e.g. Commission decision in Case COMP/C-3/37.990 *Intel* (13 May 2009), para 1672; stating that 'the Commission has examined the effects of the conduct and its impact on the market', 'leaving aside that it is not required under the case law to do so'. Some scholars argue that a type of *per se* abuses exists or ought to exist (see e.g. Eilmansberger 2005, *supra* note 339, at 147).

[380] Opinion of AG Colomer, *Sot. Lélos*, *supra* note 375, para 76.

[381] Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] nyr, para 41.

[382] *AKZO*, *supra* note 351, para 71: such prices 'must be regarded as abusive'. See also Bailey 2010, *supra* note 374, at 365.

abusive ‘in principle’, thus allowing for a justification plea.[383] Section 5.2 discusses this shift in the examination of predation cases in more detail.

3.3 The use and role of ‘objective justification’ within Article 102 TFEU

The notion of objective justification has become an important part of the case law on Article 102 TFEU. The ECJ has referred to objective justification[384] in several of its early competition law judgments,[385] and has regularly noted or hinted that an abuse implies the absence of an objective justification.[386] At the same time, however, the ECJ held in *Ahmed Saeed* and *Atlantic Container* that Article 102 TFEU does not allow for any exemptions to the prohibition it lays down.[387] Do these two judgments call into question the relevance of objective justification under Article 102 TFEU?

It is submitted they do not. I believe that these judgments merely show that, if an abuse has already been established, it cannot be ‘saved’ anymore by countervailing reasons.[388] This approach is in line with the text of Article 102 TFEU, which simply prohibits any abuse of a dominant position. However, this still

---

[383] *Post Danmark*, *supra* note 381, para 27. See also Case C-202/07 P *France Télécom v Commission* (‘*Wanadoo*’) [2009] ECR I-2369, para 109. The English language version notes that such prices are *prima facie* abusive, while the French language version notes that they are abusive ‘en principe’.

[384] Or similar concepts in different words, such as ‘objective necessity’ or ‘objective economic justification’. See also Østerud 2010, *supra* note 332, at 245.

[385] E.g. *Télémarketing*, *supra* note 331.

[386] Albors-Llorens 2007, *supra* note 332, at 1742.

[387] Case 66/86 *Ahmed Saeed* [1989] ECR 803, para 32. See also the Opinion of AG Lenz in *Ahmed Saeed*, para 41. Lenz rejected an ‘exemption’, since ‘abuses cannot be approved’. See also Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* (‘*TACA*’) [2003] ECR II-3275, para 1112. The General Court simply held that ‘Article [102] of the Treaty does not provide for any exemption’. However, this still does not make clear what may constitute an abuse in the first place.

[388] Similarly, an agreement cannot escape the application of Article 101(1) TFEU as soon as it has been found to restrict competition by object – even if it seeks a benign objective at the same time. See Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa* (‘*Slovenská*’) [2013] nyr. In my opinion, this does *not* mean that a benign objective is irrelevant for the purposes of Article 101(1) TFEU – it merely means that such a purpose should be taken into consideration as relevant context *before* labelling it as a restriction by object in the first place.

leaves open the possibility that conduct appears to be an abuse at first sight (i.e. a *prima facie* abuse), can still be condoned upon closer inspection.

The *Ahmed Saeed* and *Atlantic Container* cases also seem to reflect the differences between Articles 101 and 102 TFEU, in the sense that the latter has no explicit 'exemption' provision. This may have been the underlying reason why, in the *Syfait* case, AG Jacobs described the distinction between abuse and an objective justification as 'somewhat artificial'.[389] I agree that it is difficult to draw a neat line as to the types of arguments that relate to the *scope* of the *prima facie* prohibition and the *justifications* that may be invoked.[390] Still, I believe that a finding of *prima facie* abuse is necessary as there is otherwise no reason why a firm would need to justify its behaviour. Although the 'special responsibility' can be an onerous requirement, it does not cover every single activity by a dominant firm. An objective justification should only enter the stage if conduct *absent* that justification would be prohibited (i.e. when there is a *prima facie* abuse). I do not agree with the argument by Jacobs that the use of the word 'abuse' necessarily connotes a negative conclusion has been reached,[391] as a finding of a *prima facie* abuse merely indicates a provisional step in the analysis of Article 102 TFEU.

An early case law foundation in support of a two-step approach is the 1989 *Tournier* ruling. This case was essentially about the fees laid down by Sacem, the organization that held a monopoly on the management of copyrights in France. The ECJ held that if Sacem's tariffs were appreciably higher than those charged in other Member States, such a difference is 'indicative' of an abuse. [392] This indication seems akin to a *prima facie* abuse. It is equally clear from *Tournier* that it is open for the dominant firm

---

[389] Opinion by AG Jacobs in Case C-53/03 *Syfait v GlaxoSmithKline* [2005] ECR I-4609, para 72. See also Mann J in *Purple Parking and Meteor Parking v Heathrow Airport* [2011] EWHC 987 (Ch), who has 'some sympathies' for the one-step approach apparently favoured by AG Jacobs. See also Albors-Llorens 2007 (*supra* note 332, at 1733). She argues that a successful objective justification plea removes the conduct from the ambit of Article 102 TFEU. In her opinion, no two-step approach is needed. She does not make clear, however, how in her model any *a priori* finding of abuse (as she refers to it) can be made if the provision does not apply in the first place.

[390] See, similarly, the examination of Article 101 TFEU and the free movement rules in Chapter II.

[391] *Ibid*. However, if one does agree with Jacobs, I propose a different terminology: one examines whether the undertaking has 'used' its dominant position. If so, and if the dominant undertaking cannot offer a justification, such use will be found to constitute an abuse.

[392] Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521, para 38.

to put forward an objective justification plea, such as differences between Member States in terms of market demand.[393]

Other case law seems to confirm the importance of a two-step approach. In *Microsoft*, the General Court held that it must first be examined whether the case exhibits 'exceptional circumstances' that give rise to a duty to supply.[394] Only if such circumstances have been established the objective justification comes into play: 'then [it must be considered] whether the justification put forward by Microsoft [...] might prevail over those exceptional circumstances.'[395] Recent case law on the efficiency plea, such as *British Airways* and *Post Danmark*,[396] also provides authority for a bifurcated approach towards justification. These cases suggest that the earlier reluctance to incorporate an Article 101 TFEU-style analysis[397] has apparently waned. Indeed, the legal test mentioned by *Post Danmark* appears highly similar to that of Article 101(3) TFEU.[398]

The observations above warrant the conclusion that there is, and should be, a conceptual bifurcation between establishing a *prima facie* abuse and the possibility for firms to put forward an objective justification.[399] An objective justification has the potential to counterbalance a finding of a *prima facie* abuse based on relatively formal grounds (such as in *Tournier*) or where the effects-analysis has not yet incorporated all the efficiencies that the conduct under review may produce. Admittedly, it may sometimes be difficult to know whether certain arguments should be subsumed under the scope of a *prima facie* abuse, or rather under the scope of an objective justification (e.g. when labelling certain conduct as 'competition on the merits', as discussed in further detail by section 3.4.2). But even to the

[393] *Ibid*. Such differentiation may be based on so-called 'objective dissimilarities' with other Member States.

[394] This test was used in the following cases: Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission* ('*Magill*') [1995] ECR I-743; Case C-418 *IMS Health* [2004] ECR I-5039.

[395] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 709.

[396] *British Airways* (ECJ), *supra* note 341; *Post Danmark*, *supra* note 381.

[397] See *Ahmed Saeed*, *supra* note 387.

[398] *Post Danmark*, *supra* note 381, para 42.

[399] Odudu also seems to favour a bifurcated approach. See O. Odudu, 'Annotation of Case C-95/04 P, British Airways plc v. Commission, judgment of the Court of Justice (Third Chamber) of 15 March 2007', (2007) 44 CMLRev 1781, at 1809.

extent that most such cases will simply fall outside a *prima facie* finding, the concept of objective justification will still be useful to ensure that the Article 102 TFEU prohibition does not reach too far.

For the purposes of this study, I shall use the expression 'objective justification' for three reasons. First, it is a concept used by the EU courts and the Commission.[400] Second, the expression is not all too worrisome when one considers that there is a 'special responsibility' on dominant firms. The special responsibility means that such firms need to justify behaviour that amounts to a *prima facie* abuse. Third, 'objective justification' is a wide concept that does not *a priori* exclude any particular plea. The case law does not, in my view, merit a narrow interpretation of this topic. Finally, I prefer to use the term 'plea' rather than 'defense', since the existence of a *prima facie* abuse does not yet indicate whether Article 102 TFEU has been violated.[401]

3.4 Three types of objective justification

3.4.1 The various types of objective justification

Having explained the role and use of objective justification, it is necessary to delve into the possible sources of this concept. Philip Lowe, former Director General of DG Competition, distinguished between three types of 'objective justification'.[402] He proposed a list of three possible sources of justification: (i) legitimate business behaviour; (ii) efficiency considerations and (iii) legitimate public interest objectives.

I believe that the enumeration is a valuable starting point that aptly reflects the (desirable) scope of objective justification. Critics who favour a more narrow approach towards the concept may refer to the

---

[400] See e.g. the transparent way in which the General Court devoted a separate chapter on objective justification in *Hilti*. See Case T-30/89 *Hilti v Commission* [1990] ECR II-163, para 102 *et seq*.

[401] See e.g. *British Airways* (ECJ) (*supra* note 341) and *Microsoft* (*supra* note 395). Albors-Llorens (2007, *supra* note 332, at 1747) also avoids the label of 'defense'. Note that Whish (2009, *supra* note 331, at 206) and Loewenthal (2005, *supra* note 332, at 455) do refer to it as a defense. However, see R. Nazzini, 'The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases' (2006) 31 ELRev 518. Nazzini argues that the term 'defense' is incorrect.

[402] P. Lowe, 'DG Competition's Review of the Policy on Abuse of Dominance', in: Hawk (ed.), *International Antitrust & Policy, Annual Proceedings of the Fordham Corporate Law Institute 2003* (Juris Publishing: New York 2004), at 170-171.

2012 *Post Danmark* judgment.[403] The ECJ held that a dominant undertaking may demonstrate that its conduct is objectively necessary[404] or has a net beneficial effect on efficiency.[405] The judgment seems to have been inspired by the Commission's 2008 guidance paper, which also referred solely to these two elements of justification.[406]

Indeed, efficiencies and objective necessity are important and shall be examined in the following sections. However, 'objective justification' is – and should be – a wider concept than that. First, a dominant firm should be allowed a degree of commercial freedom to engage in 'reasonable' behaviour, as is clear from the *United Brands* strand of case law.[407] This shall be examined in section 3.4.2. Second, there are ample reasons why public interest can and should be able to provide a justification as well. This shall be discussed in section 3.4.6. In sum, I think that the justifications mentioned by the Commission's guidance document and the *Post Danmark* judgment embody only a *partial* reception of the objective justification concept.

The subsequent Sections will make clear why I prefer Lowe's wide interpretation of objective justification. The Sections will make use of a conceptual sub-division as indicated in the following table:

Objective justification			
Legitimate commercial conduct/business behaviour		Efficiency	Public interest
Commercial freedom	Objective necessity		
Competition on the merits	*Force majeure; State action*	*Positive welfare effect*	*Public interest gain*

[403] *Post Danmark*, *supra* note 381, para 41.

[404] The ECJ refers to *Télémarketing*, *supra* note 331, para 27. In the following Section, I will show why *Télémarketing* should not be read as offering a justification only in the event that the dominant undertaking had no available alternatives.

[405] The ECJ refers to *British Airways* (ECJ), *supra* note 341, paragraph 86, and *TeliaSonera*, *supra* note 347, paragraph 76.

[406] Commission guidance on enforcement priorities, *supra* note 378, para 28. For an analysis, see M. Gravengaard & N. Kjaersgaard, 'The EU Commission guidance on exclusionary abuse of dominance - and its consequences in practice', (2010) ECLR 285.

[407] Perhaps one could say that such conduct is not *prima facie* abusive in the first place. However, in practice it can be difficult to separate the scope of the prohibition and the scope of objective justification in a meaningful way.

3.4.2 Legitimate business behaviour – commercial freedom

Legitimate business behaviour is, in my view, a broad category of conduct that should be considered reasonable within the specific circumstances of the case. Importantly, the category encompasses competition on the merits by the dominant undertaking.[408] There is no reason why Article 102 TFEU should prohibit such behaviour. Judgments such as *BPB* and *Deutsche Telekom* have confirmed that firms abuse their dominant position only if they take recourse to conduct other than competition on the merits.[409]

One can consider competition on the merits in two distinct ways.[410] If an effects analysis has revealed that the conduct under review has a net beneficial effect on efficiency, the conduct can *ex post* be

---

[408] Loewenthal 2005, *supra* note 332, p. 459. Some academics don't seem to agree the concept of 'competition on the merits' is particularly relevant in the context of Article 102 TFEU. See Eilmansberger 2005, *supra* note 339, at 133. See also H.W. Friederiszick and L. Gratzà, 'Dominant and Efficient – On the Relevance of Efficiencies in Abuse of Dominance Cases', in: OECD Policy Roundtables, *The Role of Efficiency Claims in Antitrust Proceedings 2012* (DAF/COMP(2012)23), at 38. Although they do not consider competition on the merits as a justification (as will be explained below), they do consider that a competition case only arises 'when the eliminatory conduct is not based on the merits'.

[409] Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389 para 94: 'Article [102] of the Treaty prohibits a dominant undertaking from strengthening its position by having recourse to means other than those falling within competition based on merits'. In other words, a dominant undertaking may indeed strengthen its own position if it competes on the merits. See also *Deutsche Telekom*, *supra* note 336, para 177, allowing a dominant undertaking to invoke such a plea even if its conduct has an exclusionary effect. A link between objective justification and competition on the merits was suggested in *AstraZeneca*, *supra* note 331, para 130. The *TeliaSonera* judgment (*supra* note 347, para 24) suggests a narrower approach, as it simply holds that Article 102 TFEU 'does not prohibit an undertaking from *acquiring*, on its own merits, the dominant position in a market [italics added by author]'. It would be a bizarre interpretation that an undertaking, as soon as it has *acquired* market power, can no longer compete on the merits. Indeed, it would also be difficult to reconcile with the structure of Article 102 TFEU that only covers conduct by undertakings *after* they have acquired a dominant position.

[410] *TeliaSonera* (*supra* note 347, para 88) appears to refer to both possibilities, linking 'the absence of any other economic and objective justification' with 'using means other than reliance on its own merits'.

considered as competition on the merits.[411] Another possibility, which I will examine in this Section, is where the dominant undertaking competes on the merits by remaining within the boundaries of its commercial freedom. The *Hoffmann-La Roche* judgment makes clear that any such 'normal' competitive behaviour should be condoned.[412] Such a finding does not require an examination of effects. Instead, it calls for a contextual analysis of what should be considered 'normal' competition in the specific circumstances of that case.[413]

This may require an examination of the link between the dominant position and the behaviour under review. The absence of such a connection strongly suggests that an undertaking is simply engaging in normal competition that is perfectly acceptable within its business sector.[414] For example, the Commission considered in *British Midland v Aer Lingus* that a dominant airline may refuse to continue an interlining agreement if there are 'problems with currency convertibility or doubts about the

---

[411] *TeliaSonera, supra* note 347, and *Post Danmark*, *supra* note 381.

[412] *Hoffmann-La Roche, supra* note 349, para 91. See also *Akzo*, *supra* note 351, para 70. The ECJ held that Article 102 TFEU prohibits a dominant undertaking from 'strengthening its position by using methods other than those which come within the scope of competition on the basis of quality'. Do note that *Akzo* is overly formalistic to the extent that it suggests that the dominant undertaking will transgress its commercial freedom if its conduct leads to the elimination of a competitor. To my mind, a competitor may be forced to exit a market due to a plethora of reasons *other* than an abuse by the dominant undertaking. See, further, *BPB* (General Court), *supra* note 409, para 94, noting that it is 'a matter of normal commercial policy' 'to lay down criteria for according priority in meeting orders' ' in times of shortage'; even though such 'criteria must be objective and must not be discriminatory in any way'. According to some commentators, however, the fact that certain conduct is deemed to be 'normal business behaviour' does not necessarily exclude the possibility that the practice is abusive. See Eilmansberger 2005, *supra* note 339, at 132. It is submitted that prohibiting dominant firms from entering into normal behaviour comes dangerously close to prohibiting dominance as such.

[413] For the importance of context while determining the scope of the 'special responsibility' imposed on a dominant undertaking, see *Compagnie maritime belge*, *supra* note 348, para 114; *Tetra Pak II*, *supra* note 353, para 24.

[414] Obviously, this does not mean that a dominant undertaking can do everything that it could have done if it was not dominant. See e.g. Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937, paras 139-140; *Michelin I*, *supra* note 334, para 57; *Tetra Pak I*, *supra* note 370, para 23.

creditworthiness of the beneficiary airline'.[415] Such a refusal would not amount to an abuse, as non-dominant firms would also have rejected such an agreement.

Another possibility is that a dominant undertaking is simply taking reasonable and proportionate steps to protect its commercial interests.[416] Such steps include a competitive response to behaviour by other market participants. In *United Brands*, the Court confirmed that '[t]he fact [that] an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked'.[417] The judgment reflects the idea that a dominant firm, notwithstanding its 'special responsibility', is still entitled to a degree of commercial freedom.[418] It attaches legal significance to the statement that being in a dominant position is not abusive as such.[419] Importantly, *United Brands* suggests that an undertaking is entitled to take the steps that *it* deems necessary while protecting its commercial interests.[420] This implies that, in principle, it is up to the dominant firm to determine the appropriate course of action.

---

[415] Commission decision in Case IV/33.544 *British Midland v Aer Lingus* [1992] OJ L 96/34, paras. 25-26. Interestingly, the Commission seems to have had regard to normal business conduct in that specific sector, noting that interlining 'has for many years been accepted industry practice'.

[416] Albors-Llorens 2007, *supra* note 332, at 1741. The countermeasures taken must be 'fair' and 'proportionate'. See e.g. *Sot. Lélo*s, *supra* note 375, para 69. See also Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para 243, referring to 'reasonable steps'. The dominant undertaking may be led by quality considerations: *AKZO*, *supra* note 351, para 70; Case T-229/94 *Deutsche Bahn v Commission* [1997] ECR II-1689, para 78. See also *BPB* (General Court), *supra* note 409, para 117; *Irish Sugar* (General Court), *supra* note 353, para 112 and 189.See also Commission decision in Case IV/32.279 *BBI/Boosey & Hawkes* [1987] OJ L 286/36, para 19. The Commission noted that measures by the dominant firm 'must be fair and proportional to the threat'.

[417] Case 27/76 *United Brands v Commission* [1978] ECR 207, para 189.

[418] See e.g. Case T-5/97 *Industrie des Poudres Sphériques* [2000] ECR II-3759, para 77. The General Court held that the dominant firm does not need to act according to all the wishes of its customers. The Court held that '[a] firm is not committed to adapt its production to satisfy specific customers' needs'.

[419] See e.g. *Michelin I*, *supra* note 334, para 57: '[a] finding that an undertaking has a dominant position is not in itself a recrimination'.

[420] *United Brands*, *supra* note 417, para 189. This indicates that there is no strict necessity test; otherwise the dominant firm would only have the option to opt for the course of action that would restrict competition the least. For the relevance of defensive measures, see *AKZO*, *supra* note 351, para 156. See, however, *Irish Sugar* (General

However, various judgments by the General Court have adopted a much narrower conception of what dominant firms are still allowed to do in terms of their commercial freedom. The General Court suggested in *British Airways* and *Solvay* that a dominant firm cannot justify a countermeasure that strengthens its dominant position.[421] The General Court's *BPB* judgment also upholds a narrow idea of what a dominant firm can justify under its commercial freedom, suggesting that conduct cannot be justified if it is 'intended or likely to affect the structure of a market'.[422]

I believe that these judgments by the General Court offer too little room for the commercial freedom of dominant firms. If taken literally, the judgments would render illusory the important right of dominant firms to defend their own interests.[423] Any successful protection of their commercial position could theoretically be viewed as a strengthening of their market position. Such a rigorous wing clipping of dominant firms would come close to prohibiting the dominant position itself – even though well-established case law clearly holds that such a position is not unlawful in itself.[424] There is simply no basis to prohibit dominant firms from competing vigorously on the merits.[425] Indeed, such a prohibition is likely to chill competition and reduce consumer welfare. For example, the dominant undertaking has less incentive to develop innovative technologies that may have a disruptive effect. Another risk is that it may facilitate oligopolistic behaviour. As the smaller firms know that the biggest company on the market

---

Court), *supra* note 353, para 187: 'the defensive nature of the practice complained of in this case [a discriminatory rebate, TvdV] cannot alter the fact that it constitutes an abuse'.

[421] See *British Airways* (General Court), *supra* note 416, para 243; and Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para 315. The General Court held that 'such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it.' The word 'thereby' could be interpreted as meaning that the abuse will follow directly from the strengthening of the dominant position. The case is currently pending for an appeal at the ECJ, Case C-109/10.

[422] *BPB* (General Court), *supra* note 409, paras 117-118. See, for a similarly stringent approach, Case T-203/01 *Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071, paras 239-241.

[423] Albors-Llorens 2007, *supra* note 332, at 1744-1745. At 1745, Albors-Llorens interprets the consequences of *BPB* (*supra* note 409) in such a way that a dominant company is only nominally entitled to protect its commercial interests'. At 1745, Albors-Llorens notes that '[t]his effectively rules out the success of a 'meeting competition' line of justification'.

[424] *Michelin I*, *supra* note 334, para 57; *TeliaSonera*, *supra* note 347, para 24.

[425] See e.g. *Deutsche Telekom*, *supra* note 336, para 177.

has been put in a straightjacket, there is much less uncertainty about what competitive behaviour it will exhibit – even though such uncertainty is key to healthy competition.[426] Finally, the formalistic approach in the judgments above is difficult to reconcile with the importance attached to an effects-based approach (as examined by section 4.6).[427] In sum, I do not think that the weakened competition on the market will necessarily be resolved by restricting the dominant firm's commercial freedom to compete on the merits. Instead, I prefer the approach by *United Brands* that clearly shows that Article 102 TFEU will not be violated merely because of the strengthening of a dominant position. There must *also* be an abuse.[428] If a dominant firm protects its commercial interests and its market share simultaneously goes up, it should not *ipso facto* lead to a finding of an abuse.

In an OECD policy document, Friederiszick and Gratzà question whether competition on the merits can be an objective justification.[429] Their argument seems to be that competition on the merits cannot constitute a *prima facie* abuse, and – accordingly – does not reach the stage of justification.[430] Their position is compelling if one can clearly separate reasons that remove the conduct from the *scope* of the *prima facie* prohibition, and reasons that provide a *justification*. As noted before, such a distinction is often difficult to make.[431] An example is where a dominant undertaking engages in price differentiation – its reasons for doing so can equally be directed towards a finding of a *prima facie* abuse as well as a justification plea. The suggestion by Friederiszick and Gratzà may also entail difficulties to the extent that a jurisdiction relies on a formalistic approach for a *prima facie* finding of abuse.[432] In such a

---

[426] See e.g. Case C-8/08 *T-Mobile* [2009] ECR I-4529, para 35.

[427] See e.g. *Post Danmark*, *supra* note 381; *British Airways*, *supra* note 341.

[428] *United Brands*, *supra* note 417, para 189. An objective justification will not be accepted if the 'actual purpose' of the dominant firm is to strengthen its dominant position *and* abuse it.

[429] Friederiszick and Gratzà 2012, *supra* note 408.

[430] *Ibid*., at 36.

[431] See e.g. *prima facie* abusive price discrimination, which may follow from price differentiation relatively easily. The justification plea then allows an examination of relevant cost differences or other reasons for the differentiation. See e.g. *Tournier*, *supra* note 392, para 42; Opinion of AG Warner in *BP*, *supra* note 338, at 1534. See also, for examples in other areas, the examination of case law on the internal market and Article 101 TFEU, in Chapter II.

[432] Notwithstanding the 'more economic' approach, there are still many remnants of a form-based approach in EU competition law.

framework, a *prima facie* abuse may be found relatively easily, leaving only the justification stage to put the conduct under review into context. In sum, although it may be that competition on the merits (as any legitimate business behaviour) may often fall outside of the scope of a *prima facie* abuse altogether, there can also be instances where the objective justification concept is useful to cover any conduct that passes the *prima facie* stage even though it is perfectly legitimate.

3.4.3 Legitimate business behaviour – objective necessity

Conduct may also be considered legitimate business behaviour if the surrounding context leads the dominant firm to act in a particular way, often referred to as 'objective necessity'.[433] Such objective necessity can be an objective justification to the extent that it explains why the dominant undertaking entered into a *prima facie* abuse. Objective necessity is a matter of degree. A situation of *force majeure* or State compulsion may exist if it leaves the dominant undertaking no alternative other than to enter a *prima facie* abuse. A lighter degree of objective necessity may exist if the dominant undertaking is compelled to act in a particular way due to technical or commercial considerations.[434] This lighter version may sometimes be difficult to distinguish from the 'commercial freedom' category examined above in Section 3.4.2. Technical and commercial reasons will often provide important input as to when competition should be considered as 'normal'. So why is it useful to make a distinction nonetheless? To my mind, the underlying reason to maintain a distinction is as follows: commercial freedom implies that the dominant undertaking still has a degree of leeway in its business behaviour, whereas objective necessity implies that the firm could not reasonably have acted otherwise.

---

[433] See the Commission guidance on enforcement priorities, *supra* note 378, para 28. To the extent that 'objective necessity' refers to State compulsion it is true that, following from the primacy of EU law over domestic law, NCAs are required to disapply national law that infringes EU (competition) law. At the same time NCAs may not impose penalties in respect of conduct required by national law. NCAs may, however, impose penalties where national law merely 'facilitated or encouraged' the conduct. See Case C-198/01 *CIF* [2003] ECR I-8055, para 58. For an analysis of compulsion by a *foreign* State, see M. Martyniszyn, 'A Comparative Look at Foreign State Compulsion as a Defence in Antitrust Litigation', (2012) 8 The Competition Law Review 143.

[434] *Télémarketing*, *supra* note 331, paras 26-27.

The *Télémarketing* case was an early acknowledgment that technical and commercial reasons can offer an objective necessity for *prima facie* abusive conduct.[435] Such reasons could thus provide a reason for a dominant undertaking to reserve to itself an ancillary activity on a neighbouring market on which it holds a dominant position.[436] Technical and commercial constraints may be particularly relevant in the examination of a possible objective justification in a refusal to deal case.[437] There may, for example, be physical limitations. An example is the Commission decision in *Port of Rødby*.[438] The Commission observed 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 access to a competitor.[439] The Commission examined whether there were technical constraints, such as insufficient capacity, that prevented the competitor from entering the market.[440] On the facts, the Commission found no such constraints.

The surrounding circumstances may also be pressing to such an extent, as to lead to a situation of *force majeure*. Such a situation arises if external factors leave the dominant undertaking with no possibility to act otherwise. The underlying *rationale* is that an abuse implies autonomous conduct that undertakings engage in on their own initiative (the following Section on State compulsion examines autonomy in more detail). [441] An example of *force majeure* is the UK *Aberdeen Journals* case, where the OFT

---

[435] *Télémarketing* (*ibid*.), para 26. For a more elaborate explanation, see Østerud 2010, *supra* note 332, at 254-255. The *Télémarketing* case is still standing case law, see e.g. the reference in *Post Danmark*, *supra* note 381, para 41.

[436] Case 18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941, para 18.

[437] Objective justification is a necessary step in the examination of such cases, see *IMS Health*, *supra* note 394, paras 51-52.

[438] Commission decision 94/119/EC, *Port of Rødby*, OJ [1994] L 55/52.

[439] *Ibid*., para 12.

[440] *Ibid*., para 15.

[441] Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265, para 33. Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73,111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, paras 65, 66, 71 and 72. In this case, the ECJ held that the Commission insufficiently took into account government measures that greatly narrowed the competitive scope of the undertakings. The ECJ concluded that the conduct could not appreciably impede competition. See also the case law cited in *infra* note 451.

investigated below-cost pricing of advertising space.[442] Although Aberdeen Journal's prices were at some point below average variable costs,[443] the OFT did accept an objective justification for the period in which Aberdeen Journals incurred high costs due to a threat of industrial action.[444] The seemingly predatory prices were caused by exceptionally high costs, rather than low prices targeted at excluding competition. There is a sound reason to condone prices below average variable costs if it was truly impossible for the dominant firm to prevent such prices. This could be through the application of a justification, as happened in *Aberdeen Journals*, or through a finding that there was no *prima facie* abuse in the first place, as the conduct was unable to exclude competitors.[445]

Objective necessity may also arise from compulsion by the State. A national measure may draw a dominant undertaking into a *prima facie* abuse.[446] The plea will not succeed if the conduct is simply brought about or encouraged by national law.[447] Article 102 TFEU requires undertakings to make full use of the leeway that they have to prevent a restriction of competition.[448]

---

[442] See the OFT decision of 25 September 2002, *Aberdeen Journals (remitted case)*, Case CA98/14/2002, upheld by the CAT in *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11.

[443] The OFT presumes this conduct to be abusive in accordance with the *AKZO* test, *supra* note 351. See the OFT Decision of 25 September 2002 (*ibid*), paras. 175-180.

[444] *Ibid.,* para 205.

[445] The route will depend on how formalistic a jurisdiction approaches the issue of *prima facie* abuse.

[446] This paragraph refers equally to cases on Article 101 and 102 TFEU, but I will simply refer to Article 102 TFEU.

[447] Note that, in such a case, there is no necessary conflict between EU law and domestic law. See *Télémarketing*, *supra* note 331, para 16. See also Case 26/75 *General Motors v Commission* [1975] ECR 1367; Case 13/77 *Inno v Atab* [1977] ECR 2115; Case 41/83 *Italy v Commission* [1985] ECR 873. The regulatory framework may, however, provide a mitigating factor in determining the level of the fine. See e.g. Case C-198/01 *CIF* [2003] ECR I-8055, para 57. See also *Suiker Unie*, *supra* note 441, para 620.

[448] Indeed, many of the key cases on the matter showed that there was still a degree of competitive leeway left. See e.g. *CIF* (*ibid*), para 68 and 73; Case 123/83 *BNIC v Clair* [1985] ECR 391, para 22 (on a minimum price for a product); Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, para 107 and 121 (noting that DT had sufficient scope to set its prices at a level that would have enabled it to end or reduce the margin squeeze at issue). See also Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125, paragraphs 130-131 (noting that there was still some scope for competition, even though the competitors could exert little influence on the level of the retail selling price); Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831, paragraphs 27 -29 (noting that

The situation is different if the national measure allows no scope for autonomous conduct,[449] and is not obviously incompatible with EU law (which I shall assume in the following paragraphs).[450] There is ample case law that Article 102 TFEU applies only to anti-competitive conduct engaged in by undertakings *on their own initiative*, not to measures that required by the State.[451] According to *Ladbroke*, Article 102 TFEU does not apply if national legislation completely bars any possibility of competition.[452] There are two solid reasons for this approach:[453] First, Article 102 TFEU implicitly requires that the restriction is attributable to the autonomous conduct of the undertaking – which is absent in the case of State compulsion.[454] Second, Article 102 TFEU clearly targets conduct of undertakings, rather than measures

---

the State measures laid down a maximum price, which still allowed lower prices). See also *Ladbroke Racing*, *supra* note 441, para 34-35 and Case T-513/93 *Consiglio nazionale degli spedizionieri doganali v Commission* ECR II-1810, para 61.

[449] See, *a contrario*, *CIF* (*ibid*), para 56. *Deutsche Telekom*, *supra* note 336, para 81; E. Blomme, 'State Action as a Defence Against 81 and 82 EC', (2007) 30 World Competition 243. See also Whish 2009, *supra* note 331, p. 135.

[450] Cf footnote 43 by AG Cosmas in *Ladbroke Racing*, *supra* note 441. Cosmas noted that: '[i]f […] the national legislation is obviously contrary to [EU] law, a fact of which the undertaking is aware, I see no reason why the latter should be shielded by the State measure and thus avoid the sanctions of Article [101 TFEU]'. This position is based on the fact that primary EU law, including Article 102 TFEU, has primacy over domestic legislation. See Case 6/64 *Costa v ENEL* [1964] ECR 585. This hierarchy of norms explains why '[t]he Commission cannot be bound by a decision taken by a national body pursuant to Article [102 TFEU]', see *Deutsche Telekom* (General Court), *supra* note 448, para 120. The problem is that an *ex ante* assessment of compatibility with Article 102 TFEU is rarely unambiguous, providing an obvious dilemma for a dominant undertaking on how to act.

[451] Case 267/86 *Van Eycke v Aspa* [1988] ECR 4769, para 16; *RTT v GB-Inno-BM*, *supra* note 436, para 20; Case C-320/91 *Corbeau* [1993] ECR I-2533, para 10. Case C-202/88 *France v Commission* [1991] ECR I-1223, para 55 (noting that 'anti-competitive conduct engaged in by undertakings on their own initiative can be called in question only by *individual decisions* adopted under Articles [101] and [102] of the Treaty' [italics added by author]); Case 41/83 *Italy v Commission* [1985] ECR 873, paras 18 to 20; *Ladbroke Racing*, *supra* note 441, para 33.

[452] *Ladbroke Racing*, *supra* note 441, paras 33-34.

[453] Note that, from the perspective of the hierarchy of norms, it is counterintuitive to consider that national law may limit the application of EU law. However, it should be remembered that potential conflicts often involve a very specific obligation under national law as opposed to the relatively vague prohibition in Article 102 TFEU.

[454] *Ladbroke Racing*, *supra* note 441, para 33. See also *Suiker Unie*, *supra* note 441, paras 65, 66, 71 and 72. In *Suiker Unie*, the ECJ held that the Commission insufficiently took into account government measures that greatly

by Member States.[455] Member States are bound by separate Treaty requirements, such as Article 106(1) TFEU.[456] This provision prohibits Member States from placing public undertakings and undertakings with exclusive rights in a position in which they would necessarily infringe Article 102 TFEU.[457] In sum, if the State leaves no room for an undertaking to act in compliance with Article 102 TFEU, its conduct should be considered objectively justified. Only to the extent that the dominant undertaking can be certain that the national measure is contrary to EU law (for example: if an NCA has disapplied the relevant measure on the basis of *CIF*), should the possibility of liability reappear.[458]

However, the case law also provides various indications suggesting a different approach. Apart from the prohibition laid down in Article 106(1) TFEU, the case law has developed a more general rule that a Member State is not allowed to introduce or maintain measures that may render ineffective the competition rules applicable to undertakings.[459] Such measures may lead to an infringement of a

---

narrowed the competitive scope of the undertakings. The ECJ concluded that the conduct could not appreciably impede competition.

[455] See e.g. Case C-1/12 *Ordem dos Técnicos Oficias de Contas v Autoridade da Concorrência* [2013] nyr, para 54: 'when a Member State grants regulatory powers to a professional association, whilst defining the public-interest criteria and the essential principles with which its rules must comply and retaining its power to adopt decisions in the last resort, the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings'.

[456] Note that undertakings entrusted with a service of general economic interest are exempted from the application of the competition rules in so far as necessary for those services. See Article 106(2) TFEU; Case C-393/92 *Gemeente Almelo and Others v Energiebedrijf IJsselmij* [1994] ECR I-1477, para 46. *Corbeau*, *supra* note 451, paras 13-14.

[457] *RTT*, *supra* note 436, paras 20-21; Joined Cases C-271, 281 and 289/90 *Spain, Belgium and Italy v Commission* [1992] ECR I-5833, para 36.

[458] See e.g. P.-J. Slot & A. Johnston, *An Introduction to Competition Law* (Hart Publishing: Oxford and Portland, Oregon 2006), at 275. See e.g. the *CIF* case, *supra* note 447, para 51. If a National Competition Authority disapplies a national measure as it infringes the EU competition rules, the dominant undertaking can no longer rely on the *Ladbroke Racing* rule (*supra* note 441).

[459] *CIF*, *supra* note 447, para 45. See also Case 13/77 *GB-Inno-BM* [1977] ECR 2115, para 31; *Van Eycke*, *supra* note 451, para 16; Case C-185/91 *Reiff* [1993] ECR I-5801, para 14; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, para 14; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, para 20; and Case C-35/99 *Arduino* [2002] ECR I-1529, para 34.

combination of provisions: Article 102 TFEU,[460] the objective of undistorted competition (Protocol 27),[461] and the duty of loyal cooperation (Article 4(3) TEU).[462] Crucially, this line of reasoning suggests that such conduct cannot be imputed to the dominant firm,[463] but is still considered to be an abuse.[464] Perhaps the ECJ considered that it could only hold a Member State accountable if there was an underlying infringement of the competition rules.

The second approach, although technically perhaps more 'pure', has considerable drawbacks when one considers the implications for a private law action. Article 16(1) of Regulation 1/2003 provides that national courts cannot take decisions running counter to a decision already adopted by the Commission.[465] In the context of Article 102 TFEU, this should normally mean that a national court, in a private follow-on action, should follow the finding of an abuse. Although the abuse may not be imputable for the purposes of EU public enforcement, I doubt whether this conclusion on imputability can be transposed just as easily to a private enforcement setting. Given the absence of detailed EU law on the matter, Member States still have ample freedom to decide on the rules on imputability in private law actions – [466] as long as they conform to the principles of 'equivalence'[467] and 'effectiveness'.[468] It is

[460] Or, depending on the facts of the case, Article 101 TFEU.

[461] The former Article 3(1)(g) EC. See also *CIF*, *supra* note 447, para 47. In *CIF*, the ECJ also noted that Member States have agreed to observe the principle of an open market economy with free competition.

[462] *Van Eycke*, *supra* note 451, para 16.

[463] *CIF*, *supra* note 447, para 51. See also Opinion of AG Cosmas in *Ladbroke Racing*, *supra* note 441, para 63.

[464] It is theoretically possible to subsume under this heading the case law that approval by a public authority of a certain course of action does not absolve the obligations under Article 102 TFEU. See e.g. *Deutsche Telekom* (General Court), *supra* note 370, para 107 and *Masterfoods, supra* note 331, para 48; Case 123/83 *BNIC v Clair* [1985] ECR 391, para 22-23. However, I prefer to read this case law in the sense that it still left a possibility for conduct that *was* in conformity with EU law (note that that the request for approval embodies a degree of autonomy).

[465] Regulation No 1/2003, [2003] OJ L 1/1.

[466] Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para 64: 'In the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right'. Member States may also have a foreseeability criterion in their private law, which raises another complicating factor similar to that of imputability.

by no means evident that all EU Member States, in their private laws, would automatically reject imputability in a situation of State compulsion.

In sum, the second approach would still be able to expose dominant undertakings to an unfavourable private law ruling, contrary to the holding in *CIF* that State compulsion should be able to shield 'the undertakings concerned *from all the consequences* of an infringement of Articles [101 TFEU] and [102 TFEU]', applying to 'both public authorities *and other economic operators*' [italics added by author]'.[469] If the ECJ wants to ensure that State compulsion does not have any consequences in the private law sphere, it should rather decide that there is no abuse in the first place. Member States could still be held accountable, by holding that there is a *prima facie* abuse whose only objective justification lies in the compulsion by the State. It is submitted that such a justification plea could be brought by the dominant undertaking, but not by the State itself – it would be absurd if the State could avoid the application of a Treaty prohibition by referring to legislation that it has itself enacted.

3.4.4 Legitimate business behaviour – The BP *judgment*

The sections above have shown various perspectives of legitimate business behaviour. Of course there are no clear boundaries. Rather, the categories offer different points of view that are useful to understand the relevant context. The *BP* judgment offers a fine example.[470] The case concerned BP's decision, in the wake of the oil crisis in the early 1970s, to reduce its supplies of petrol products to a distributor named ABG. The Commission held that BP's reduction of supplies to ABG was much greater degree compared to the supplies to other customers, and that BP had been unable to provide objective

---

[467] I.e. the domestic rules applicable to EU law may not be not less favourable than those governing similar domestic actions. Case C-453/99 *Courage v Bernard Crehan* [2001] ECR I-6297, para 29. *Manfredi* (*ibid*.), para 62 and 77.

[468] I.e. the domestic rules that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law. *Courage* (*ibid.*), para 29; *Manfredi*, *supra* note 466, para 62 and 77.

[469] *CIF*, *supra* note 447, para 54. Do note that *CIF* seemed to support the second approach, which depends on an infringement of Article 102 TFEU.

[470] *BP*, *supra* note 338.

reasons for this.[471] Disagreeing with the Commission, the AG's Opinion and the ECJ's judgment provide several reasons why there was no abuse, after all.[472]

First, the case involves an element of State intervention. AG Warner considered the intervention by a government agency – even though not compulsory – may have created doubts as to whether BP should honour its contractual obligations.[473] Furthermore, there was an element of *force majeure*. The wider context was the shortage of oil products,[474] forcing BP to choose how to allocate its supplies. The ECJ held that BP could indeed differentiate between 'traditional' and 'occasional' customers. If BP had reduced its supplies to ABG only to a limited amount, it would have had to considerably lower its deliveries to its traditional customers.[475] The ECJ also noted that ABG would not be greatly affected, as it had various alternative sources of supply through the intermediary of a government agency.[476] Finally, the differentiation also contained an element of commercial freedom. AG Warner suggested customers may indeed be given priority if they had been prepared to pay higher prices in normal times – with the aim to obtain an assured supply in times of scarcity.[477] The *BP* case thus shows how various perspectives can put the conduct under review in its proper context, and how a conclusion may follow that there has been no abuse.

3.4.5 Efficiency

An efficiency plea provides another type of objective justification.[478] The plea is based on the link between economic efficiency and consumer welfare, which some commentators argue should be the

---

[471] *Ibid*., para 19.

[472] *Ibid.*, para 43. See also the Opinion of AG Warner in the same Case.

[473] Opinion of AG Warner in *BP* (*ibid.*) *supra* note 338, at 1540

[474] As well as the 'regrouping of BP's operational activities following the nationalization of a large part of the company's production activities'. See *BP* (*ibid*.), para 28.

[475] *Ibid*., para 33.

[476] *Ibid*., para 39.

[477] Opinion of AG Warner in *BP* (*ibid*), at 1534.

[478] See Whish (2008, *supra* note 331, at 208), who argues that Article 101(3) TFEU serves as a useful template to consider an efficiency plea under Article 102 TFEU.

key objective of competition law.[479] In essence the efficiency criterion requires the dominant firm to show that the *prima facie* abuse has no net harm effect on consumer welfare.[480] The efficiency plea is likely to gain more ground following the Commission's 2009 guidance paper that pushes for a more economic approach vis-à-vis abuse cases.[481]

Several early ECJ judgments show the relevance of efficiency considerations within Article 102 TFEU. Examples include *Hoffmann-La Roche*,[482] *Michelin I*[483] and *Michelin II*.[484] A more formal acknowledgment of the efficiency plea came in *British Airways*. The case shows that Article 102 TFEU can accommodate an efficiency-based balancing act.[485] The ECJ held that, even where there is an 'exclusionary effect',[486]

---

[479] L. Lovdahl Gormsen, 'How well does the European Legal Test for Predation go with an Economic Approach to Article 102 TFEU?', (2010) 37 *Legal Issues of Economic Integration* 294 ('Gormsen 2010'). She notes that it is 'debatable' whether consumer welfare is reflected in the case law of Article 102 TFEU. See, further, L. Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press: Cambridge 2010).

[480] See Commission guidance on enforcement priorities, *supra* note 378, para 30. See also *Irish Sugar* (General Court), *supra* note 353, para 187-189. The General Court held that dominant undertakings are allow to take measures of a defensive nature if they are based on criteria of economic efficiency, provided it is consistent with the interests of consumers. More recent case law, as shall be examined below, seemingly expanded the possibilities for dominant firms to invoke efficiency benefits.

[481] In its guidance document, the Commission repeatedly emphasized the importance of an effects-based approach instead of a form-based approach. See the Commission guidance on enforcement priorities, *supra* note 378. For a view supporting the effects-based approach, see e.g. Competition Law Forum Article 82 Review Group, 'The Reform of Article 82: Recommendations on Key Policy Objectives', (2005) European Competition Journal 179, at 180-182.

[482] *Hoffmann-La Roche*, *supra* note 349, para 90.

[483] *Michelin I* (ECJ) *supra* note 334, para 85.

[484] *Michelin II* (General Court) *supra* note 422, para 59.

[485] *British Airways* (ECJ), *supra* note 341, para 69. Interestingly, in the *Atlantic Container* ruling the General Court held that efficiencies *cannot* constitute and objective justification under Article 102 TFEU. See Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, para 1112. Only months later, however, the General Court confirmed in *British Airways* that the efficiency plea exists after all. See *British Airways* (General Court), *supra* note 416, para 280. It seems there has been extensive debate between the judges, which has finally been settled in favour of the pro-efficiency side.

[486] In sum, there was thus a *prima facie* abuse.

such an effect 'may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.'[487] Conduct that meets this criterion should, *ex post facto*, be considered as competition on the merits.[488] It reflects the idea that competition law should not intervene if a dominant firm is able to outperform its competitors simply as a result of superior efficiency.

Building upon *British Airways*, the 2012 *Post Danmark* judgment offers a clear framework as how to perform such an efficiency-balancing test.[489] The ECJ held that:[490]

> 'it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition'.

The *Post Danmark* judgment thus calls for a weighing exercise of positive and negative effects that arise from the conduct; not only effects in terms of consumer welfare (that is often equated with an

---

[487] *British Airways* (ECJ), *supra* note 341, para 69. Cf. Opinion of AG Kokott in *British Airways* (*ibid*), para 59. The General Court's ruling in *British Airways* (*supra* note 416, para 280) referred explicitly to 'economic efficiency'. An earlier relevant judgment was *Irish Sugar* (General Court), *supra* note 353, para 189. In *Irish Sugar*, the General Court held that protection of the commercial position of an undertaking must be based on criteria of economic efficiency and be consistent with the interests of consumers.

[488] *TeliaSonera*, *supra* note 347, paras 24 and 43. At para 88, the ECJ appeared to sketch a link between the dominant firm's 'reliance on its own merits' and 'the absence of any […] economic and objective justification'. See also *Post Danmark*, *supra* note 381, at paras 21 and 22. In the latter paragraph the ECJ held that 'not every exclusionary effect is necessarily detrimental to competition', explaining that competition on the merits may well lead to the exit of competitors from the market. Note that this is slightly different from the 'competition on the merits' discussed in section 3.4.2 above, which concerns conduct that takes place within the commercial freedom afforded to the dominant undertaking.

[489] *Post Danmark, supra* note 381, paras 41-42; *British Airways*, *supra* note 341, para 86, and *TeliaSonera, supra* note 347, para 76; Also note that some recent cases have remained relatively traditional; Case C-549/10 P *Tomra Systems ASA and Others v Commission* [2012] nyr.

[490] *Post Danmark*, *supra* note 381, para 42.

efficiency standard), but in terms of competition, more broadly, as well. The test is strikingly similar to the conditions of Article 101(3) TFEU.[491] Some commentators have argued that such a transposition is inappropriate.[492] However, *Post Danmark* is not that surprising considering the widespread call for, and the ECJ's apparent wish to follow, a more effects-based approach.[493] The conditions of Article 101(3) TFEU simply provided a tried and tested framework that the ECJ is familiar with. The transposition also has the benefit of bringing more consistency in the application of Articles 101 and 102 TFEU.[494]

Efficiency is not a unitary concept, but can be viewed from different perspectives. These perspectives include allocative efficiency (output maximization), productive efficiency (cost minimization) and dynamic efficiency (innovation maximization). There is no sound basis to prefer, *in abstracto*, one type of efficiency to the other.[495] Only a balancing act of the various, and often opposing, effects can

---

[491] See *Post Danmark*, *supra* note 381, para 41-42. The dominant undertaking must show that the likely efficiency gains must 'counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition'. Article 101(3) TFEU, for its part, notes that a restrictive agreement will not be prohibited if it 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

[492] J. Temple Lang, 'Judicial review of competition decisions under the European Convention on Human Rights and the importance of the EFTA court: the Norway Post judgment', (2012) 38 European Law Review 464, at 487. For another criticism, see Friederiszick and Gratzà 2012, *supra* note 408, at 38. They note that 'copying the conditions from art. [101](3) of the Treaty to art. [102] may contribute to the illusionary character of efficiency defence'. Of course, this position assumes that Article 101(3) TFEU cannot adequately accommodate for an efficiency plea.

[493] D. Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom?', (2004) 41 *Common Market Law Review* 1527.

[494] See e.g. *Continental Can*, *supra* note 343, para 25. See also section 3.2.1 in chapter II.

[495] Allocative efficiency is strongly associated with the model of price equilibrium, which many commentators argue should be the basis for competition policy. At the same time, productive efficiencies could be preferred as it

determine whether conduct has a net beneficial effect on efficiency. In practice, a *prima facie* abuse will usually entail a net loss in allocative efficiency, raising the question whether the loss can be outweighed by productive or dynamic efficiencies. For example, the General Court examined productive efficiencies in *British Airways* (focusing on possible cost savings of the scheme under review)[496] and dynamic efficiencies in *Microsoft* (focusing on the incentives to innovate).[497] Another example is a refusal to license an IP right. Such a refusal may reduce allocative efficiency (as it likely to lower output and raise prices), but at the same time strengthens the incentive to invest, thus strengthening dynamic efficiency.[498]

Although an efficiency-balancing test is relatively straightforward in theory, in practice it is anything but.[499] It is, generally speaking, difficult to quantify the various effects in a precise and reliable way.[500] This is particularly the case for dynamic efficiencies, which usually entail highly uncertain benefits in the future. By comparison, productive efficiencies are often less difficult to quantify. A system that solely takes into account effects that can be quantified in a reliable manner is thus likely to have a bias in favour of productive efficiencies; even though dynamic efficiencies can have a much greater long-term influence on consumer welfare.[501]

---

is often the easiest to accurately measure (Friederiszick and Gratzà 2012, *supra* note 408, at 36). Finally, dynamic efficiencies have the benefit of taking into account long-term benefits, but are particularly difficult to assess.

[496] *British Airways* (General Court), *supra* note 87, paras 267 and 284-285.

[497] *Microsoft*, *supra* note 395, para 709.

[498] See also Opinion of AG Jacobs in Case C-7/97 *Bronner* [1998] ECR I-7791, para 57. Jacobs holds that 'interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations', referring in particular to the opposing effects on short term and long term competition. See also Opinion of AG Poiares Maduro in *KPN v OPTA*, supra note 331, para 53: 'a duty under Article [102 TFEU] for a dominant undertaking to aid its competitors should not be assumed too lightly'. Poiares Maduro also notes that '[a] balance should be kept between the interest in preserving or creating free competition in a particular market and the interest in not deterring investment and innovation by demanding that the fruits of commercial success be shared with competitors'.

[499] See also the difficulties noted by K. Tosza, 'Efficiencies in Art. 82 EU: An illusionary defence?', (2009) Concurrences: Law & Economics 35, at 35-36.

[500] *Ibid*.

[501] Note also the criticism on the Commission's approach towards dynamic efficiencies, putting more faith in 'follow-on incremental innovation' rather than 'breakthrough competition for the market'. See Friederiszick and

In practice, the efficiency plea should attempt to approximate the effects of the conduct. There should be a balance between the *magnitude* of the effects and the *likelihood* with which they are to arise. Such an approach removes the bias towards any type of efficiency: although dynamic efficiencies are often much less certain, they may represent substantial efficiency gains. An approximation of effects, rather than an intricate quantification, may sound as a wobbly basis for an efficiency analysis. However, assessments whether conduct tends to be pro-competitive or not have been used within the framework of Article 101 TFEU for many years. Usually, once can find proxies to what extent conduct can be expected to be efficient. For example, if the conduct is simply a continuation of a practice that the firm already engaged in before attaining dominance, it is likely to be pro-competitive.

An efficiency examination should, in my view, also consider the degree of dominance to the extent that it has an impact on the effects of the conduct under review. In its Article 102 TFEU guidance paper, the Commission stated that exclusionary conduct of a super-dominant firm 'can normally not be justified' on efficiency grounds.[502] The Commission's cautious choice of words indicates that not even a super-dominant firm is barred *in toto* from invoking an efficiency plea.[503] Nevertheless, such an undertaking will find it more difficult to invoke an objective justification than a firm that barely meets the criteria for dominance. This seems a reasonable stance. As was argued in paragraph 2.2, the higher the degree of market power, the less likely *prima facie* abusive conduct will exhibit redeeming features that are

---

Gratzà 2012, *supra* note 408, at 39. They refer e.g. to D. F. Spulber, 'Competition Policy and the Incentive to Innovate: The Dynamic Effects of Microsoft v. Commission', (2008) 25 Yale Journal on Regulation 300.

[502] Commission guidance on enforcement priorities, *supra* note 378, para 30.

[503] The Commission does not mention what I consider to be the other sources of objective justification, i.e. public interest considerations and legitimate business practice. There seems to be no reason why super-dominant firms should, as a matter of principle, not be allowed to invoke these sources. Whether they can be accepted is of course a different matter. See also DG Competition's discussion paper on the application of Article [102] of the Treaty to exclusionary abuses of December 2005, available at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf. At paras 90-91, the Commission holds that it is highly unlikely that a dominant undertaking can successfully invoke efficiencies if its conduct would lead to a monopoly. I think that this statement is too restrictive, as it would bar an efficiency plea in sectors where competition is *for* the market – sectors, in other words, that tend towards (temporary) monopolies even under perfectly legitimate competition.

sufficient to compensate for its anti-competitive features. The *TeliaSonera* judgment is somewhat ambivalent on this issue. Although it held that 'the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct', this is not the case 'to the question of whether the abuse as such exists'.[504] To my mind, the second quote is mistaken, as it suggests that an examination of the extent of effects is irrelevant for a finding of an abuse – contrary to the reliance on an effects-based approach in the same judgment.[505]

Admittedly, the difficulty with the quantification of effects may lead to challenges for legal certainty.[506] If the test can only produce results with hindsight, it may leave dominant undertakings with insufficient possibility to adapt their behaviour beforehand.[507] According to Temple Lang, '[t]here should be a test of exclusionary foreclosure that dominant companies can apply before they begin the conduct in question'.[508] A dominant undertaking can formulate *ex ante* what efficiency gains it considers applicable and, importantly, how they benefit consumers. Another useful examination is asking whether the conduct is truly necessary for the efficiencies to arise – this test will often prove to be the most formidable hurdle for an efficiency plea. However, there is no single *ex ante* test that can provide 100% reliability on an examination of effects – if only because the conduct may have unexpected consequences, either pro- or anti-competitive. It appears that an effects-based approach entails a degree of uncertainty that we will simply have to live with. At the end of the day, I believe it is preferable to opt for an effects-based approach that contains slightly more uncertain rules, instead of a form-based approach that is fully predictable but also bans many practices that are actually pro-competitive.

As a final comment, I should note the ambiguity as to the precise relation between the efficiency plea and objective justification. Rousseva has argued that the efficiency plea should not form part of objective justification.[509] Her point raises an important question: why would a dominant undertaking

---

[504] *TeliaSonera*, *supra* note 347, para 81.

[505] *Ibid.*, para 76

[506] According to the principle of legal certainty, dominant firms must be able to know whether conduct is prohibited or not. See *Deutsche Telekom*, *supra* note 336, para 202; *TeliaSonera*, *supra* note 347, para 44.

[507] Temple Lang 2012, *supra* note 492, at 469-470.

[508] *Ibid*.

[509] Rousseva 2010, *supra* note 332, at 380-387.

have to justify efficient behaviour? Why is such conduct not legitimate in and of itself? It is submitted that the answer lies in the opposing effects that conduct may have. The need to proffer a justification arises precisely because the conduct has *some* anti-competitive characteristic, such as an adverse impact on allocative efficiency.[510] The net effect can only be found by weighing the pro-competitive effects as well. The same approach applies to merger control. A merger filing may require an efficiency defence for a merger that – if the defence proves successful – transpires to have a net efficient effect.

3.4.6 Public interest

Public interest objectives may serve as another type of objective justification. It is submitted that a dominant undertaking should not be *a priori* precluded from taking public interest into account when determining its course of action. Sometimes public interest is equated with 'non-economic' values. In my view, a sharp distinction between 'economic' and 'non-economic' values can be deceptive. At least in theory, it is possible to valuate, in economic terms, values that we would otherwise think of as 'non-economic'.[511] An example is where the production of a certain good has negative effects on the environment. If perfect information were available, it would be possible to calculate all its negative externalities and compare it to the benefits of continuing production. If the benefits are greater than the costs, the polluter could theoretically negotiate full compensation for the harm it inflicts upon others.[512] In this way, public interest values can to a large extent be considered in terms of efficiencies, as they call for a weighing exercise of beneficial and harmful welfare effects.

Indeed, the issue is not that public interest values can never viewed in economic terms (because, theoretically, they often can), but that they are often exceedingly difficult to quantify in actual practice. For example, a comprehensive examination of harm to the environment should not only assess the current effects, but its impact in the future as well. But how do we valuate the burden that we put on

---

[510] An 'exclusionary effect', in the words of *British Airways* (ECJ), *supra* note 341, para 68-70.

[511] For several examples of how we can make difficult societal choices (such as the decision in which municipality to build a prison) through market mechanisms, see e.g. R.F. Frank, *The Darwin Economy: Liberty, Competition and the Common Good* (Princeton University Press: Princeton, New Jersey 2011). Of course, it is a different matter whether this is always desirable or practicable.

[512] Do note that this implies that those receiving compensation are representative for the full extent of the relevant harm. Alas, this does not seem likely. For example, people not yet born are unlikely to be compensated, even though they may well be affected (see Townley 2011, *infra* note 513).

future generations by, say, burning irreplaceable fossil fuels or by contributing to irreversible climate change?[513]

There is simply no sufficiently reliable and precise data available that provides a solid basis to make an all-inclusive balancing exercise. Indeed, there may be an undesirable bias in favour of present-day benefits as they are relatively easy to quantify, compared to future adverse effects that are more uncertain – even though those future adverse effects can be much greater than the current benefits. And even if we do succeed in quantifying all the relevant effects, there may still be a market failure. Coming back to the previous example, people not yet born can simply not claim compensation for the harm to them by previous generations – leaving current generations largely free to neglect the extensive harm that their conduct may inflict on future generations.

In addition to the point raised above, there may also be values that, from an ethical perspective, we do not *wish* to translate into economic terms. Welfare maximisation is not the only value we care about.[514] That is why competition law should not *a priori* bar a dominant undertaking from bringing its actions more in line with the interests of society at large. The mere fact that an interest is difficult to properly express in economic terms, does not mean that it should be neglected. Although competition law is obviously not the primary means to pursue public interest goals, it is submitted that Article 102 TFEU should not, by definition, reject such considerations as irrelevant.[515]

---

[513] For a further analysis, see C. Townley, 'Inter-Generational Impacts in Competition Analysis: remembering those not yet born', (2011) 11 European Competition Law Review 580.

[514] See e.g. C. Townley, 'Is Anything more Important than Consumer Welfare (in Article 81 EC)?: reflections of a Community lawyer', (2007-2008) 10 Cambridge Yearbook of European Legal Studies 345. See also the discussion between Dworkin and Posner on whether 'wealth' itself can be considered a value: R.M. Dworking, 'Is Wealth A Value?', (1980) 9 J. Legal Stud. 191; R.A. Posner, 'The Value of Wealth: A Comment on Dworkin and Kronman', (1980) 9 J. Legal Stud. 243.

[515] Note that not all commentators seem to agree with this separate category of 'objective justification'. For example, Kingston seems to argue that environmental concerns should be subsumed under the heading of 'objective necessity'. See S. Kingston, *The Role of Environmental Protection in EC Competition Law and Policy* (dissertation Leiden 2009), at 211. I that Kingston's approach has the risk of focusing too much on the alleged impossibility for a dominant firm to act otherwise – even though the real crux is raised when a dominant firm has chosen environmentally-friendly behaviour out of free will, namely: do we accept a diminuation of the level of competition in favour of a more effective protection of the environment?

In my view, EU competition law provides ample room to accommodate public interest considerations. The ECJ has consistently held that the competition rules must be interpreted in light of the principles and objectives of the EU.[516] Indeed, the ECJ has noted that the competition rules are 'essential for the accomplishment of the tasks entrusted to the [EU]''.[517] These tasks clearly go beyond the economic well being of consumers,[518] and include many objectives that can easily be associated with the public interest. Article 9 TFEU provides that, in defining and implementing its policies and activities, the EU shall take into account requirements linked e.g. to the promotion of a high level of employment, the guarantee of adequate social protection, and a high level of protection of human health. Article 3(3) TEU provides that the EU shall work for, *inter alia*, 'sustainable development', 'social progress' and 'a high level of protection and improvement of the quality of the environment'. These objectives can have an ample influence on the application of the competition rules.[519] An example is *Preussen Elektra*, where the ECJ held that 'environmental protection requirements must be integrated into the definition and implementation of other [EU] policies'.[520] The *Kanal 5* judgment offers another confirmation of the relevance of public interests: the ECJ held that an objective justification within the meaning of Art. 102 TFEU 'may arise, in particular, from the task and method of financing public service undertakings'.[521]

---

[516] See e.g. *Continental Can*, *supra* note 343, para 25. See also Kingston 2009 (*ibid*., at 209-210), who – in my view, rightly – concludes that environmental concerns could thus be relevant in the interpretation of Article 102 TFEU.

[517] See, on Article 101 TFEU but clearly transposable to Article 102 TFEU as well, *Courage*, *supra* note 467, para 20 and Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 36.

[518] Indeed, one could question to what extent a competition policy that is solely based on consumer welfare finds a basis in the Treaties. One basis that seems to get closest is Article 3(1) TEU, which provides that the EU aims to promote e.g. 'the well-being of its peoples'. The concept of 'well-being' is much broader than simply (monetary) 'welfare'.

[519] Note that Article 7 TFEU provides that the EU shall ensure consistency between its policies and activities, reflecting the link between various policy areas and objectives.

[520] Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para 76.

[521] Case C-52/07 *Kanal 5 and TV 4 v STIM* [2008] ECR I-9275, para 47. Unfortunately, the ECJ provided no further explanation. The funding of a public service obligation may, alternatively, be considered as 'objective necessity'. I prefer, however, to categorise it under public interest, because it is a deliberate *choice* to pursue a specific policy objective, rather than a situation akin to *force majeure*.

I agree with the consideration of wider public interest objectives laid down by the EU Treaties, as those objectives would become hollow statements if they cannot make a difference in EU policies. A public interest plea is particularly persuasive if the relevant conduct protects a vital public interest goal, and presents only a limited issue for competition. Such may be the case if a dominant firm expects its business partners from abiding by minimum Corporate Social Responsibility (CSR) criteria.[522] In my view, Article 102 TFEU should not *a priori* preclude a dominant firm refusing to buy from upstream suppliers that, say, make use of child labour,[523] or that supply wood from uncertified forests.[524]

Another reason in favour of considering public interest is the role they can play within Article 101 TFEU.[525] Townley has aptly shown why public interest goals should be taken into consideration while analysing an agreement under Article 101 TFEU.[526] Considering the parallelism that should be upheld while interpreting Articles 101 and 102 TFEU (see section 3.2.1 in chapter II above), there is ample reason to give due consideration to public interest in the framework of Article 102 TFEU as well.

Two well-known Article 102 TFEU cases where the litigating parties invoked public interest are *Hilti* and *Tetra Pak II*.[527] In *Hilti*, the Court examined a justification plea that an exclusionary practice was necessary for the protection of public health and safety. Hilti argued that it disallowed the compatibility of its own products with products made by other companies for public health reasons. The General Court rejected this claim because public health in this area was already protected by a government body and by various regulations. The General Court observed that, under such circumstances, it is not the task of the dominant undertaking to 'take steps on its own initiative to eliminate products which, rightly or

---

[522] On the connection between CSR and competition law, see e.g. T.R. Ottervanger, *Maatschappelijk verantwoord concurreren: mededingingsrecht in een veranderende wereld* ['socially reponsible competition: competition law in a changing world'] (inaugural address 19 March 2010, Leiden University).

[523] Article 3(3) and (5) TEU provide that the EU shall promote the protection of the rights of the child.

[524] Article 3(3) TEU provides that the EU aims for a high level of environmental protection, while Article 3(5) TEU provides that the EU shall contribute to the sustainable development of the Earth.

[525] Case C-309/99 *Wouters* [2002] ECR I-1577. See also Commission decision in Case COMP.F.1/37.894 *CECED* [2000] OJ L 187/47.

[526] C. Townley, *Article 81 EC and Public Policy* (Hart Publishing: Oxford and Portland, Oregon 2009). See, differently, O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP: Oxford 2006).

[527] *Hilti* (General Court), *supra* note 400; *Tetra Pak II* (General Court), *supra* note 357.

wrongly, it regards as dangerous or at least as inferior in quality to its own products.'[528] Similarly, in *Tetra Pak II* the General Court did not agree with the dominant firm's submission that allowing interoperability would entail health and safety risks and would therefore be contrary to the public interest.[529]

Crucially, *Hilti* and *Tetra Pak II* rejected the public interest on the facts, but *not* as a matter of law.[530] The facts of the cases do not indicate any particular weakness in the applicable legal framework protecting health and safety, and accordingly no reason why the dominant undertaking should have gone beyond its formal legal requirements. The facts also showed little sign that the safety concerns were genuine. For example, in *Hilti*, the dominant undertaking did not pro-actively approach the competent authorities for a ruling that the use of non-Hilti nails was, in fact, dangerous.[531] There was clearly an alternative that Hilti should have taken up.

I doubt whether it follows from *Hilti* and *Tetra Pak II* the mere existence of government rules and institutions should, by definition, preclude dominant firms from ever going beyond the health and safety requirements formally required by law. This issue becomes particularly relevant in a situation where the relevant rules are, for whatever reason, ineffective to ensure health and safety standards – such a situation would not be covered by the reasoning in *Hilti* and *Tetra Pak II*, as that reasoning depends on the assumption that the relevant objective is already sufficiently protected. The most important hurdle for a dominant undertaking will be to show why its conduct is necessary to achieve the desired goal. For example, in *RTT v GB-Inno-BM*, the dominant undertaking relied in its approval of telephone equipment on 'the safety of users, the safety of those operating the network and the protection of public telecommunications networks against damage of any kind'. [532] The ECJ did not hold that these

---

[528] *Hilti* (*ibid*.), para 118. For the ECJ appeal, see Case C-53/92 P *Hilti v Commission* [1994] ECR I-667. The ECJ appeal focused on the nature of the evidence that needs to be submitted to the EU courts.

[529] *Tetra Pak II* (General Court), *supra* note 357.

[530] See, similarly, Case T-151/01 *DSD v Commission* [2007] ECR II-1607.

[531] *Hilti* (General Court), *supra* note 400, para 115.

[532] *RTT v GB-Inno-BM, supra* note 436, para 22.

considerations are irrelevant for the purposes of Article 102 TFEU, but rejected the plea as the dominant undertaking could have resorted to less anti-competitive alternatives.[533]

The objective justification pleas seem to have been unsuccessful because the conduct went beyond what is necessary to protect the stated public interest. I agree that there is no basis to accept a public interest plea if less anti-competitive measures would have been able to achieve the objective as well. The rulings therefore merely show that the ECJ does not accept hollow references to public interest – and rightfully so. I believe that the case law still allows dominant firms to uphold a public interest goal; as long as they can show why that goal is relevant in the EU legal context; and how their conduct meets the proportionality test (as examined below in Section 4).

Apart from the ECJ, the Commission has also dealt with public interest concerns in various cases. In the decisions discussed below, the Commission showed that it is conceptually possible to consider public interest issues in the abuse analysis. The *Port of Genoa* case concerned the differentiation of tariffs for piloting in the Port of Genoa.[534] The Commission found that pilots cannot favour certain shipping companies to the detriment of others – unless there is an objective reason to do so. The Commission noted that such objective reasons may include the 'protection of the sea bed' – confirming that environmental reasons may justify a *prima facie* abuse.[535] In *Spanish Airports*, the Commission objected to a system of discounts on landing fees in use at Spanish airports.[536] It again held that there may be 'objective reasons' for such behaviour, such as the 'aim of reducing air traffic noise or air congestion'.[537]

The finding of an abuse in both in *Port of Genoa* and *Spanish Airports* implies that no 'objective reasons' were applicable.[538] The Commission could – and should – have been more explicit as to why the relevant public interests at play were unable to justify the *prima facie* abuse. It is unclear how the differentiation

---

[533] *Ibid*. The ECJ notes that it could have been sufficient to lay down specifications and to establish a procedure for type-approval to examine whether those specifications have been met.

[534] Commission decision in Case 97/745/EF *Port of Genoa* [1997] OJ L 301/27.

[535] *Ibid*., para 21. The Commission also referred to economies of scale.

[536] Commission decision in Case 2000/521/EF *Spanish Airports* [2000] OJ L 208/36.

[537] *Ibid*., para 52. As in *Port of Genoa*, the Commission referred to economies of scale as well.

[538] Even though, in *Spanish Airports,* the Commission does note why the conduct does not lead to any economies of scale.

under review truly contributed to the relevant public interest aims. For example, a justification would have been much more persuasive in *Spanish Aiports* if the discounts had actually been linked to the level of noise that a particular aircraft would create by landing there.

In *GVG/FS*, the Commission examined a complaint from GVG, a German railway company. Ferrovie dello Stato, the Italian national railway carrier, allegedly made it impossible for GVG to enter the Italian market, for example by refusing to provide traction.[539] One of the arguments raised was that traction could not be provided based on safety concerns. Although the Commission did not denounce the importance of such safety reasons as a matter of law, it did reject the argument on the facts. The Commission observed that GVG, before being able to offer passenger transport services, would first have to obtain a safety certificate. As this is the responsibility by the infrastructure manager, 'it is not the responsibility of [Ferrovie dello Stato] to judge whether GVG fulfils the necessary safety requirements'[540] – echoing the approach taken in *Hilti*. It seems reasonable that a general reference to safety concerns is unlikely to be persuasive – especially if there specific regulations are in place dealing with that specific concern.[541]

A number of arguments can be raised against considering public interest within the framework of Article 102 TFEU.[542] Some commentators have suggested that competition law should only consider efficiencies and the effect of conduct on consumer welfare,[543] which seemingly takes public interest out of the equation. To my mind, this position creates a false dichotomy. As said before, public interests have an

[539] Commission decision in Case COMP/37.685 *GVG/FS* [2004] OJ L 11/17.

[540] *Ibid*., para 136.

[541] Provided that there are no strong reasons to assume that the regulations are inadequate.

[542] V. Brisimi, 'Abuse of a Dominant Position and Public Policy Justifications: A Question of Attribution', (2013) 24 EBLR 261. He argues, *inter alia*, that the right of undertakings to lobby is 'the flip side of the cases that reject public policy justifications under Article 102 TFEU' (at 267). Although insightful, I believe that there can be situations in which Brisimi's birfucation is inadequate. For example, how would this system work in terms of a particularly successful lobby, namely where the legislator gives the dominant firm leeway to achieve certain public interest goals?

[543] See e.g. Odudu 2006, *supra* note 526.

impact on (consumer) welfare just like more easily quantifiable interests. There is no solid foundation to discard interests just because they are difficult to gauge.[544]

Another argument is that the State, instead of private firms, should resolve issues related to public interest.[545] The case law, such as *Hilti* and *Tetra Pak II*, seems to support this position.[546] In another case, *Sot. Lélos*, the ECJ rejected a claim that restrictions to parallel imports were necessary to prevent shortage of medicines on a given national market – according to the ECJ, it should be for the national authorities to resolve the situation.[547] Although it makes sense that it is normally the role of States to ensure the public interest, I consider it too simplistic to hold that State action always provides the answer. As said earlier, State legislation may be ineffective to reach the desired goal or, alternatively, may still be in the making. Another possibility is that the legislator has provided leeway for a dominant undertaking to take public interests into account.[548] For instance, such a 'delegation' of public interest responsibilities may exist within the framework of a public service obligation, or may arise within the activities of a public-private partnership.[549] Another issue is that a national authority – or court – does not necessarily protect EU interests at large, but may have a statutory duty to focus on certain domestic interests. As a result, one cannot conclude that, by definition, national authorities sufficiently protect the interests defined by the EU Treaties. Dominant undertakings may thus be confronted with public interest issues, even though it does not seem their prerogative at first sight. In short, the distinction between 'public' and 'private' is often not easy to make. Indeed, the *Bosman* judgment, an internal

---

[544] Also consider that efficiency balancing tests themselves are often based on an approximation of effects, rather than a precise quantification.

[545] See e.g. Brisimi 2013, *supra* note 542.

[546] *Hilti* (General Court), *supra* note 400; *Tetra Pak II* (General Court), *supra* note 357. See also the General Court rulings in *Irish Sugar*, *supra* note 353 and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389.

[547] *Sot. Lélos*, *supra* note 375, para 75. The authorities should do so 'by taking appropriate and proportionate steps'.

[548] Providing such leeway may improve the flexibility of legislation. A State may attach more relevance as to the principles that are upheld, rather than the actual implementation of those principles. This may particularly be the case for markets where technological developments make it difficult for the legislator to keep up.

[549] See Article 106(2) TFEU. Cf, in the context of Article 101 TFEU, the *Wouters* case, *supra* note 525. Dutch law gave the Bar Council ample leeway to work towards objectives such as the independence of lawyers.

market case, confirmed that private actors may rely on the public interest contained in Article 36 TFEU: '[t]here is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health'.[550] Of course, this does not mean *carte blanche* for any type of behaviour that would otherwise be prohibited. It simply means that we should not, by definition, turn a blind eye to the relevance of public interest concerns for the purposes of Article 102 TFEU.

Yet another criticism may be that NCAs and courts are considered ill-equipped to deal with the balancing of competition and public interests.[551] The idea is that it would require them to weigh interests of a completely different nature, also known as *incommensurabilia*. I doubt whether this argument is sufficiently potent, as EU law often requires NCAs and courts to make such decisions. For example, how to deal with agreements that appear pro-competitive overall, but at the same time segment national markets (and could thus harm the functioning of the internal market)?[552] Indeed, balancing various interests that are difficult to compare is often at the core of what judges do – not just those applying EU law.[553]

A final critique is that introducing public interest concerns in competition matters lacks a democratic basis;[554] such issues should more properly be examined in the political field.[555] Such criticism appears to overlook that, because of the hierarchy of norms, the national and EU legislator[556] are incapable of

550 Case C-415/93 *Bosman* [1995] ECR I-4921, para 86.

551 See e.g. Brisimi (*supra* note 542, at 270), who warns for a potential 'distorted application of competition law'.

552 Joined Cases C-403/08 and C-429/08 *FAPL* ('*Karen Murphy*') [2011] ECR I-9083.

553 It is interesting that commentators who argue in favour of an efficiency-based approach appear to assume that competition authorities and courts are perfectly capable of doing so – even though judging the soundness of an economic effects analysis is *not* what courts normally do.

554 This point is often raised by commentators who also argue that competition law should only involve an efficiency analysis – a position that is itself questionable from a democratic legitimacy point of view. I doubt whether the people representing the contracting parties, at the time of the adoption of the text of Article 102 TFEU, were Chicago School adepts *avant la lettre* (the text has remained substantively unchanged from the very beginning of the European Economic Community). See, differently, P. Akman, 'Searching for the Long-Lost Soul of Article 82 EC', (2009) 29 Oxford Journal of Legal Studies 267.

555 Brisimi argues that public interest isses should be resolved, *inter alia*, through appropriate legislation. See Brisimi 2013, *supra* note 542, at 264.

556 I am referring to the EU institutions that make secondary EU legislation.

introducing rules that set aside a Treaty provision such as Article 102 TFEU (see also section 3.4.3). So, in fact, allowing such considerations to influence the interpretation of Article 102 TFEU may actually *enhance* the impact of democratically agreed-upon public interest values. In this vein, one should remember that the democratic legitimacy of Article 102 TFEU is not greater – or smaller – than that of the provisions in the EU Treaties that show concern for non-competition interests.

4 THE LEGAL ASSESSMENT OF OBJECTIVE JUSTIFICATION

4.1 Introduction

It is useful to examine the requirements that any objective justification must meet. I shall examine the use of the proportionality test; a key legal framework for many parts of EU law. It is frequently used by the ECJ to examine whether a justification applies vis-à-vis conduct that would otherwise be considered contrary to the Treaty, and is clearly relevant for EU competition law as well.[557]

The proportionality test embodies a number of elements.[558] It first ascertains whether the aim relied upon is legitimate and whether the conduct is suitable to achieve that aim. The necessity test then requires an examination of whether the means were necessary to achieve the desired aim, i.e. whether less anti-competitive means could have obtained the stated objectives just as well. The necessity often provides the crux of the legal analysis, as it is usually the most difficult condition to meet. Finally, there may also be a proportionality test *stricto sensu*, which assesses whether the conduct under review does not disproportionality advance the dominant firm's interests in comparison to the interests of other market participants.

---

[557] Opinion of AG Cosmas in *Masterfoods, supra* note 331, para 101: 'the question of whether conduct is justified or not is assessed on the basis of the principle of proportionality'. See also the Opinion of AG Kirschner in *Tetra Pak II* (General Court), *supra* note 357, paras 68-71, showing the relevance of the proportionality principle in several important cases on Article 102 TFEU. See, more recently, R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 211): 'All defences in the Article 102 TFEU context must meet a proportionality test'.

[558] The European Commission's discussion paper (*supra* note 503, para 81) notes the importance of a proportionality test when assessing a 'meeting competition defense'.

After the examination of the proportionality test, I shall also deal with the relevance of anti-competitive intent and effects. All these elements provide insight into the main issues that are relevant in the legal analysis of an objective justification. A red thread in my analysis is that the type of justification at play largely determines what legal conditions can and should play a role.[559] The following paragraphs also contain several references to the *Post Danmark* legal test that applies to an efficiency plea, as discussed in Section 3.4.5.

4.2 Legitimate aim & suitability[560]

It is unclear what kind of legitimate aims a dominant undertaking may invoke. An aim should in any case be considered legitimate if it seeks to achieve a goal that is consistent with one of the objectives of EU competition law – this will be an attractive route for a public interest plea, for example if the conduct benefits environmental protection.[561] More generally, a legitimate aim should refer to benefits that accrue wider than simply to the dominant firm itself. This is particularly the case in terms of the justifications that call for a balancing test, namely the efficiency plea and the public interest plea. As the finding of a *prima facie* abuse connotes that the conduct under review has the potential to harm competition; a justification then requires a wider benefit to the market.[562]

[559] See, differently, R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 215). They suggest that objective justification *always* requires a full examination of suitability, necessity and proportionality.

[560] For a discussion of the relevance of 'legitimate aim', reasonableness and proportionality, see Loewenthal 2005, *supra* note 332,at 465.

[561] See e.g the objectives mentioned in *supra* note 523 and 524. See also Kingston (2009, supra note 516, at 210), who argues that a dominant firm that relies on environmental benefits of its conduct should be able to meet the suitability test.

[562] Case T-66/01 *ICI v Commission* [2010] ECR II-2631, para 306: 'the desire to maintain or increase production capacity is not an objective justification to allow an undertaking to act independently of Article [102 TFEU]'. I believe that the General Court could not have made such a sweeping statement if the dominant firm would have relied more heavily on the wider efficiency benefits of its conduct.

In my opinion, the condition of a legitimate aim should not be strictly enforced vis-à-vis legitimate business conduct. Such a justification implies that the dominant undertaking is simply making use of its commercial freedom. Within the boundaries of 'legitimate business conduct', the dominant firm may indeed be led by a wish to pursue its own interests,[563] rather than a more 'objective' benefit to the market at large. At the same time, such a plea is more likely to be persuasive if the dominant firm succeeds in showing the wider benefits of its conduct: would markets be functioning better if all market participants exhibit the same conduct? For example, consider a dominant undertaking that refuses to deal with a purchaser that refuses to pay its bills. Although such a refusal obviously seeks to protect the financial interests of the dominant undertaking, its beneficial ramifications are wider than that. If all companies would pay their bills, the economy would be better off as a whole.

As to a plea based on objective necessity, the circumstances will dictate to what extent it can be subsumed under a legitimate aim. Compliance with legislative standards is clearly a legitimate aim. It should then be examined whether the conduct is capable of meeting those standards. However, the 'legitimate aim' criterion cannot be easily laid down on a situation of *force majeure*, as such a plea connotes that the dominant undertaking acts out of necessity (which is considered justified *ex post facto*), rather than a legitimate aim.

Finally, an assessment of legitimate aim should also include a check whether the conduct is *suitable* to achieve the professed legitimate aim. If the conduct is incapable of reaching the desired objective, there is no reason to condone the behaviour on the basis of a legitimate aim. In effect, the suitability test calls for a 'first glance' examination, and is accordingly a lighter version of the more important necessity test. The necessity test shall be examined below.

4.3 Necessity test

Under the necessity test, sometimes referred to as the 'indispensability' test, a dominant firm must use the least anti-competitive means to reach its professed goal. Various authors, such as Loewenthal and Eilmansberger, appear to attach much weight to the necessity test.[564] The value of the necessity test for

[563] Even though such conduct may have wider benefits.

[564] Loewenthal 2005, *supra* note 332, at 466. See also Eilmansberger 2005, *supra* note 339, at 172-173.

objective justification is not apparent from early case law such as *United Brands*. The ECJ held that, in principle, the dominant firm is at liberty to decide what type of action it carries out as part of a commercial 'counter-attack' vis-à-vis its competitors.[565] The judgment does not include a requirement to choose the least anti-competitive means. In addition, the ECJ seemed to create a link between the principle of proportionality and 'the economic strength of the undertakings confronting each other'.[566] This does not seem to refer to a necessity test, but rather a requirement to abstain from certain conduct depending on the *degree* of dominance. Such a test is compatible with a concept of dominance that is not black and white but more akin to a sliding scale (as suggested in section 2.2).

However, the case law seems to have made a gradual shift with an increased focus on the necessity test.[567] *Tetra Pak II* can be interpreted as an early indication that a necessity test should be performed. In that case, the General Court was unconvinced that the protection of public health – the professed goal of the *prima facie* abuse – could not be guaranteed by other means.[568] Later, in *British Airways*, the ECJ established the necessity criterion more firmly: 'If the exclusionary effect of [a rebate] system […] goes beyond what is necessary in order to attain [efficiency] advantages, that system must be regarded as an abuse.'[569] The same emphasis on the necessity test is apparent from the Commission decision in *Microsoft*.[570] For its part, the ECJ firmly established the necessity test as one of the legal conditions in *Post Danmark*.[571]

A way to reconcile *British Airways*, *Microsoft* and *Post Danmark* on the one hand; and *United Brands* on the other hand is by considering the different types of objective justification that were at play. In the former cases, the dominant firm invoked an efficiency plea. In such a balancing exercise it is

---

[565] *United Brands*, *supra* note 417, para 189.

[566] *Ibid*., para 190.

[567] It should be noted that the ECJ has never overruled *United Brands,* but keeps referring to it.

[568] *Tetra Pak II* (General Court)*, supra* note 357, paras 84 and 140.

[569] *British Airways* (ECJ), *supra* note 341, para 86.

[570] Commission decision in Case COMP/C-3/37.792 *Microsoft* (24 March 2004), recital 970.

[571] *Post Danmark*, *supra* note 381, para 42.

understandable that the conduct should be necessary for the professed pro-competitive outcome.[572] In terms of a public interest plea, there is – likewise – no need to condone *prima facie* abusive conduct if the dominant undertaking had less anti-competitive means available to work towards the relevant public interest objective.[573]

However, a necessity test makes less sense when the objective justification plea is based on legitimate business behaviour. In such a case it is more difficult – and less desirable – for competition authorities and courts to second-guess the appropriate route for the dominant firm to take. A dominant firm may therefore still have ample liberty to choose its preferred conduct, as was decided in *United Brands*.

But how can one differentiate in the application of the necessity test, considering that it appears to entail such a straightforward examination? The necessity test can indeed become more stringent, or more lenient, depending on the context. Case law on the internal market[574] and Article 101 TFEU[575] confirms this approach. For example, the *Wouters* case shows that a restrictive measure by the Dutch Bar Council could be justified, even though the Bar Councils in several other Member States did not have such restrictive measures. Transposed to Article 102 TFEU, it means that a dominant firm may still pas

---

[572] The analysis should be less stringent when it concerns dynamic efficiencies. Considering the uncertain nature of such efficiencies, it will usually be impossible to determine whether the conduct is truly necessary for those efficiencies to materialize.

[573] See *Tetra Pak II* (General Court), *supra* note 357, para 115-119. See also *RTT v GB-Inno-BM*, *supra* note 436, paras 21-22. The ECJ referred specifically to an alternative: 'In order to ensure that the equipment meets the essential requirements of, in particular, the safety of users, the safety of those operating the network and the protection of public telecommunications networks against damage of any kind, *it is sufficient to lay down specifications which the said equipment must meet and to establish a procedure for type-approval to check whether those specifications are met* [italics added by author].' The dependence on other market participants may also be relevant in a follow-on private action based on Article 101 TFEU, see *Courage*, *supra* note 467, paras 32-33. See also Kingston (2009, supra note 516, at 210), who argues that a dominant firm that relies on environmental benefits of its conduct should be able to meet the necessity test. See, similarly attaching weight to the necessity test, T. Graf & D.R. Little, 'Tying and Bundling', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331) at 553.

[574] See e.g. Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, para 63; Case C-36/02 *Omega* [2004] ECR I-9609, paras 37; Case C-333/08 *Commission v France* [2010] I-757, para 105.

[575] See e.g. *Wouters*, *supra* note 525, paras 109-110.

the necessity test even if a comparable actor (for instance a dominant firm in the same product market, but in a different geographic area) has achieved the same goals by 'less' anti-competitive conduct.

4.4 Proportionality *stricto sensu*

The proportionality test, *stricto sensu*,[576] essentially assesses whether there is an equitable balance between the means to achieve a professed objective, and the (potential) impact on the market.[577] To my mind, proportionality *stricto sensu* can be an important element in the context of 'objective justification' depending on the type of objective justification at play.[578]

The role of proportionality *stricto sensu* is ambiguous as regards an efficiency plea.[579] Such an examination should primarily delve into the question whether or not the pro-competitive effects *outweigh* the anti-competitive effects; the extent to which it does so appears to be less relevant. This approach is confirmed by the *Post Danmark* judgment, which comprises no proportionality test *stricto sensu*. On the other hand, proportionality *stricto sensu* is not irrelevant here either; because even efficient conduct may fail the *Post Danmark* test if it leads to the elimination of all competition.

Similarly, the importance of the proportionality test *stricto sensu* may vary vis-à-vis an objective necessity plea. The test has little use if it was truly impossible for the dominant undertaking to act otherwise. However, to the extent that such a firm relies on a 'lighter' version of objective necessity, based on commercial or technical, there is more room for a balancing test of various interests.

---

[576] Proportionality in the wider sense entails an examination of (i) legitimate aim and suitability; (ii) necessity and (iii) proportionality *stricto sensu*. See also section 4.1 above.

[577] See, differently, Østerud 2010, *supra* note 332, at 279. He argues that the proportionality test 'requires a determination of whether a conduct's net effect for consumers is positive or negative'. In my view, this test should be subsumed under the efficiency category rather than the proportionality criterion.

[578] This may not be surprising if one considers EU law more broadly. In the words of Albors-Llorens (2007, *supra* note 332, at 1729), '[o]bjective justification and proportionality have conditioned the development of key areas of [EU] law'.

[579] Even though the idea of balancing various interests is of course similar to that in the examination of an efficiency plea.

Proportionality *stricto sensu* has a particularly prominent role when examining pleas based on public interest and legitimate business behaviour.[580] In terms of public interest, the key examination is whether a fair balance has been struck between competition and non-competition interests – an assessment clearly in tune with proportionality *stricto sensu*. As regards legitimate business behaviour, the ECJ held in the *United Brands* ruling:

> 'Even if the possibility of a counter-attack [by the dominant firm] is acceptable *that attack must still be proportionate to the threat* taking into account the economic strength of the undertakings confronting each other. [italics added, TvdV]' [581]

On the facts, the ECJ held that the refusal to supply by United Brands was a disproportionate response to the actions by the purchaser.[582] Apart from proportionality *stricto sensu*, the *United Brands* judgment also noted that a dominant firm may take steps insofar they are 'reasonable'.[583] It appears that conduct is considered reasonable if it conforms to a proportionality *stricto sensu* test.

A dominant undertaking is free to act as it wishes, which may even entail a certain degree of harm to other market participants, *until* that harm is no longer proportionate to the objective sought by the conduct. In *Syfait*, AG Jacobs opined that GlaxoSmithKline's limitations on parallel exports were justified, as they were 'reasonable' within the specific context of the pharmaceutical sector.[584] The *United Brands* judgment and the Opinion in *Syfait* aptly show that one cannot draw this boundary in the abstract, and will always depend on an in-depth examination of the relevant context.

---

[580] For an example, see e.g. *Atlantic Container*, *supra* note 485, para 1120.

[581] *United Brands*, *supra* note 417, para 190.

[582] *Ibid.,* para 191.

[583] *United Brands*, *supra* note 417, para 189-190.

[584] Opinion of AG Jacobs in *Syfait*, *supra* note 389, para 100 (stating that the conduct under review must be 'reasonable' and 'proportionate'). See, for a critical analysis of the Opinion (targeting in particular AG Jacob's reasoning on the internal market), C. Koenig and C. Englemann, 'Parallel trade restrictions in the pharmaceuticals sector on the test stand of Article 82 EC: Commentary on the Opinion of Advocate General Jacobs in the case Syfait/GlaxoSmithKline', (2006) 26 ECLR 338. Do note that, on the facts, the ECJ finally took a different approach is *Sot. Lélos*, *supra* note 375.

4.5 Intent

Loewenthal has argued that single firm conduct cannot be justified if its 'primary aim' is to eliminate competitors, portraying a widely held view that the dominant firm's intent is an important consideration.[585] I see two main – and distinct – ways to use intent.[586] The first possibility is that documents showing anti-competitive intent may provide context, and can support the finding of an abuse.[587] Such evidence is clearly relevant in cases involving selective price-cutting[588] as well as refusal to supply.[589] In addition, establishing an anti-competitive purpose is a necessary condition before one can label prices between Average Variable Costs and Average Total Costs as an abuse.[590]

The second possibility is that anti-competitive intent is, *ex post facto*, inferred from the finding of an abuse. This may be because the conduct under review has an anti-competitive effect,[591] or is considered to have no other *rationale* other than an anti-competitive purpose – such as the case for prices below

---

[585] *Ibid*. Similarly, Østerud (2010, *supra* note 332, at 249) emphasizes the importance of the 'legitimate aim' by the dominant firm. See also Eilmansberger 2005, *supra* note 339, at 146 *et seq.*

[586] Note also that the *lack* of anti-competitive intent may be relevant. Negligence, which entails a lack of such intent, may be a mitigating factor in determining the level of the fine, see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C 210/2, para 29.

[587] See e.g. the UK *Aberdeen Journals* case, where the OFT found overwhelming evidence of a carefully established plan by the dominant firm to get rid of its main competitor. See also Commission guidance on enforcement priorities, *supra* note 378, para 66 (on predation): '[i]n some cases it will be possible to rely upon direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy'. See also *United Brands*, *supra* note 417, para 189. This paragraph refers to the 'purpose' of the conduct in question. For a clear example of where the finding of abuse hinged on the motivation of the dominant undertaking, see *BPB* (General Court), *supra* note 409.

[588] A. Jones & B. Sufrin, *EC Competition Law* (OUP: Oxford 2008), at 325. See e.g. the following cases: Case C-497/99 P *Irish Sugar v Commission* [2001] ECR I-5333; *Compagnie maritime belge*, *supra* note 348. See also R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 214): 'the defence [of prices below AVC/AAC] contains a strong intent element'.

[589] See e.g. the Opinion of Advocate-General Jacobs in *Syfait*, *supra* note 389, at para 72.

[590] Indeed, according to *AKZO* (*supra* note 351, para 72), prices between Average Total Costs and Average Variable Costs are abusive if they are part of a plan to eliminate a competitor.

[591] *Michelin II*, *supra* note 334, para 241.

Average Variable Costs.[592] The application of unrebuttable presumptions can be highly problematic, as they disregard the overall context – leaving no room for objective justification – and may well lead to mistaken inferences (as shall be examined more closely in paragraph 5.2).

Most cases with considerations on intent somehow use it as an element in line with a finding of abuse. Indeed, it appears far from easy to convince the courts that *prima facie* abusive conduct actually had a 'benign' purpose. The courts may simply regard the justification plea as an *ex post facto* explanation of conduct that 'had never really occurred to anyone in the decision-making process'.[593] Still, the *General Motors* judgment shows that a dominant firm will be able to stave off a finding of an abuse if it changes its behaviour in accordance with Article 102 TFEU in a timely fashion (i.e. before any intervention by the Commission).[594] The *General Motors* case seems to confirm that the circumstances may indeed show benign intent, which may – in turn – set aside a finding of an abuse.

Although intent can thus play an important role, its relevance should not be overstated either. First, the abuse of dominance is an objective concept.[595] This suggests that the subjective intent of a dominant firm is normally not a necessary condition to establish a breach of Article 102 TFEU.[596] I take from this that the *lack* of intent will usually not be sufficient to establish an objective justification.

[592] See e.g. the seemingly unrebuttable presumption in *AKZO* (*supra* note 351, para 71) that prices below Average Variable Costs reveal anti-competitive intent: '[a] dominant undertaking has no interest in applying such prices except that of eliminating competitors'. As discussed in section 5.2 below, this presumption may not always be warranted.

[593] Mann J in *Purple Parking and Meteor Parking v Heathrow Airport* [2011] EWHC 987 (Ch), at 204.

[594] *General Motors v Commission*, *supra* note 447, paras 20, 22.

[595] See e.g. Eilmansberger 2005, *supra* note 339, at 146. In the *Deutsche Telekom* ruling (*supra* note 336, para 124), the ECJ observed that intent and negligence is in any case irrelevant if the firm 'cannot be unaware of the anti-competitive nature of its conduct'.

[596] In addition, there is no 'fault' criterion. See e.g. *BPB*, *supra* note 409, para 70. This reasoning is derived from the fact that the concept of abuse is an objective one, see *Hoffmann-La Roche*, *supra* note 349, para 91.

Second, there is a risk of false positives: which firm would *not* want to eliminate its rivals?[597] As it is difficult to know with certainty what a company's 'primary aim' is,[598] shaky legal presumptions need to be introduced. It will also prove tricky to attach a unitary aim to a firm, especially if it is a large multinational corporation. And what happens if there is a managerial struggle over the primary aim of the firm, or if it shifts over time? Is the firm only in violation for the months during which bullish strategy notes were created philosophizing about the elimination of rivals; and could it possibly end if the tone of these documents turns more dovish?

Third, anti-competitive intent, even by a dominant firm, does not necessarily result in a restriction of competition. This may depend in particular (i) on the type of practice engaged in and (ii) on the degree of dominance. Firms that barely meet the dominance threshold may not be sufficiently potent to alter the competitive landscape at will. In the *Microsoft* and *British Airways* rulings, the EU courts suggested that conduct is only considered abusive if it is *capable* of restricting competition.[599] If a dominant undertaking has an anti-competitive intent, but engages in conduct that is incapable of restricting competition, it is difficult to see how that criterion has been met.[600] In addition, the more Article 102 TFEU is considered to focus on effects, the less value one can attach to the dominant undertaking's intent.

A fourth argument that cautions against attaching too much relevance on intent, is discernable from case law on Article 101 TFEU. The *Matra Hachette* ruling made clear that even an agreement that restricts competition *by object* (the very concept that presupposes anti-competitive intent) may be exempted from the prohibition on the basis of Article 101(3) TFEU.[601] Surely, such restrictions are

---

[597] See *AKZO* (*supra* note 351, para 71), which laid down a seemingly unrebuttable presumption. By contrast, more recent case law seems to have put forward a rebuttable presumption. See *Wanadoo* (ECJ), *supra* note 597, para 110. See also Gormsen 2010, *supra* note 479, at 297.

[598] This is the reason I have difficulty with the weight Albors-Llorens attaches to the dominant firm's 'genuine motivation' (2007, *supra* note 332, 1746).

[599] *Microsoft*, *supra* note 395, para 867. Østerud (2010, *supra* note 332, at 266 *et seq*.), however, seems to regard this criterion as part of the proportionality test. See also the ECJ ruling in *British Airways*, *supra* note 341, para 86.

[600] On the other hand, see *Commercial Solvents*, *supra* note 494, where the conduct was thought to entail a risk that competition would be eliminated. In practice this comes close to a prohibition of an attempted abuse.

[601] Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595.

usually harmful to competition and therefore necessitate considerable countervailing benefits. Nevertheless, the possibility remains open.[602] There is no good reason why such a possibility would exist for restrictions by object under Article 101 TFEU, and not for similar restrictions that suggest anti-competitive 'intent' under Article 102 TFEU.[603] This point is all the more relevant, as the legal test mentioned by the ECJ in *Post Danmark* for the purposes of Article 102 TFEU is close to the examination under Article 101(3) TFEU.[604]

For the reasons set out above, I believe that intent is usually important for the overall context of a case, but is not necessarily decisive.[605] I also think that the importance of intent should depend on the type of objective justification that the dominant firm wishes to invoke. In the context of an efficiency plea, the aim of the dominant firm does not seem to be particularly important. Such a plea should fail or succeed based on the effect of the conduct, rather than the intent that the firm wishes to pursue.[606]

As to legitimate commercial conduct, the case law has been slightly confusing. In *United Brands*, the ECJ noted that a dominant undertaking is barred from protecting its commercial interests 'if its actual purpose is to strengthen this dominant position and abuse it'.[607] The General Court's *British Airways* judgment inserted one – seemingly crucial – word, making the final limb read 'and *thereby* abuse it'.[608] The insertion of 'thereby' appears to be a considerable expansion of the scope of Article 102 TFEU. It

[602] It is to be noted that scholars who argue in favour of a *per se* abuse in the context of Article 102 TFEU often seem to believe that Article 101 TFEU also deploys *per se* illegality, much like the US approach to issues like price fixing or market sharing. However, to my mind the *Matra Hachette* ruling (*ibid*.) has shown that this position is incorrect.

[603] Also note that a finding of a restriction by object does not require evidence of the subjective intentions of the parties. Rather, the aims of the agreement 'as such' should be examined. Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, para 26; Case C-209/07 *BIDS and Barry Brothers* [2008] ECR I-8637, para 21. See, further, Guidelines on the application of Article [101](3) of the Treaty, OJ [2004] C 101/97, para 22.

[604] *Post Danmark*, *supra* note 381, para 42. In essence, both Article 101(3) and the *Post Danmark* test seek to assess whether the conduct has a net pro-competitive effect – even though their wording may be slightly different.

[605] Cf *T-Mobile*, *supra* note 426, para 27. Do note that this case is about Article 101 TFEU.

[606] Even though, admittedly, documents showing intent may be instructive to understand the effects that the conduct has.

[607] *United Brands*, *supra* note 417, para 189-190.

[608] *British Airways* (General Court), *supra* note 416, para 243. Emphasis added by author.

suggests that a finding of an abuse will automatically follow where the dominant undertaking's actual purpose has been to strengthen its position. I disagree with this reading, as practically *any* conduct of the dominant undertaking can be considered to affect the competitive structure of the market.[609] My preferred reading is to look at what the case law seeks to prohibit: namely the exclusion of *equally efficient* competitors by using means other than competition on the merits.[610] As long as the dominant firm does not have such intent, it should not affect its ability to rely on an objective justification.

Finally, the Court has appeared hesitant to accept a plea based on legitimate commercial conduct plea if the practice at play is a marked change from historic conduct.[611] In cases ranging from *Commercial Solvents* to *Microsoft*, the refusal to supply another firm was preceded by a (long) period of business relations. The smoking gun is particularly apparent if the refusal to supply only came about after the firm's dominance was firmly established (see e.g. *Microsoft*) or after the dominant firm introduced an entrant of its own on the downstream market (see e.g. *Commercial Solvents*).[612] I agree that such a change can be an indicator for anti-competitive intent, even though the relevant context may show a wholly different (and indeed: benign) reason for the shift.[613]

---

[609] Albors-Llorens 2007, *supra* note 332, p. 1746-1747.

[610] *AKZO*, *supra* note 351, para 72. See also e.g. *Deutsche Telekom*, *supra* note 336, para 177.

[611] See, similarly, Commission decision in *British Midland v Aer Lingus*, *supra* note 415, para 26. The Commission held that a refusal to continue an interlining agreement with an airline that starts competing with the dominant undertaking on an important route.

[612] For a perspective from U.S. Antitrust Law, see e.g. U.S. Supreme Court, *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). In this case the U.S. Supreme Court took into account the fact that the conduct under review was different from what it had been in the past.

[613] See e.g. *BP*, *supra* note 338, para 28. One of the reasons for the change was the nationalization of a part of BP's production capacity.

4.6 Effect

Before discussing the importance of effects, the first question is what kind of effects we are talking about in the first place.[614] Early cases, such as *Michelin I*, often considered how the conduct under review affected competitors or other market participants.[615] Many commentators have argued that this approach is mistaken, stating that the ECJ should solely focus on the effects on consumer welfare.[616]

Even though the ECJ has indeed put more emphasis on consumer welfare in recent case law,[617] it clearly has regard to the broader interests of 'competition as such' as well.[618] The efficiency-focused *Post Danmark* ruling referred to the effects on consumer welfare *and* the effects on competition.[619] It appears that the broad term 'effect on competition' is appropriate to reflect the case law by the ECJ, including – but not limited to – the effects on consumer welfare.

A practice will only be abusive if it has – at least – a potential effect on competition. However, no actual effect needs to be shown.[620] So '[i]f it is shown that the object pursued by the conduct […] is to limit

---

[614] Although Article 102 TFEU requires an effect, actual or potential, on trade between EU Member States, I do not examine it in this study. I consider this requirement to be a jurisdictional issue, rather than provide a possibility for objective justification.

[615] *Michelin I*, *supra* note 334, para 85. The ECJ noted that discounts, such as the one under review, are liable to restrict a customer's freedom of choice and independence.

[616] See e.g. Odudu 2006, *supra* note 526.

[617] See e.g. *Post Danmark*, *supra* note 381, paras 41-42. One could interpret *TeliaSonera* (*supra* note 347, para 24) *a contrario* as holding that Article 102 TFEU only prohibits practices that cause damage to consumers, either directly or indirectly.

[618] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services v Commission* [2009] ECR I-9291, para 63: the Treaty's competition rules aim 'to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, *competition as such* [italics added by author]'. This means that, according to the Court, it is *not* necessary for final consumers to be deprived the advantages of effective competition in terms of supply or price. For a recent confirmation of this line of reasoning, see *Slovenská*, supra note 388, para 18.

[619] *Post Danmark*, *supra* note 381, para 42.

[620] See e.g. *British Airways* (ECJ), *supra* note 341, para 30; *British Airways* (General Court), *supra* note 416, para 293; *Michelin II*, *supra* note 422, paras 238 and 239. These cases make clear that it is sufficient to show that the

competition, that conduct will also be liable to have such an effect'.[621] As establishing the effect of conduct under review is normally not a constituent part of the condition of a dominance abuse, its absence will normally be insufficient to offer an objective justification.

Nevertheless, Article 102 TFEU may require an analysis of effect. First, the relevant *prima facie* abuse may hinge on its effects. For example, in *Deutsche Telekom*, the ECJ held that 'in the absence of any effect on the competitive situation of competitors', the alleged margin squeeze 'cannot be classified as exclusionary if it does not make their market penetration any more difficult'.[622] Another example is an exclusive purchasing practice by a dominant firm. The higher the degree of dominance, the more likely the practice will have a significant impact on competition.

Second, certain types of objective justification require an examination of effect. This is particularly clear if a dominant firm raises an efficiency plea. Such a plea will only be accepted when the exclusionary effect is counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.[623] Indeed, the *Post Danmark* judgment has made clear that one must examine the efficiency gains that 'have been, or are likely to be, brought about as a result of [the] conduct [under review]'.[624]

---

conduct under review 'tends to restrict competition or, in other words, that the conduct is capable of having that effect'.

[621] See e.g. *Michelin II* (General Court), *supra* note 422, para 241. The General Court held that 'for the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing', referring to *Irish Sugar* (General Court), *supra* note 353, para 170. The case law on exclusionary rebates provides further guidance. The ECJ has held on various occasions that rebates that e.g. '*tend to* remove or restrict the buyer's freedom to choose his sources of supply [italics added, TvdV]' may be found abusive. The use of the word 'tend' connotes that a potential effect could also be sufficient. See also *Hoffmann-La Roche*, *supra* note 349, para 90; *Michelin I*, *supra* note 334, para 73 and *Irish Sugar* (General Court), *supra* note 353, para 114. In the context of a margin squeeze case, see *Deutsche Telekom*, *supra* note 336, para 250.

[622] *Deutsche Telekom* (*ibid*), para 254. Note the clear parallel with internal market case law that focuses on market access, as discussed in Section 2.4 of chapter II.

[623] See *British Airways* (ECJ), *supra* note 341, para 86; *Telia Sonera*, *supra* note 347, para 76; *Post Danmark*, *supra* note 381, para 42.

[624] *Post Danmark* (*ibid*.).

Effect on competition may be less relevant if a party invokes a public interest plea. In such a case it is the benefit to another goal that justifies the restriction of competition. However, the practice must be *capable* of achieving the professed goal.[625] There is no reason why a court should accept a hollow reference to public interest. Similarly, a plea based on legitimate business conduct does not call for an analysis of effects, even though it usually concerns conduct that can be associated with pro-competitive effects. For example, charging higher interest rates to a customer that poses a substantial credit risk makes perfect economic sense. Finally, there is little need to examine effects while assessing an objective necessity plea. If such a plea is successful, and no less anti-competitive alternatives were available, the dominant firm could not have avoided the effects anyway.

The observations above also have an impact on the question of causation. Eilmansberger raised the question whether the lack of causation between the conduct and the effect can be an objective justification.[626] I believe that this idea is not in line with the ECJ's overall position on effect. Causation is needed to establish a link between conduct and an end result that (potentially) violates a norm. But if the end result (here: the effect on the market) is usually irrelevant in determining whether the norm has been violated or not, it is not clear why the link between behaviour and effect should necessarily be analysed. The exception to that observation may – yet again – be an efficiency plea. If there is no causal link between the conduct and the efficiency that is being observed, the conduct is unlikely to be justified as it does not meet the necessity test.

As a final comment, an effects analysis may not only focus on the direct effects on competition, but equally on the wider effects on residual competition.[627] The latter test examines whether the conduct under review is liable to eliminate all effect competition on the market. The ECJ has referred to residual competition in cases such as *IMS Health* and *Post Danmark*,[628] but their position in the analysis seems to have been quite distinct. In *IMS Health*, the residual competition test was one of the separate

[625] See e.g. Albors-Llorens 2007, *supra* note 332, p. 1758. She refers to it as the 'suitability' test.

[626] Eilmansberger 2005, *supra* note 339, at 140.

[627] A possible interpretation would be that no conduct should be allowed if it leads to a (quasi-)monopoly. I disagree, as this still leaves open the possibility for competition for the market – especially in sectors that depend on competitors leap-frogging over each other with disruptive innovations. Any other approach would take away the possibility of competition *for* the market.

[628] *IMS Health*, *supra* note 394, and *Post Danmark*, *supra* note 381.

conditions, *apart* from objective justification, to determine whether the dominant undertaking had a duty to license its IP rights.[629] By contrast, in *Post Danmark*, the residual competition test was part of the examination of whether pro-competitive effects outweigh the anti-competitive effects, and therefore seemed to be part of the objective justification analysis itself.[630] I prefer the latter view, as it allows for a more holistic examination of objective justification. Note that this test should not be equated with the protection of competitors. Competition may thrive even if individual competitors are forced to exit the market. Indeed, it may be a hallmark sign of healthy competition where the competitive process roots out the ones least apt to survive. It is submitted that the test should be taken to mean that the conduct under review may not eliminate the effective competitive constraints upon a dominant undertaking – and that inefficient firms are unlikely to represent a notably competitive constraint in the first place.

5 JUSTIFICATIONS VIS-À-VIS SPECIFIC TYPES OF ABUSE

5.1 Introduction

The previous sections have noted on multiple occasions the importance of context. This obviously includes the type of *prima facie* abuse that is under review. The following section examines how objective justification relates to selected types of abuse.[631] The section deals with exclusionary abuses,

[629] *IMS Health* (*ibid*.), para 52: 'the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market'.

[630] *Post Danmark*, *supra* note 381, para 42.

[631] Opinion of AG Colomer in *Sot. Lélos*, *supra* note 375, para 70. Colomer notes that 'the option of accommodating certain types of abuse under Article [102 TFEU] by means of objective justification should remain open'. The following chapter does not discuss tying and bundling practices, even though such practices may also involve objective justification: T. Graf & D.R. Little, 'Tying and Bundling', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331) at 547. They note that 'combining the sale of several products may generate a number of procompetitive effects, creating economies of scope, and generating efficiencies in distribution or production'.

even though exploitative abuses (such as excessive prices) may be subject to a justification plea as well.[632]

5.2 Predation

In its landmark *AKZO* judgment, the ECJ took a very strict line as regards below-cost pricing, also known as 'predation'. The Court suggested that such conduct is abusive *per se* if the prices are lower than average variable costs (AVC),[633] as a dominant undertaking could have no interest in such pricing behaviour other than to seek the elimination of competitors.[634]

I disagree that an unrebuttable presumption for pricing below AVC is the right approach. A blanket prohibition has a notable problem of attaching too little weight to the surrounding context. There are several circumstances in which such conduct should be justified nonetheless. The sale below AVC may simply be a cost-minimizing strategy, for example if the relevant goods lose their value (such as perishable goods, news-related content or obsolete products) or if they cause substantial running expenses (such as storage costs). In addition, in two-sided markets companies routinely sell one service at a loss to make another service (more) attractive. The Google search engine is a case in point: it offers a free and attractive service at no charge (so by definition below AVC), attracting advertisers to earn money.

There is no clear reason why competition law should *a priori* ban business models that are likely to be pro-competitive and enhance welfare. So even though the wording of *AKZO* suggests a *per se* prohibition, it is preferable to allow the dominant firm to rebut the presumption of illegality if the prices are not anti-competitive after all; for instance because such prices do not have any exclusionary effect, or because a justification applies. Although the EU Courts have regularly confirmed the precedent in

[632] See e.g. Case 40/70 *Sirena v Eda* [1971] ECR 69, para 17. Particularly high prices can, under certain circumstances, be justified by 'objective criteria'.

[633] See, similarly, the approach by AG Colomer in *Tetra Pak II* (ECJ), *supra* note 353.

[634] *AKZO*, *supra* note 351, para 71. Kingston (2009, supra note 516, at 214) notes that below-cost pricing may also follow from environmental concerns, for example if the dominant firm wishes to provide a price incentive for customers to adopt a new and environmentally friendlier product.

AKZO,[635] more recent cases do suggest a shift in the ECJ's approach.[636] In *Wanadoo*, the ECJ held that prices below AVC are 'prima facie abusive'.[637] In *Post Danmark*, it observed that such prices should '*in principle*, be regarded as abusive [italics added by author]'.[638]

The *Wanadoo* and *Post Danmark* cases thus show that a dominant firm is indeed allowed to rebut the presumption of illegality. The main challenge will be to show that the pricing policy had an economic objective *other than* the elimination of competitors.[639] The *Wanadoo* judgment appears to leave open the possibility of a justification if pricing below AVC is normal business practice in a sector (e.g. to minimize losses), connoting that it is unlikely to exclude competitors.[640] The *Post Danmark* case appears to add another possibility, namely where the practice has a net efficient effect that also benefits consumers.[641]

The paragraphs above have discussed to what extent a dominant firm can justify below-cost pricing in order to meet competition. Indeed, several cases have made clear that a dominant firm has some

---

[635] *Tetra Pak II* (ECJ), *supra* note 353, para 41.

[636] R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 210), state that '[i]t is now generally accepted that even prices below AVC/AAC can have an objective justification'.

[637] *Wanadoo* (ECJ), *supra* note 597, para 109.

[638] *Post Danmark*, *supra* note 381, para 27 (italics added by author). The underlying rationale seems to be that only pricing practices with an exclusionary effect are prohibited (*ibid*., para 25). The conduct can be condoned if no such effect exists. Note that the ECJ thus seemed to depart from its bright-line rule set in *AKZO* (*supra* note 351), but did refer to that case at para 27.

[639] *Wanadoo* (ECJ), *supra* note 597, para 107-109. R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 215) note that the 'meeting competition' plea also requires that the 'price cuts must be defensive in nature', referring e.g. to *United Brands*. At 216 *et seq*, they specify why 'the dominant company must act in good faith'.

[640] Of course, one could also argue that, in such a case, there is no *prima facie* abuse. However, such an approach is difficult to reconcile with the *AKZO* judgment, *supra* note 351. In a 2004 submission to the OECD, the Commission observed that prices should be justified if it could have no exclusionary effect. See OECD Policy Roundtable document 2004, *Predatory Foreclosure*, available at http://www.oecd.org/competition/abuse/34646189.pdf, at 237.

[641] *Post Danmark*, *supra* note 381, para 41.

leeway to protect its commercial interests.[642] I do not think that this conclusion should be altered based on the *Wanadoo* case, in which the ECJ held that there is no 'absolute' or 'unconditional' right to align prices with those of competitors.[643] I am hard pressed to think of *any* defense in competition law that is absolute or unconditional – *Wanadoo* simply shows that such a plea will not be automatically accepted if the dominant undertaking is able to show that it has aligned its prices.[644]

As a final remark, it is clear that EU competition law does not require proof of recoupment in a predation case.[645] As a consequence, the dominant undertaking will find little benefit in arguing that it will *not* be able to recoup its losses. However, if the EU courts continue on their path to afford more weight to efficiency, a dominant firm can perhaps couch the substance of that same plea in a different framework. This would mean that the dominant undertaking shows that the below-cost pricing is beneficial to current consumer welfare, and is incapable of reducing future consumer welfare, as it has no exclusionary effect.

5.3 Rebates

Rebates by a dominant undertaking based on the volume of purchases, also known as 'volume' or 'quantity' rebates,[646] will normally be consistent with Article 102 TFEU. Such rebates are normally

---

[642] *Irish Sugar* (General Court), *supra* note 353, paragraph 189: 'the protection of the commercial position of an undertaking in a dominant position with the characteristics of that of the applicant at the time in question must, at the very least, in order to be lawful, be based on criteria of economic efficiency and consistent with the interests of consumers'. Note that this paragraph suggests that 'commercial freedom' should only be seen in terms of efficiencies. See also *United Brands*, *supra* note 417, para 189-190. See also Commission guidance on enforcement priorities, *supra* note 378, paras. 237-238. The Commission noted that it would be justified to meet the prices of one's competitor in order to minimize short-run losses.

[643] *Wanadoo* (ECJ), *supra* note 597; confirmation of Case T-340/03 *France Télécom v Commission* ('*Wanadoo*') [2007] ECR II-107, para 187. See, differently, Commission decision in Case IV/31.900 *BPB Industries* [1989] L 10/50, para 131-134, in which it did accept a meeting competition defense.

[644] See also *Wanadoo* (General Court) (*ibid*.), para 187; see also the Opinion of AG Mazák in *Wanadoo* (ECJ) (*ibid*.), paras 47 and 95. See, similarly, R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 213),

[645] *Wanadoo* (ECJ), *supra* note 597, para 110.

[646] For possible pro-competitive effects of rebates, see e.g. *Hoffmann-La Roche*, *supra* note 349, para 90.

deemed to reflect gains in efficiency and economies of scale made by the dominant firm.[647] However, the scheme will not be accepted if the 'criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends […] to prevent customers from obtaining their supplies from competitors'.[648] In order to make the distinction between competitive and abusive rebates, there should be an examination of 'all the circumstances'.[649]

Rebates can thus be condoned if they can be subsumed under an 'objective economic justification'.[650] In *Irish Sugar*, the General Court enunciated the broad nature of such a justification: it can apply based on the 'quantities purchased by the customer, marketing and transport costs or any promotional, warehousing, servicing or other functions which the relevant customer might have performed'.[651] It is only proper that a dominant undertaking is allowed to pass on cost benefits to its customers through volume rebates.[652]

The facts of *Irish Sugar* revealed that the rebates were solely based on the retailer's place of business, which the Court considered an insufficiently valid reason to provide a rebate. The Court's approach appears too straightforward, as it should have paid more attention as to whether the relevant customers were indeed exposed to a higher level of competition compared to customers that did *not* receive a rebate.[653] It would substantially hamstring dominant undertakings if they cannot adjust their rebates to alternative offers or the price sensitivity of customers. The latter possibility is particularly relevant: if a dominant firm cannot satisfy the needs of those customers, they may be priced out of the market leading to a reduction of output. In sum, although one should obviously consider whether such rebates simply are exclusionary, their potential pro-competitive effect should also be examined.

---

[647] *ICI*, *supra* note 562, para 298.

[648] *ICI* (*ibid*.), para 299. See also *Hoffmann-La Roche* (*supra* note 349), para 90, and Case T-203/01 *Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071, para 59.

[649] *ICI* (*ibid.*), para 300. See also *Hoffmann-La Roche* (*ibid*.), para 90; *Michelin II* (*ibid*.), para 60.

[650] *Irish Sugar* (General Court), *supra* note 353, para 173.

[651] *Ibid.* The General Court held, on the facts, that '[t]he border rebate was unrelated to objective economic factors like the sales volume of the customers'.

[652] See also *BPB* (Commission Decision), *supra* note 643, para 131. The Commission found that certain discounts were justified, as they reflected cost differences.

[653] *Irish Sugar* (General Court), *supra* note 353, para 188.

5.4 Discrimination

Many of the observations in the previous paragraph on rebates can also be transposed to the issue of price discrimination.[654] It is clear that price differentiation, even if found *prima facie* abusive,[655] is 'not inherently harmful'.[656] Such conduct may be justified based on a number of reasons. For example, the conduct may be subsumed under legitimate business conduct.[657] Such may be the case if a customer continues to receives a favourable price as a reward for being an early adapter of a new technology by the company that later turns out to be dominant.[658] Either way, the degree of differentiation should be commensurate with the interest that it seeks to support.[659]

Differentiation may also be justified in a situation of objective necessity. In *BPB*, the General Court acknowledged that a shortage of resources should enable a dominant undertaking to 'lay down criteria

---

[654] Note that I do use 'discrimination' in a legally and morally neutral way.

[655] P. Akman, 'To abuse, or not to abuse: discrimination between consumers', (2007) 32 ELRev 492, at 495. Akman seems to argue that 'mere differential' pricing may already be *prima facie* abusive price discrimination. However, it is submitted that it must also be established that the conduct may have an exclusionary effect. See, *mutatis mutandis*, *British Airways* (ECJ), supra note 341, paras 58-60.

[656] Odudu 2007, *supra* note 399, at 1810. See also A. Layne-Farrar, A. Setari & P. Stuart, 'Abusive Discrimination', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331), at 570. They specify: 'while conceptually separate from the determination of equivalence between two transactions, in practice, this assessment is generally carried out in the context of the assessment of the equivalence between transactions and by reference to the same parameters'. Their view confirms that there is less room for a justification if there has already been an in-depth examination when determining whether there has been a *prima facie* abuse.

[657] AG Kokott referred to the possibility to justify otherwise abusive price discrimination based on 'legitimate business considerations'. See also Opinion of AG Kokott in *British Airways*, *supra* note 341, para 114. See also *Michelin I*, *supra* note 334, para 90, referring to differences in treatment between different dealers that were, on the facts, not based on 'legitimate commercial reasons'.

[658] See e.g. the initial decision of 28 April 2003 as well as the administrative appeal decision of 29 June 2005 of the Dutch NCA, currently named ACM, in Case 2978/*Superunie v Interpay*. The ACM considered price differentiation to be justified as an appropriate reward for risks taken. See, further, section 3.2.3 in chapter V.

[659] *Irish Sugar* (General Court), *supra* note 353, para 142-143. The Court rejected the justification plea, holding that the 'justification does not match the scope of the discrimination impugned in the contested decision'.

for according priority in meeting orders' as 'a matter of normal commercial policy'.[660] Such criteria are justified if they are objective and non-discriminatory.[661]

Differentiation can also be based on efficiencies. The same reasoning that applies to rebates should be applied, providing room for differentiation that is based, *inter alia*, on cost benefits that arise from economies of scale. This may be particularly relevant in network sectors, where variable costs are relatively low. In addition, differentiated prices can improve welfare if price sensitive customers receive lower prices, ensuring that they do not exit the market altogether.

Finally, it appears to me that a dominant undertaking should have some leeway to differentiate prices on non-economic grounds. Just think of a dominant publisher that provides its content at lower prices to not-for-profit customers. Even if some of these parties would have been willing and able to pay the 'normal' price (i.e. there is no direct economic *rationale* to differentiate),[662] the dominant firm may still agree to a lower price for these customers to reflect its corporate social responsibility policy.[663]

Akman has argued that discrimination between consumers, instead of intermediate customers, can also be contrary to Article 102 TFEU.[664] Although I acknowledge that this possibility cannot be rejected as such, I do think decision makers should be reluctant in condemning such practices – especially if one (like Akman) believes that one of the objectives of Article 102 TFEU is to strive towards consumer welfare.[665] Think of the example where the domestic train incumbent has lower prices for the young and

---

[660] *BPB* (General Court), *supra* note 409, para 94.

[661] *Ibid*.

[662] There may be an overlap with an efficiency analysis, are not-for-profit customers are likely to be more price sensitive than 'regular' corporate clients.

[663] See e.g. Oxford Journal's policy of granting free content access to organisations located in countries ranging from Afghanistan to Zimbabwe, see a full list at http://www.oxfordjournals.org/access_purchase/developing_countries_list.html. See, in terms of environmental protection, Kingston 2009, supra note 516, at 213. Kingston argues that 'a dominant undertaking might legitimately distinguish between prices granted to environmentally-damaging undertakings and environmentally-friendlier undertakings, as long as this was done on an objective and proportionate basis'.

[664] Akman 2007, *supra* note 655.

[665] *Ibid*., at 503.

the elderly. Such a pricing practice is likely to benefit consumer welfare in terms of allocative efficiency, as output can be expanded to groups that can generally be described as price sensitive. The train company may also differentiate in another way, offering lower prices for travel during the off-peak hours. Such differentiation may not only be beneficial to allocative efficiency,[666] but also to productive efficiency as it encourages a more spread-out use of capacity that is both scarce and costly.

5.5 Refusal to deal

Under EU law, a dominant undertaking is, in principle, free to deal with whom it wishes. However, there may be 'exceptional circumstances' under which a refusal to deal may be contrary to Article 102 TFEU. These types of cases should consider the *degree* of market power. In his Opinion in the *IMS Health* case, AG Jacobs noted that the relevant facility must provide the dominant firm with a 'genuine stranglehold' on the market, rather than give it a 'competitive advantage'.[667] The *Magill* judgment, a case on IP rights, stipulated the conditions for an abusive refusal to deal: the input must be indispensable, the refusal prevents the emergence of a new product for which there was potential consumer demand and it is likely to exclude all competition in the downstream market.[668] Importantly, the dominant undertaking may also invoke that the refusal 'was not justified by objective considerations'.[669] From *Bronner* it appears that the same conditions apply to access issues to property rights other than IP rights, apart from the 'new product' criterion.[670]

[666] Again, price sensitive consumers are able to benefit from lower prices, especially if their trip is not time critical.

[667] Opinion of AG Jacobs in *Bronner*, *supra* note 498, para 65.

[668] *Magill*, *supra* note 394, paras 53-56. See also the ECJ judgment in *Bronner* (*ibid*.), para 40.

[669] *Magill* (*ibid*.), para 55. See also *IMS Health*, *supra* note 394, para 52.

[670] See e.g. the ECJ judgment in *Bronner*, *supra* note 498, para 41. See also D. Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom?', (2004) 41 *Common Market Law Review* 1527. Geradin argues that there is no clear reason for imposing the 'new product' criterion. See also D. Ridyard, 'Compulsory Access under EC Competition Law – A New Doctrine of "Convenient Facilities" and the Case for Price Regulation', (2004) 11 ECLR 669.

Although *IMS Health* suggests that the justification criterion requires a fact-specific inquiry,[671] there are – yet again – few indications in the case law of what may constitute justification. Documents by the Commission provide some additional guidance, even though its views may not necessarily be shared by the ECJ. In its notice related to the telecom sector, the Commission provided the following examples where a refusal to provide access may be condoned:[672]

> '[r]elevant justifications in this context could include an overriding difficulty of providing access to the requesting company, or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market'.

The Commission further notes that the competent authorities must examine whether the difficulties associated with providing supply can outweigh the anti-competitive effect,[673] showing the need for a balancing test. Finally, the Commission notes that technical feasibility may also provide an objective justification for a refusal to supply, for example if the technical standards are not compatible.[674]

Although I agree with the examples given by the Commission, their inclusion in a document written specifically for the telecom sector raises questions about their applicability in other situations. The Commission should strive for a more holistic treatment of this topic in future guidance. A useful exercise is to consider whether the dominant undertaking is likely to have refused supply if it would have lacked market power. Such a thought experiment is likely to filter out cases where there is no link between the

---

[671] *IMS Health*, *supra* note 394, para 51: 'it is for the national court to examine, if appropriate, in light of the facts before it, whether the refusal of the request for a licence is justified by objective considerations'.

[672] Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ [1998] C 265/2, para 86. At para 85, the Notice refers to the possibility that a company requesting supply represents a potential credit risk.

[673] *Ibid*., para 93.

[674] *Ibid*., para 96. The Commission also notes the possibility of capacity constraints. However, such constraints may not prove to be a justification if the firm had reasonable alternatives to overcome those constraints. See, even more strongly, M. Dolmans & M. Bennett, 'Refusal to Deal', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 506). They hold that '[t]here are indications that a refusal to supply cannot be justified by lack of capacity if a non-dominant or non-vertically-integrated firm in the circumstances would have invested in expansion or capacity'.

dominant position and the refusal, such as the case where a dominant firm refuses supply because of credit risks, or because of genuine environmental concerns.[675] As said before, one should be very hesitant to prohibit practices that have nothing to do with market power. Such a stance would defeat the very *raison d'être* of Article 102 TFEU, that seeks precisely to ban certain practices that only make sense, and are harmful, because of the dominant position enjoyed by one undertaking.

As a final observation, the essential facilities doctrine may increasingly considered be as an efficiency-balancing test, as suggested by Geradin.[676] Basically, mandatory access is likely to enhance current allocative efficiency, as it introduces more competition on the downstream level. At the same time, such access is likely to harm dynamic efficiency, as it reduces the financial rewards of investments.[677] Geradin is critical on whether NCAs and courts are able to actually make such a balancing test, arguing that the risk of mistaken decisions is particularly high.[678] I consider the issue to be less grave than Geradin suggests. Remember that even a dominant firm is able to deal with whom it wants, save for *exceptional* circumstances. To the extent that mandatory supply is truly reserved in a limited number of cases, EU competition law could be said to have a bias in favour of non-intervention and towards protecting investments. The law only risks becoming too interventionist if a *prima facie* abuse is found relatively easily and if dynamic efficiencies are awarded too little weight.

---

[675] See e.g. Kingston 2009, supra note 516, at 213. Kingston argues that 'a dominant undertaking might legitimately refuse to supply, or to grant access to an essential facility, to an undertaking whose practices are objectively extremely environmentally dangerous. Alternatively, a dominant undertaking might refuse to grant access to an essential facility, if a natural resource, or might cease supply of this resource to an existing customer, because it would risk unsustainably exhausting or overusing this resource'. According to Kingston, such an interpretation is consistent with *Commercial Solvents* and *Bronner*.

[676] Geradin 2004, *supra* note 670, at 1539 *et seq*. Geradin refers to the Opinion of AG Jacobs in *Bronner* (*supra* note 667) as one of the few significant references to such a balancing exercise.

[677] The effects on productive efficiency will often be more difficult to gauge. If the facility is already used efficiently and at full production capacity, allowing access is likely to raise costs and thus reduce productive efficiency. However, if the facility runs (far) below full capacity, providing access is likely to enhance the utilisation rate, thereby lowering costs and improving productive efficiency.

[678] Geradin 2004, *supra* note 670, at 1542. Although I sympathize with his remark as such a balancing test is undoubtedly difficult, I do think it is interesting that commentators who argue in favour of an effects-based approach often seem to be mistrustful of the capacity of courts or NCAs to properly exercise such a balancing act. These two views seem difficult to reconcile.

5.6 Margin squeeze

A so-called margin squeeze can occur if a vertically integrated dominant undertaking provides an indispensable input at the wholesale level and also competes at the retail level.[679] The price difference between the wholesale and retail price may leave insufficient margin for an equally efficient competitor to viably compete, for example if the wholesale price is kept artificially high.[680]

The EU Courts have accepted that a margin squeeze can have an exclusionary effect on equally efficient competitors.[681] As a result, a margin squeeze is a separate abuse under Article 102 TFEU,[682] but only in the absence of a justification.[683] The case law is unclear about what such justifications could entail. The

---

[679] For the recognition that margin squeeze can be a separate abuse under Article 102 TFEU, see *Deutsche Telekom*, *supra* note 336, para 183 and *TeliaSonera*, *supra* note 347, para 31. By contrast, U.S. Federal Antitrust law does not accept that margin squeeze is a separate type of conduct that should be prohibited under Section 2 of the Sherman Act, see *Pacific Bell Telephone v. linkLine Communications*, 555 U.S. 438 (2009). According to the U.S. Supreme Court, such conduct is only prohibited under the Sherman Act either if there is predation downstream (under the standard of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993); or if there is an illegal refusal to deal upstream (under the standard of *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In its view, a margin squeeze would be an attempt to 'amalgate' two complaints that would otherwise fail. See also G.A. Hay & K. McMahon, 'The Diverging Approach to Price Squeezes in the United States and Europe', (2012) 8 Journal of Competition Law & Economics 259.

[680] See e.g. Case T-336/07 *Telefónica v Commission* [2012] nyr, para 187 (an appeal case is pending before the ECJ, Case C-295/12 P). Note that this does *not* require the wholesale price to be excessive, see *Deutsche Telekom*, *supra* note 336.

[681] *TeliaSonera*, *supra* note 347, para 31 and *Deutsche Telekom*, *supra* note 336, para 177. In the latter case, the ECJ added that such practices 'are capable of making market entry very difficult or impossible' for equally efficient competitors. In order to test for equal efficiency, the costs and strategy of the dominant undertaking are used as a benchmark (*Deutsche Telekom* (*ibid.*), para 198).

[682] See e.g. *Telefónica* (General Court), *supra* note 680, para 187; Deutsche Telekom (*ibid*), para 177-178.

[683] *TeliaSonera*, *supra* note 347, paras. 31 and 88. *Telefónica* (General Court), *supra* note 680, para 187 (just mentioning 'objective justification'). See also F.E. Gonzáles & J. Padilla, 'Margin Squeeze', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 292): 'There are indeed several reasons why a dominant firm might, at least temporarily, price in a manner consistent with a margin squeeze', referring to para 89 of the Commission's

TeliaSonera case suggests that a dominant undertaking may be able to show that the relevant conduct was not anti-competitive.[684] For example, the margin squeeze may have been a single occurrence only lasting a short period of time: such an event is unlikely to exclude equally efficient competitors.

To my mind, an objective justification should also exist if the margin squeeze is caused by factors external to the dominant undertaking. An obvious example would be a situation where the State dictates the relevant wholesale and retail prices. However, to the extent that the regulatory framework still allows the dominant undertaking a degree of discretion to lower its wholesale prices, raise its retail prices (or both), the dominant undertaking is expected to make use of that leeway if that would avoid a margin squeeze.[685]

6 CONCLUSION

This chapter has shown that objective justification is an important topic within the framework of Article 102 TFEU. There is only an abuse absent an objective justification. As a consequence, the scope of abuse depends to a large extent on the scope of objective justification. Notwithstanding its importance, however, the concept of objective justification has not received the attention that it deserves. This chapter has sought to examine the most important feature of objective justification, and assess its potential. To my mind, the potential of the concept lies, in particular, in its ability to consider a *prima facie* abuse in its proper context. As a consequence, the concept is also able to draw Article 102 TFEU away from a *per se* approach, and thus avoid the risk of mistaken inferences of anti-competitive behaviour.

This chapter has distinguished between various types of objective justification. The first source of objective justification is legitimate business behaviour. This category reflects that dominant undertakings still have a degree of commercial freedom (for instance if they compete on the merits), or that they could not have been expected to act differently (in the case of objective necessity). The

---

guidance paper (*supra* note 18). They hold that efficiencies and preserving the incentive to innovate should in any case be accepted as a possible justification.

[684] *TeliaSonera*, *supra* note 347, para 88.

[685] *Deutsche Telekom* (*supra* note 336).

efficiency plea embodies a second type of objective justification. The plea succeeds if the conduct leads to a net gain in welfare. This plea is likely to receive more attention in a more effects-based approach of competition law; I would, however, counsel against considering this to be the only relevant justification plea. A third source of objective justification is public interest, where the attainment of a non-efficiency objective trumps the application of Article 102 TFEU. This type of justification is likely to be controversial in the competition community, even though it seems clear from EU law that wider public interest objectives may influence the interpretation of any policy areas, including competition law.

Admittedly, it may be difficult to distinguish between these types in actual practice, as they may have considerable overlaps. For instance, conduct may at the same time be subsumed under legitimate business behaviour as well as under an efficiency heading. Hence, the subdivision should not be seen as a watertight compartmentalisation, but rather as an analytical tool to help determine the proper scope of objective justification and the applicable legal conditions.

CHAPTER IV PROCEDURAL ASPECTS OF OBJECTIVE JUSTIFICATION[*]

1 INTRODUCTION

The proof of the pudding is in the eating. Believe it or not, but making pudding and establishing an abuse of dominance have something in common. Despite careful preparation both can be shaky and vulnerable to collapse. The proof of Article 102 TFEU is not in the eating, however, but in its operation in practice. This calls for an analysis of procedural elements that are crucial to the operation of any legal prohibition – namely the applicable burden of proof, evidentiary burden and standard of proof.

As was made clear in the previous chapter, the EU courts have repeatedly confirmed that an objective justification plea is available.[686] Although this case law has triggered a debate about the substantive scope and meaning of objective justification,[687] the procedural issues have often been overlooked. This chapter discusses key procedural concept and their significance in the context of an objective justification plea. Paragraph 2 examines the legal burden of proof and the evidentiary burden that apply if an undertaking invokes an objective justification. Paragraph 3 discusses the applicable standard of proof. Paragraph 4 analyses the private law dimensions of the burden and standard. Paragraph 5 offers a short conclusion.

---

[*] This Chapter is a revised version of T. van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of *prima facie* Dominance Abuses?', (2012) 4 Journal of European Competition Law & Practice 121.

[686] See e.g. Case 27/76 *United Brands v Commission* [1978] ECR 207, para 189 and Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paras 85-87.

[687] See e.g. A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC', (2007) 44 CMLRev 1727.

2 THE BURDEN OF PROOF

2.1 Introduction

The burden of proof is an important procedural matter. It focuses on the question which of the litigating parties is required to prove a submission in order to satisfy the applicable standard of proof (the standard of proof is examined in paragraph 3).[688] The basic rule is that the party alleging an infringement of the law bears the burden of proof and must thus adduce sufficient evidence. Within a public competition enforcement procedure the *legal* burden of proof is borne by the competent competition authority – in the EU context, the European Commission – and cannot shift to the defendant.[689] The legal burden reflects the principle that undertakings are presumed to be innocent. The State may only impose a punitive sanction if it adduces sufficient evidence that meets the requisite standard of proof – a key value in countries governed by the rule of law.[690]

---

[688] See e.g. C. Graham, 'Judicial Review of the Decisions of the Competition Authorities and the Economic Regulators in the UK', in: O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing: Groningen 2009), p. 244. See also E. Paulis, 'The Burden of Proof in Article 82 Cases' in: B. Hawk (ed.), *Fordham Competition Law Institute: International Antitrust Law and Policy 2006* (Juris Publishing: New York 2007).

[689] See e.g. the speech of 16 September 2006 at the Fordham Conference by E. Paulis, available at http://ec.europa.eu/competition/speeches/text/sp2006_014_en.pdf. The UK Competition Appeal Tribunal ('CAT') confirmed that, just like in EU law, the allocation of the legal burden of proof does not 'necessarily prevent the operation of certain evidential presumptions', see *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, para 95. The CAT gives the example that sales below average variable costs may, in the absence of rebuttal, be presumed to be predatory. Cf. the Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and 396/96 P *Compagnie maritime belge v Commission* [2000] ECR I-1442, para 127. See also D. Bailey, 'Presumptions in EU competition law', (2010) 31 ECLR 362.

[690] See, for example, the CAT judgment in *JJB and Allsports v OFT* [2004] CAT 17, para 204: 'the evidence must be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking is entitled'. The same standard is relevant as regards abuse of dominance cases, see *Burgess v OFT* [2005] CAT 25, paras 115-116.

The legal burden must be distinguished from the *evidentiary burden*, which is more flexible in nature.[691] In essence the evidentiary burden demands that he who makes an assertion must provide proof thereof.[692] The evidentiary burden may thus be borne by any of the litigating parties depending on what they have asserted. A flexible allocation of the evidentiary burden contributes to the expediency of a trial. It requires proof from the party best positioned to provide it, and makes it unattractive for a party to make assertions that it cannot substantiate.

2.2 The establishment of a *prima facie* abuse

Within the context of EU competition law, Article 2 of Regulation 1/2003 confirms that the legal burden rests on the party or authority alleging an infringement. This means that the Commission bears the legal burden to adduce sufficient evidence for the finding of a *prima facie* Article 102 TFEU infringement. In practice it is often a difficult hurdle to establish such a *prima facie* abuse.[693] The level of difficulty to discharge the legal burden will depend largely on the conduct's impact and the context of the market dynamics under review.

For instance, fidelity rebates by a super-dominant firm will satisfy the threshold for a *prima facie* abuse more easily compared to discounts that have a more benign effect on competition.[694] In *British Airways*, the ECJ observed that the Commission must show that a system of (non-fidelity) discounts can produce

---

[691] See e.g. P. Hellström, 'A Uniform Standard of Proof in EU Competition Proceedings', in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing: Oxford and Portland, Oregon 2011), p. 147; P. Lowe, 'Taking Sound Decisions on the Basis of Available Evidence', in: Ehlermann and Marquis 2011 (*ibid*.), p. 163; A. Ó Caoimh, 'Standard of Proof, Burden of Proof, Standards of Review and Evaluation of Evidence in Antitrust and Merger Cases: Perspective of Court of Justice of the European Union', in: Ehlermann and Marquis 2011 (*ibid*.), p. 276.

[692] For a clear description of the burden of proof and the evidentiary burden, see e.g. *The Racecourse Association v Office of Fair Trading* [2005] CAT 29, paras 130-134.

[693] Sometimes evidential presumptions will facilitate the Commission to establish a *prima facie* abuse, such as in the event that a dominant firm charges prices below average variable costs.

[694] Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para 334. See also Case T-203/01 *Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071, paras 107-109.

exclusionary effects.[695] In terms of price discrimination, Article 102(2)(c) TFEU explicitly states that there can only be a *prima facie* abuse if the conduct leads to a 'competitive disadvantage'. In the *Michelin I* ruling the ECJ suggested that such a disadvantage follows from the application of unequal criteria, in which similar cases are treated in a dissimilar way.[696] Similarly, in *Post Danmark*, the ECJ held that it must be assessed whether a dominant firm's pricing policy produces an actual or likely exclusionary effect to the detriment of competition and consumers.[697] The more Article 102 TFEU is interpreted as working towards consumer welfare, the stronger a *prima facie* abuse must be couched in terms that the conduct has consequences harmful to consumer welfare.[698]

2.3 Responding to the establishment of a *prima facie* abuse

As soon as the Commission has put forward its case indicating a *prima facie* abuse the dominant firm can raise two different shields, namely by (i) questioning the establishment of a *prima facie* abuse or by (ii) invoking an objective justification.

As to the first shield, the dominant firm is likely to target the evidence used and the inferences the Commission has drawn from it. In essence this argument contends that the Commission has not discharged its legal burden, as it has failed to adduce sufficient evidence to meet the applicable standard of proof. According to AG Kokott a dominant firm can successfully make such a claim if it is able to 'show in detail why the information used by the Commission is inaccurate, why it has no probative value […] or why the conclusions drawn by the Commission are unsound'.[699] Kokott opines that this requirement does not reverse the legal burden, but simply reflects 'the normal operation of the respective burdens of adducing evidence'.[700] Paragraph 3.3 discusses this subject in more detail.

---

[695] *British Airways*, *supra* note 686, para 68. This rule applies if the discount system cannot be seen as fidelity rebates within the meaning of Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461.

[696] Case 322/81 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 90. Here the ECJ refers to the possibility to invoke 'legitimate commercial reasons' for a *prima facie* discriminatory practice.

[697] Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] ECR not yet published, para 44.

[698] O. Odudu, 'Annotation of Case C-95/04 P, British Airways plc v. Commission, judgment of the Court of Justice (Third Chamber) of 15 March 2007', (2007) 44 CML Rev 1781, at 1809.

[699] Opinion of AG Kokott in Case C-105/04 P *FEG v Commission* [2006] ECR I-8725, para 74.

[700] *Ibid*.

If a dominant firm wishes to rely on the second shield, the question arises which party bears the (initial) evidentiary burden to provide proof: is it the Commission (to show the absence of objective justification) or the dominant undertaking (to show the applicability of objective justification)? Some have argued that Article 2 of Regulation 1/2003 requires the Commission to prove the absence of an objective justification, as only in that case there will be an infringement of Article 102 TFEU.[701] The following paragraph challenges the view that the initial evidentiary burden related to objective justification is borne by the Commission.

2.4 Proving (the absence of) an objective justification

Regulation 1/2003 contains a preamble that offers guidance as to its interpretation. Recital 5 of the preamble of Regulation 1/2003 provides that: 'It should be for the undertaking […] invoking the benefit of a defence against a finding of an infringement to demonstrate […] that the conditions for applying such defence are satisfied.'

At a first glance it appears to confirm that the dominant firm should demonstrate the applicability of an objective justification. A possible counter-argument is that objective justification should not be considered a 'defence' within the meaning of Regulation 1/2003. According to this line of reasoning the acceptance of an objective justification means that there was no abuse to begin with – thus removing the need for an undertaking to provide a defence. In my view, this argument erroneously ignores the fact that there is only a need to raise an objective justification if the Commission succeeds in providing ample proof of a *prima facie* abuse. In addition, the mere fact that an undertaking must provide a 'defence' does not necessarily cast a negative subjective spell on its conduct. By comparison, in merger control an efficiency plea is also referred as a 'defence', even though it is clear that completing an efficient merger is in no way legally or morally reprehensible.

[701] P. -J. Loewenthal, 'The Defence of "objective justification" in the application of Article 82 EC', (2005) 28 World Competition 455. See, similarly, R. Nazzini, 'The wood began to move: an essay on consumer welfare, evidence and burden of proof in Article 82 EC cases', (2006) 31 ELRe*v* 520, 522. Albors-Llorens 2007, *supra* note 687, at 1747. Albors-Llorens argues that Article 102 TFEU requires a one-step analysis which requires the Commission to consider potential justifications within that analysis.

Leaving this semantic issue aside, ECJ case law clearly requires the dominant firm to produce evidence supporting an objective justification claim. Several early case law examples emanate from the field of pricing abuses. In cases such as *Metro, Tournier* and *Aéroports de Paris* the ECJ expected the dominant firm to provide evidence in order to justify a *prima facie* abusive pricing practice.[702] More recent judgments – such as *TeliaSonera*, *British Airways* and *France Télécom* – show that the dominant undertaking ought to demonstrate that a rebate system, notwithstanding its exclusionary effect, can be 'economically' justified.[703] Yet it is the *Microsoft* ruling by the General Court that offers perhaps the clearest evocation that the dominant firm bears the evidentiary burden as to objective justification:

> 'Although the burden of proof of the existence of the circumstances that constitute an infringement of [Article 102 TFEU] is borne by the Commission, *it is for the dominant undertaking concerned* […] *to raise any plea of objective justification and to support it with arguments and evidence*. It then falls to the Commission […] to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted [italics added by author]'.[704]

In sum, the Commission bears the burden to prove the existence of a *prima facie* infringement. The dominant firm may raise an objective justification plea and bears the (initial) evidentiary burden to provide the necessary arguments and proof.[705] If the dominant firm is unable to provide sufficient

---

[702] Case 78/70 *Metro* [1971] ECR 487, para 19 and Case C-395/87 *Ministère Public v Tournier* [1989] ECR 2521, para 38. See also Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, paras 201-202 (upheld by Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297). See, similarly, Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, para 52.

[703] Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, para 75; *British Airways*, *supra* note 686, paras 69 and 86; Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369, para 111. See also Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para 334 and *Michelin II* (General Court), *supra* note 694, para 107-109. See, similarly, Case E-15/10 *Posten Norge v ESA* [2012] EFTA Ct. Rep 246, para 206, in which the EFTA Court held that: 'it is for the applicant to demonstrate that its conduct is objectively necessary or produces efficiencies.'

[704] Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paras 688 and 1144.

[705] In *Microsoft* (*ibid*.) the General Court states that it expects the objective justification plea to be invoked 'before the end of the administrative procedure'. This suggests that firms cannot invoke a justification in court that was not raised during the administrative procedure. This seems to be a different approach than was taken by the CAT

evidence, the ECJ may be satisfied that the *prima facie* abuse cannot be objectively justified, and thus constitutes an infringement of Article 102 TFEU.[706] However, if the dominant firm does succeed in proving that its conduct can be objectively justified, the evidentiary burden shifts to the Commission. The Commission must then provide ample proof countering the firm's objective justification claims.

2.5 Examining the ECJ's approach

In my view, the ECJ has a perfectly sensible approach towards evidence related to objective justification. As the UK Competition Appeal Tribunal ('CAT') held in *Genzyme*, it would be overly burdensome to require competition authorities to comprehensively examine every conceivable justification and to ask them to prove a negative.[707] The ECJ's allocation of the burden ensures a focused debate on the types of objective justification that really matter – resulting in a more effective and less intrusive procedure.

In addition, the success of an objective justification plea will often depend on evidence that, by its very nature, is only available to the dominant firm. The ECJ appears to take due account of such circumstances. In *AstraZeneca* the General Court observed that: 'the undertaking concerned is alone aware of [the] objective justification or is naturally better placed than the Commission to disclose its existence and demonstrate its relevance.'[708]

---

in *Genzyme*, suggesting that the dominant firm may raise 'further' pleas of objective justification during the appeal stage even though these have not been raised earlier. See *Genzyme v Office of Fair Trading* [2004] CAT 4, para 578.

[706] Cf. Nazzini 2006, *supra* note 701, at 534.

[707] Cf. *Genzyme, supra* note 705, para 577. The CAT expects the OFT at the decision stage 'to consider the issue of objective justification, and in particular any arguments put forward by the dominant undertaking' (*ibid*.). See also E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Alphen aan den Rijn: Kluwer Law International, 2010), p.246-247. See also P. Akman, 'To abuse, or not to abuse: discrimination between consumers', (2007) 32 ELRev 492, at 497. Akman notes that to prove a negative is against the general rules on the burden of proof, referring to Case T-117/89 *Sens v Commission* [1990] ECR II-198, para 20.

[708] Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para 686. The ECJ has put forward similar observations in Article 101 TFEU cases, see e.g. Case C-413/08 P *Lafarge v Commission* [2010] ECR I-5361, para 30 and Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P & 219/00 P *Aalborg Portland v Commission* [2004] ECR I-123, para 79.

I believe this approach is the right one, and shall give two hypothetical examples demonstrating why the dominant firm is often better equipped to show certain justifications. The first example concerns a possible efficiency plea. A dominant firm may wish to show quantitative proof that certain conduct creates a wealth of efficiencies, even though it risks excluding a third party at the same time. Although such documents are not necessarily sufficient, they may be able to persuade a court. This is consistent with merger control practice, where the party bears the evidentiary burden to successfully invoke efficiency benefits arising from the proposed transaction.[709]

The second example relates to an objective justification based on public interest. Just imagine that a dominant wholesaler of goods refuses to deal with certain distribution companies. The Commission may consider the refusal to be a *prima facie* abuse. The dominant firm could then invoke an objective justification, for instance by stating that the refusal only applies to road haulers that do not make use of environmentally friendly lorries. The Commission could respond by noting that the blanket refusal is unnecessary for the professed goal, possibly because legislation already adequately addresses this issue.[710] The dominant firm could subsequently perhaps refer to the lax government enforcement as to the compliance with environmental rules, triggering the need for the firm to step up its own conditions. Such a dialectic process[711] could prove lengthy, but provides the most appropriate manner to properly examine a plea based on objective justification.

3 STANDARD OF PROOF

3.1 Introduction

Apart from the issue *which* of the litigating parties bears the burden of proof, it is also relevant to know *how high* the evidentiary threshold is. The standard of proof consists of the requirements that must be

[709] The general principles governing the burden of proof are largely identical in antitrust and merger cases (Lowe 2011, see *supra* note 691, p.165).

[710] Cf. Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, para 118.

[711] See also the Opinion of AG Colomer in Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others v GlaxoSmithKline* [2008] ECR I-7139, para. 70.

satisfied for facts to be regarded as proven.[712] EU law provides no clear framework as to the applicable standard of proof.[713] This is in line with the continental European legal tradition, in which no formal standard of proof exists[714] – often to the great unease of common lawyers.[715] Basically the party bearing the legal or the evidentiary burden must simply be able to persuade the court; connoting that the judge's personal conviction (also referred to as '*intime conviction*') is key.[716] It should be noted, however, that the focus on the judge's personal conviction may, in practice, not be all that different compared to a common law approach. In the English *Purple Parking* case, a private claim alleging abuse of dominance by Heathrow Airport, Mann J observed that '[a]t the end of the day the question is whether I am satisfied or not that the relevant matters have been proved'.[717]

Notwithstanding the absence of a formal standard of proof in EU law, the ECJ has provided a number of principles that indicate the level of the evidentiary threshold. The analysis below will examine these principles. It will also touch upon the standard of judicial review exercised by the EU courts, as this is closely interlinked with the applicable standard of proof.[718] The higher the standard of judicial review

---

[712] Hellström 2011, see *supra* note 691, p. 147. See also *supra* note 64 of the Opinion by AG Kokott in Case C-97/08 *Akzo Nobel v Commission* [2009] I-8237.

[713] See, generally, H. Legal, 'Standards of Proof and Standards of Judicial Review in EU Competition Law' in B. Hawk (ed), *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute 2005* (Juris Publishing: New York 2006).

[714] Gippini-Fournier warns that this concept must be used with great caution, as it involves the use of 'categories which lose much of their sense outside the common law'. See E. Gippini-Fournie**r**, 'The Elusive Standard of Proof in EU Competition Cases' in Ehlermann & Marquis 2011 (see *supra* note 691), p. 296.

[715] See also I. Forrester, 'A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review"', in Ehlermann & Marquis 2011 (see *supra* note 691), p. 419.

[716] See e.g. Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93, para 47 and Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, para 43. In the latter judgment the Court held: 'it is necessary to ascertain whether the Commission gathered sufficiently precise and consistent evidence to give grounds for a *firm conviction* that the alleged infringement took place [italics added by author]'. See also Gippini-Fournier 2011, *supra* note 714, p. 297-298.

[717] *Purple Parking* [2011] EWHC 987 (Ch), at 185.

[718] See e.g. Graham 2011, *supra* note 688, p. 245 and Hellström 2011, *supra* note 691, p. 149. See also A. Gerbrandy, *Convergentie in het mededingingsrecht* [*Convergence in Competition Law*] (Boom Juridische Uitgevers: The Hague 2009), Ch.4.

vis-à-vis a finding of an infringement, the more difficult it will be for the party alleging that infringement to provide sufficient evidence in order to meet the standard of proof.[719] As the standard of proof and the standard of judicial review function much like two communicating vessels, they shall both be discussed.

3.2 The standard of proof & judicial review

Primary EU law provides the legal basis for judicial review by the ECJ. Article 261 TFEU provides the ECJ with 'unlimited jurisdiction' in its assessment of penalties such as those imposed under Regulation 1/2003.[720] More broadly, Article 263 TFEU provides that the ECJ may review the legality of Commission decisions. A legality review implies a degree of deference to the Commission decision and, accordingly, is not as comprehensive as a full appeal on the merits. In particular, the ECJ shows deference to so-called 'complex economic assessments' made by the Commission.[721] At the same time, even where the Commission has a certain margin of discretion, the Court must still carry out an in-depth review of the law and of the facts.[722]

---

[719] The standard of judicial review is the standard 'a reviewing tribunal or appellate court applies when reviewing the legality of a decision or an administrative body or lower tribunal' (see Hellström 2011, *supra* note 691, p. 149). See also B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1 European Competition Journal 7. For a critical analysis of this topic, see D. Geradin & N. Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment', TILEC Discussion Paper No. 2011-008.

[720] As implemented by Article 31 of Regulation 1/2003, which reads as follows: 'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment'. It is unclear from this provision whether unlimited jurisdiction refers mainly to the power to adjust the fine or should also entail the possibility to examine afresh all the underlying merits.

[721] *Ibid*. See also *Aalborg Portland*, *supra* note 708, para 279. See also Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para 88.

[722] See Case C-272/09 P *KME Germany AG v European Commission* [2011] ECR nyr. See also A. Meij, 'Judicial Review in the EC Courts: *Tetra Laval* and Beyond' in: O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing: Groningen 2009), p. 15. See, similarly, the EFTA Court judgment in *Posten Norge, supra* note 703, para 99. The EFTA Court held that the evidence relied on, even of an economic nature, must be accurate, reliable, and complete, and support the conclusions drawn from it.

Turning to the standard of proof, the ECJ has often held that the Commission needs to demonstrate its case 'according to the requisite legal standard'.[723] The ECJ has used different types of wording to express its expectations vis-à-vis the quality of evidence, namely that it ought to be 'sufficiently precise and coherent',[724] 'sufficiently precise and consistent',[725] 'sufficiently cogent and consistent',[726] 'convergent and consistent',[727] 'convincing',[728] 'consistent'[729] or 'cogent'.[730] In other words, the ECJ assesses whether the body of evidence, taken as a whole, is sufficiently plausible to meet the requisite standard.[731] The standard expressed by the ECJ thus seems to be relatively strict, even though it falls short of the 'beyond reasonable doubt' standard familiar from criminal law in common law jurisdictions.[732]

3.3 The ECHR perspective

For a long time now, commentators have debated whether the intensity by which the EU courts review Commission decisions complies with Article 6 of the European Convention of Human Rights ('ECHR').[733,]

---

[723] Hellström 2011, *supra* note 691, p. 151. See also Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8471, para 58.

[724] Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, para 20.

[725] Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paras 43 and 72; Joined Cases T-67/00, T-68/00, T71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, para 179.

[726] Joined Cases C-68/94 and C-30/95 *France v Commission* [1998] ECR I-1375, para 228.

[727] Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, para 97.

[728] Case T-56/02 *Bayerische Hypo- und Vereinsbank v Commission* [2004] ECR II-3495, para 118-119.

[729] Case C-89/85 *Ahlström v Commission* ('*Woodpulp II*') [1993] ECR I-1307, para 127.

[730] Case T-305/94 *Limburgse Vinyl Maatschappij a.o. v Commission* [1999] ECR II-931, para 644.

[731] *JFE Engineering*, *supra* note 725, para 180.

[732] Case T-53/03 *BPB v Commission* [2008] ECR II-1333, para 64.

[733] Article 6(3) of the Treaty on European Union provides that fundamental rights, as protected by the ECHR, constitute general principles of EU law. According to Article 52(3) of the Charter of Fundamental Rights, the Charter rights corresponding to those in the ECHR will have at least the meaning and scope of those rights under the ECHR. See, also, ECJ case law dating back to the 1970s that already confirms that the EU is bound by fundamental rights. See e.g. Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and Case 36/75 *Rutili* [1975] ECR 1219. Currently, the EU is negotiating to become a contracting party to the ECHR. The relevant legal bases are Protocol 14 to the ECHR and Article 6(2) TEU respectively. See e.g. the document of 10 June 2013 at

[734] This provision requires a fair and public hearing by an independent and impartial tribunal if a person – natural or legal – is subject to a 'criminal charge'. Such a tribunal must also have full jurisdiction to examine all matters of law and fact relevant to the case before it;[735] seemingly requiring more than a legality review.

But how does Article 6 ECHR relate to the field of competition law? The ECJ has suggested, on the basis of ECtHR case law, that competition proceedings are 'criminal' for the purposes of Article 6 ECHR.[736] Indeed, in *Jussila*, the European Court of Human Rights ('ECtHR') explicitly referred to competition law as one of the areas in which fines may fall under the scope of a criminal charge.[737] However, the ECtHR did add the important nuance that the guarantees of Article 6 ECHR do not apply in its full stringency to sanctions that do not carry any significant degree of stigma, as opposed to so-called hard-core criminal law cases.

---

http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf. There is still a long way to go: the ECJ still has to give its opinion, and the Council of the EU as well as the Council of Europe representatives will have to ratify the final agreement.

[734] See e.g. M. Bronckers & A. Vallery, 'Fair and effective competition policy in the EU: which role for authorities and which role for the courts after *Menarini*', (2012) 8 European Competition Journal 283; J. Venit, 'Human All Too Human: The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82', in Ehlermann & Marquis 2011 (*supra* note 691), p. 241.

[735] See e.g. *Menarini*, *infra* note 738, paras 59 and 61. ECtHR judgment of 13 February 2003, *Chevrol v France* (appl. no. 49636/99), para 77.

[736] See e.g. Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4575, paras 175 and 176. The judgment considers the presumption of innocence to be applicable, as found in Article 6(2) ECHR. Note that this provision only applies to cases that involve a 'criminal offence'.

[737] ECtHR judgment of 23 November 2006, *Jussila v Finland* (appl. no. 73053/01). The mere fact that Article 23(5) of Regulation 1/2003 states that fining decisions 'shall not be of a criminal law nature' is not decisive for the purposes of the ECHR, as the notion of 'criminal charge' is an autonomous concept under the ECHR. See e.g. ECtHR judgment of 21 February 1984, *Öztürk v Germany* (appl. no. 8544/79), para. 49-50. See also B. Vesterdorf, 'Article 102 TFEU and sanctions: appropriate when?', (2011) 28 ECLR 573. At 574, he notes that in *Hüls* the ECJ came very close to admitting that the proceedings and sanctions under EU competition law are of a criminal law nature. See Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, para. 150, referring to 'the nature of the infringements in question and the nature and degree of severity of the ensuing penalties'.

In the *Menarini* case, the ECtHR held that a fine imposed by the Italian competition authority amounted to a criminal charge.[738] The ECtHR reiterated standing case law that an administrative authority may impose such a fine, as long as it is subject to the review by a court with full jurisdiction – on matters of law and on the facts.[739] In this case, the ECtHR found that the Italian administrative appeal system was adequate in terms of the requirements of Article 6 ECHR.[740]

Although I agree with the outcome of the *Menarini* case, I believe that the majority of the ECtHR placed too much emphasis on the *system* of administrative review exercised by the Council of State, instead of focusing primarily on what the Council of State had actually done in this particular case. I agree with the concurring opinion of Judge Sajó, in which he finds that the Council had, in this case, sufficiently reviewed the merits of the case to comply with Article 6(1) ECHR.[741] He aptly shows that the most important thing is to examine what the court is actually doing in its review – rather than to focus on its use of terminology indicating either a full review or a legality test.

I believe that the competition community should move beyond the abstract question whether the current EU competition law enforcement system is, as such, compliant with the ECHR or not. Only a case-by-case analysis can show if the Commission and the subsequent review by the ECJ have – in that particular case – complied with the ECHR.[742] In my view the crucial matter is not what the ECJ says it's doing when reviewing a Commission decision, but what it actually does. Indeed, even though the EU

---

[738] ECtHR judgment of 27 September 2011, *Menarini v Italy* (appl. no. 43509/08), para 28-45. See, similarly EFTA Court, *Posten Norge*, *supra* note 703, para. 90.

[739] *Menarini* (*ibid*.), para 59. An appeal was open to an administrative court, and subsequently to the Italian Council of State ('Consiglio di Stato').

[740] This position seems to be mirrored by EU case law. See e.g. Case T-348/94 *Enso Española v Commission* [1998] ECR II-1875, paras 55-65 and Case T-156/94 *Aristain v Commission* [1999] ECR II-645, paras 27-30. See also Opinion of AG Sharpston in *KME*, *supra* note 722. See, however, the dissenting opinion by Judge Pinto de Albuquerque in *Menarini* (*ibid*.), arguing that there had indeed been a violation of Article 6(1) ECHR.

[741] Concurring opinion by Judge Sajó in *Menarini* (*ibid*.), para 6.

[742] See also the Opinion of AG Sharpston in *KME*, *supra* note 722, para 73-83. Advocate General Sharpston also emphasised the importance of what kind of review the Court has conducted in actual fact, rather than what type of reviw the Courts says it has conducted.

courts frequently refer to the Commission's margin of discretion, they normally still carry out an in-depth review of the law and the facts.[743] This entails an analysis of whether 'the evidence relied on is factually accurate, reliable and consistent' and also 'whether that evidence contains all the [necessary] information […] and whether it is capable of substantiating the conclusions drawn from it'.[744] In my view, as long as these principles are genuinely upheld, the ECJ's review does not infringe the requirements set by the ECtHR in *Menarini*.

Returning once more to the standard of proof, it is by no means evident that the ECtHR requires use of the 'beyond reasonable doubt' standard in competition cases.[745] Indeed, in *Napp*, the UK Competition Appeals Tribunal ('CAT') made clear why the use of the civil standard is ECHR compliant.[746] The civil standard calls for a balance of probabilities, implying that it is more probable than not that the infringement has occurred. Considering the seriousness of competition law penalties, however, the CAT does require 'strong and convincing' evidence.[747] I think that this approach is sound and ECHR compliant,[748] as long as the courts comply are genuinely critical in their assessment of evidence and go beyond a mere legality review.[749]

---

[743] M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?', (2011) 2 Journal of European Competition Law & Practice 295.

[744] Case T-210/01 *General Electric v Commission* [2005] ECR II- 5575, paras 62 and 63; Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, para 39 and Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paras 87, 88 and 89.

[745] See, by implication, *Jussila* (*supra* note 737).

[746] *Napp v Director General of Fair Trading* [2002] CAT 1, paras 102 and 104.

[747] *Ibid*., paras 108-110. The CAT also refers to the same standard as 'strong and compelling evidence'. The CAT adds that it is unlikely that the use of the criminal standard would lead to different results in competition cases. In a private enforcement action setting, see the judgment by Rimer J in *Chester City Council v Arriva* [2007] UKCLR 1582, para. 10.

[748] In my view, this conclusion is not altered by the EFTA Court's judgment in *Posten Norge* that it had 'no doubt' that there was an abuse. In my reading, the EFTA Court was simply convinced of an infringement based on the facts of the case, but that does not mean it had upheld a 'beyond reasonable doubt' standard. See *Posten Norge, supra* note 703, paras 162 and 180. This is confirmed by the fact that although the applicant invokes the 'beyond reasonable doubt' standard, it is not referred to in the Court's own findings.

[749] In the word of the *KME* judgment, if the court engages into an in-depth review of the law and of the facts. See *KME*, *supra* note 722, para. 102.

3.4 Responding to the Commission establishing a *prima facie* abuse

An applicant has two main options to challenge a Commission infringement decision. It may (i) counter the establishment of a *prima facie* abuse and/or (ii) invoke an objective justification. As to the first possibility, the applicant is required 'to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence […] to demonstrate that its objections are well founded'.[750] The defendant must cast sufficient doubt on the Commission's body of evidence to the extent that it no longer satisfies the requisite standard of proof.[751] If the Commission's evidence is particularly consistent and convincing, it will thus be commensurately more difficult for the dominant firm to set aside a finding of a *prima facie* infringement.[752] The following paragraph discusses the second possibility, examining how difficult it will be for a dominant firm to successfully invoke an objective justification.

3.5 The standard of proof related to the various types of objective justification

3.5.1 Introduction

There is little basis to conclude that the standard of proof pertaining to objective justification should, as a matter of principle, be different from the standard applicable to a finding of a *prima facie* abuse. The Commission's 2009 guidance paper suggests that an objective justification plea requires evidence that possesses 'a sufficient degree of probability' and is equally based on 'verifiable evidence'.[753] In terms of case law, the ECJ held in *Solvay* that if the dominant firm must produce sufficiently 'firm evidence',[754]

---

[750] Case C-386/10 P *Chalkor v Commission* [2011] nyr, para 65.

[751] See also *Chalkor* (*ibid*.), para 64. The ECJ held that 'it is for the applicant to raise pleas in law against [the Commission's] decision and to adduce evidence in support of those pleas.'

[752] Ó Caoimh 2011, *supra* note 691, p. 273.

[753] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 30.

[754] Case T-57/01 *Solvay v Commission* [2009] ECR II-4621, para 334. See also *Portugal v Commission*, *supra* note 702, para 56. In *Michelin II* the General Court held that the evidence provided by the applicant was insufficiently specific. See *Michelin II* (General Court), *supra* note 694, paras 107-108,

which must be assessed 'on the basis of all the circumstances of the case.'[755] Evidence is unlikely to meet this standard if it is inconsistent with the facts, and thus appears to be solely an *ex post facto* attempt by the dominant firm to justify its conduct.[756] Another judgment of note is *GlaxoSmithKline Services*. The General Court held, and the ECJ confirmed, that the examination should focus on whether it is more likely or not than the alleged advantages would be achieved.[757]

Although *GlaxoSmithKline Services* concerned alleged benefits that would arise in the future (thus requiring a 'prospective analysis'), I do think that the same reasoning can be transposed to Article 102 TFEU. This would mean that the dominant firm will have to show that it is more probable than not that an objective justification applies. In practice, the difficulty in establishing an objective justification plea will vary depending on the conduct's effects and on the type of objective justification that the dominant firm wishes to invoke. As I have argued in the previous Chapter, objective justification pleas can roughly be subdivided in three main categories. They can be based on considerations of (i) legitimate business behaviour, (ii) efficiency or (iii) public interest. The following paragraphs examine how the difficulty to meet the standard of proof may differ depending on these three categories.

3.5.2 Legitimate business behaviour

The plea based on legitimate business behaviour can be divided in 'objective necessity' and 'competition on the merits'. In the context of 'objective necessity' the dominant firm ought to show it had no alternative way to act. This will not be easy to prove, as alternatives courses of action will often be imaginable.[758] The standard will be easily satisfied, however, if the lack of alternatives follows clearly

[755] *TeliaSonera, supra* note 703, para 76. Although the ECJ refers to *Michelin I* as a precedent, that ruling appears to refer to the assessment of the abuse as a whole rather than the assessment of a justification as such. See Case 322/81 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 73.

[756] Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 150.

[757] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission* [2009] ECR I-9291, para 94.

[758] See e.g. Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, upholding the General Court ruling in Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477. Although this case concerned a highly regulated (wholesale) market, Deutsche Telekom was still in the position to avoid the margin squeeze under review, for instance by raising the relevant downstream price.

from the available evidence – for instance that the dominant firm's conduct was prescribed by law. Under these circumstances the undertaking's actions should be considered to be legitimate.[759]

A plea based on competition on the merits will often be less straightforward and will require an intricate balancing test. In the refusal to deal *CBEM* case the ECJ mentioned the possibility to invoke 'technical [and] commercial requirements' relating to the nature of the market on which the dominant position was held.[760] The ECJ subsumed this plea under the heading of 'objective necessity'.[761] However, substantively it appears to reflect the notion that a dominant firm can justify its conduct not because it has no alternatives, but because it has sound business reasons for its conduct. Such reasoning also appears in *United Brands*, which suggests that a dominant firm has – in principle – a relatively wide margin on what type of activity it engages in to protect its commercial interests.[762] The defendant's main challenge will be to show that its conduct was proportionate to protect its interests.[763] In my view this approach is perfectly reasonable. The starting point of competition law should be that even dominant undertakings may fully take part in the competitive process: despite the 'special responsibility' incumbent upon such undertakings, regulatory intervention should still be the exception rather than the rule.

By way of example, consider an airline company that is dominant on a particular route. An efficient low-cost airline enters the market and introduces very low fares. The dominant firm immediately drops its prices to match those of its competitor – to a level below its costs. It then slashes its costs in a

---

[759] If the objective necessity refers to compulsion by the State, such conduct is only legitimate if the domestic legislation itself is not contrary to EU competition law, see e.g. Case C-198/01 *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato* ('*CIF*') [2003] I-8055.

[760] Case 311/84 *CBEM v CLT* ('*Télémarketing')* [1985] ECR 3261, para 26.

[761] *Ibid.*, para 27.

[762] Case 27/76 *United Brands v Commission* [1978] ECR 207, para 189.

[763] See e.g. *United Brands* (ibid.), para 190. See also *British Airways, supra* note 686, para 86. For an example outside of Article 102 TFEU, see Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* ('*TACA'*) [2003] ECR II-3298, para 1120. Here, the General Court examined the proportionality of the alleged need invoked by the parties to ensure equality between shippers and to improve administrative efficiency.

comprehensive three-month restructuring of its business, lowering its average total costs to below its new fares.

Assuming a potential exclusionary effect, competition law may view such pricing behaviour (before the completion of the restructuring) as a *prima facie* abuse on the basis of predation.[764] However, the dominant firm's response is exactly the type of conduct that competition law seeks to promote; resulting in lower prices and more choice for consumers. In my view, it's not particularly relevant that a dominant firm has charged below-cost prices for a short period of time – especially if the exclusionary effect remains theoretical and does not lead to an exit of the new entrant. Indeed, the *rationale* of the abuse prohibition is underpinned by the belief that firms with market power are usually inefficient and therefore have high costs. It should be applauded that a price maverick forces a dominant firm to be more efficient. It is fully consistent with the overall purpose of competition law to consider such competition on the merits to be justified. Finally, the example above shows that competition on the merits will normally involve conduct that is strongly associated with efficient behaviour, and could thus also be considered under an efficiency plea. In my view, however, I think that the conduct is so clearly within the realm of pro-competitive behaviour that there is no need to enter into the balancing test that an efficiency plea would require.

3.5.3 Efficiency

EU case law allows the dominant firm to provide evidence that the exclusionary effects arising from an exclusionary pricing practice are counterbalanced, or outweighed, by advantages in terms of efficiency that also benefit the consumer.[765] In practice the standard seems difficult to meet due to the assumption that a *prima facie* abuse of dominance entails harmful welfare effects.[766] The greater the anti-competitive effects of the conduct, the more difficult it will be to meet the requisite standard. By contrast low-impact conduct will meet the standard much more easily.

---

[764] *AKZO, supra* note 693, para 146. If a dominant firm charges prices between average variable costs and average total costs, the Commission must be able to show anti-competitive intent.

[765] *British Airways, supra* note 686, para 86; *TeliaSonera*, *supra* note 703, para 76.

[766] This is partly because the very presence of a dominant firm already restricts competition, which is a key *rationale* for the 'special responsibility' incumbent upon such firms. See e.g. Case 322/81 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 57 and *BPB, supra* note 732, para 67.

An underlying requirement is that the evidence invoked by the dominant firm must be sufficiently precise. In *Michelin II,* the ECJ declined to uphold that a loyalty-inducing rebate system was justified, as Michelin's plea was 'too general' and 'insufficient to provide economic reasons to explain specifically the discount rates chosen'.[767] Thus the dominant firm cannot rely on a general reference to pro-competitive effects, but must establish *inter alia* that its quantity rebates are based on 'actual cost savings'.[768]

In *British Airways* and *TeliaSonera* the ECJ held that the exclusionary effect must bear a relation to the stated benefits and may not go beyond what it necessary to attain such advantages.[769] This suggests that the anti-competitive effects must be an unavoidable result of the conduct that has a net pro-competitive effect. In *Post Danmark* the ECJ introduced an additional criterion, namely that the conduct in question may not eliminate effective competition.[770] The introduction of this requirement suggests that the ECJ is bringing the interpretation of objective justification under Article 102 TFEU more into line with Article 101(3) TFEU where this criterion is also one of the necessary elements.[771]

Not only must the beneficial effects be sufficiently great to offset any disadvantageous effects, they must also be sufficiently certain to materialize.[772] In *Post Danmark* the ECJ held that the relevant gains either *must have been*, or *are likely to be*, brought about as a result of the conduct under review.[773] Any pro- and anti-competitive effects 'likely' to result from the conduct under examination must accordingly

---

[767] *Michelin II* (General Court), *supra* note 694, para 109. See also *Portugal v Commission*, *supra* note 702, para 56. In the latter case, the Court attached great importance to the context of the case, which involved airports with a natural monopoly for most of their activities. The Court took this high level of dominance into account when it ruled that the rebates under investigation were *prima facie* abusive and could not be justified.

[768] See e.g. the Opinion of AG Mischo in *Portugal v Commission, supra* note 702, para 118. According to the AG, the applicant failed to show that 'the discounts in question represent genuinely and specifically lower costs for the airports' operator'.

[769] *British Airways, supra* note 686, para 86; *TeliaSonera, supra* note 703, para 76.

[770] *Post Danmark, supra* note 697, para 42.

[771] An earlier guidance document by the Commission clearly aims to do the same, see the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 30.

[772] *Ibid*., para 30. The guidance states that the evidence must possess 'a sufficient degree of probability'.

[773] *Post Danmark*, *supra* note 697, para 42.

be balanced out with each other.[774] In my view the case law thus leaves room for a combined analysis of the extent of the effects and the likelihood with which they are thought to arise. This enables a balanced approach which could allow small but certain effects to outweigh effects that may be larger but much more doubtful to arise.

By way of example of an efficiency plea, consider a telecoms company that has a 51% market share in the market for fibre optic connections to household consumers. The firm starts construction only if a sufficient percentage of a group of households opts for such a connection. The telecoms company chooses the construction company performing the works and passes on the construction costs as a lump sum payment to the newly connected households. This may be seen as a form of tying, as the consumer cannot opt for any other construction firm if it chooses the fibre optic connection from the dominant firm. However, the choice to only deal with a single construction company is likely to have overall efficient effects, with benefits trickling down to consumers, as fixed costs are spread out over a larger number of customers.

3.5.4 Public interest

A public interest plea requires a balancing test of various norms that normally cannot be easily quantified.[775] It requires a qualitative assessment of why the practice is beneficial to a stated public interest and why the interest at stake should trump the application of Article 102 TFEU. The *Hilti* and *Tetra Pak II* rulings give little insight in the way the ECJ would weigh potential public interest benefits with anti-competitive effects.[776] However, if the ECJ does engage in a balancing exercise it would logically follow that the slighter the anti-competitive effects of the conduct and the higher the perceived value of the public interest norm, the easier it is to condone the behaviour under examination.

---

[774] *Ibid*.

[775] An exception is the *CECED* case, concerning an agreement by producers to phase out less efficient washing machines. In *CECED* the Commission considered not only the benefits for individual consumers (partly due to lower electricity bills), but also attempted to quantify the added value arising from environmental protection. See the Commission decision of 24 January 1999, [2000] OJ L 187/47. It could be questioned, however, to what extent this precedent is still relevant, as the *CECED* approach has not been followed in any recent Commission decisions.

[776] See the rulings in Case T-30/89 *Hilti v Commission* [1991] ECR II-1439 (upheld on appeal in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667) and Case T-83/91 *Tetra Pak International v Commission* (‘*Tetra Pak II*’) [1994] ECR II-755 (upheld on appeal in Case C-333/94 P *Tetra Pak International v Commission* (‘*Tetra Pak II*’) [1996] ECR I-5951).

For instance, imagine that a company that is dominant in the wholesale procurement of furniture. It wishes to purchase wooden chairs only from suppliers that do not make use of child labour. Under the assumption that the refusal does not entail great harm to consumer welfare, while it does serve a key public interest, such conduct should be objectively justified.

4 THE BURDEN AND STANDARD OF PROOF IN A PRIVATE LAW CONTEXT

4.1 Introduction

The analysis above dealt with the burden and standard of proof within the framework of an administrative procedure. However, competition law litigation may also take place between two private parties, which equally raises questions as to the applicable burden and standard of proof. Litigation between private parties based on Article 102 TFEU may involve e.g. an injunction to require a dominant firm to supply a third party or to alter its wholesale prices in order to prevent a margin squeeze. It could also include an action for damages. For instance, a firm may have lost sales if it has procured an input from a dominant undertaking at a price that later transpires to be excessive.

The ECJ has made clear that aggrieved parties are entitled to a damages claim following a violation of the EU competition rules.[777] Such litigation inevitably takes place in the arena of domestic private law courts. National rules of procedure thus primarily determine the burden and standard of proof in a private law action.[778] EU law does require, however, that such domestic rules may not impinge on the

[777] See the 'trinity' of key cases on private enforcement of EU competition law: Case C-344/98 *Masterfoods* [2000] ECR I-11369; Case C-453/99 *Courage v Crehan* [2001] ECR I-6297 and Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619. Also note that the Commission has proposed a Directive to facilitate private enforcement actions, see COM(2013) 404, proposal of 11 June 2013.

[778] As to the standard of proof, see e.g. recital 5 of the preamble of Regulation 1/2003, which clearly states that the Regulation affects neither 'national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case'.

effet utile of the private enforcement rights bestowed upon litigants.[779] The following paragraphs examine the implications for follow-on and stand-alone private actions respectively.

4.2 Follow-on private action

The applicable burden and standard of proof seem to be relatively straightforward in an action following on a Commission infringement decision. In such a case Article 16 of Regulation 1/2003 provides that a national court judgment cannot run counter to the Commission decision.[780] In principle, national courts are thus expected to follow the Commission's finding of an infringement. A private claimant will be able to satisfy the burden and standard of proof by showing how the Commission decision feeds into the domestic requirements for civil liability.

Of course the defendant has an incentive to show why the infringement decision of Article 102 TFEU should not lead to any civil liability. However, in my view there is little room for an objective justification plea in a follow-on action. The Commission decision (if upheld by the EU courts) presupposes that no objective justification applies; otherwise there would have been no abuse.

An effective line of defense is thus more likely to focus on the non-applicability of the *domestic* conditions for civil liability. For instance, domestic private law may require that the damage incurred was a foreseeable consequence of the defendant's conduct. As the foreseeability criterion is not a constituent part of Article 102 TFEU, a defendant is still free to argue that this condition has not been met. In addition, a Commission decision does not normally include an elaborate quantum of damages analysis suffered by private parties. A claimant thus needs to show the extent of the damages it has suffered,[781] as well as causation between these damages and the dominant firm's wrongful act.

[779] See the *Masterfoods*, *Courage* and *Manfredi* rulings mentioned above in *supra* note 777. The relevance of the *effet utile* doctrine is also apparent from Case C-126/97 *Eco Swiss* [1999] I-3055, para 37.

[780] See also *Masterfoods, supra* note 777, para 60. Domestic competition law may set specific rules on the effects of decisions by the NCA. For example, in the UK, claimants may rely on a finding of infringement by the OFT. In Germany, claimants may even rely on a finding of infringement by other NCAs in the EU.

[781] In order to help national courts to assess the quantum of damages, the Commission has issued a draft guidance paper named 'Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty', available at http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html.

Still, objective justification is not completely irrelevant for a defendant in a follow-on action. An infringement decision cannot fully be detached from the context in which it was taken. This means that an objective justification might still be available insofar the domestic situation can be differentiated from the context assessed by the Commission. For instance, it may be that a practice had no net beneficial welfare effect at the EU level (comparing the benefits and harm in all relevant Member States), but did have a net pro-competitive effect in one particular Member State. This could happen if the market circumstances in one Member State are markedly different from those in other Member States. In such a case, an efficiency plea may fail during the administrative proceedings at the EU level, but may be able to succeed in the civil courts at the domestic level.

4.3 Stand-alone private action

A more complex situation arises in the context of a 'stand-alone' private law action. There is little lucidity on how national courts would allocate the evidentiary burden on objective justification in such cases. In my view, a flexible approach by the courts will be paramount to ensure effective private enforcement of competition law considering the (often) wide information asymmetries between litigants.[782]

National courts must allocate the burden of proof and the evidentiary burden in such a way that safeguards the *effet utile* of private enforcement. As key evidence will often be in the sole possession of the defendant, domestic courts should use the full extent of available domestic rules in order to require the disclosure of such documents. Flexibility is also warranted in terms of how the evidentiary burden is laid down. Some legal regimes explicitly allow for such flexibility. For example, Article 150 of the Dutch Code on Civil Procedure ('*Wetboek van Burgerlijke Rechtsvordering*') states that although the party invoking a fact must provide the necessary proof, the evidentiary burden may be reversed on grounds of fairness or equity.

---

[782] A. Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing: Oxford and Portland, Oregon 2008), p. 224. Also note that national law bestows certain powers on public authorities to acquire information, whereas the powers of private claimants are usually much more limited.

The success of a defendant's attempt to stave off civil liability is likely to hinge on the type of objective justification that it wishes to invoke. Civil courts may have little trouble to entertain a plea based on objective necessity, where the dominant firm had no alternative way to act. For instance, if the State sets the prices for a product sold by the dominant firm, the pricing behaviour is unlikely be imputable to the dominant firm, in which case its conduct will normally not lead to an award of a damages claim.

It will be more difficult, however, for a defendant to justify a *prima facie* abuse based on efficiency or public interest grounds. A civil court is normally used (or even required) to focus solely on the dispute brought before it – and not enter into an examination of the wider ramifications of the conduct under review. Consequently a court may not be willing or able to take into account whether the conduct has lead to wider efficiency gains or has promoted certain public interest goals.

Another difficulty for a domestic court in applying an objective justification may arise from EU law itself. Article 6 of Regulation 1/2003 unequivocally states that national courts have the competence to apply Article 102 TFEU. This suggests that domestic courts may issue, *inter alia*, a declaration that conduct is objectively justified and hence not an abuse of dominance. But how should this be reconciled with the recent *Tele2 Polska* ruling? In that judgment the ECJ held that 'the Commission alone is empowered to make a finding that there has been no breach of Article 102 TFEU',[783] suggesting that domestic courts are *not* allowed to determine that a *prima facie* abuse is objectively justified.

I submit that this would be an erroneous reading of the case. The *Tele2 Polska* ruling should be read as an account of the relationship between the European Commission and national competition authorities; and *not* between the European Commission and national courts. Indeed, in *Tele2 Polska* the ECJ emphasized that Article 5 of Regulation 1/2003 limits the powers bestowed upon national competition authorities, whereas the Regulation contains no such restriction for domestic courts.[784] Additionally, if domestic courts would be impeded from applying an objective justification in a private law action, this would run counter to the notion that public enforcement is not hierarchically superior to private enforcement, as recently confirmed in *Pfleiderer*.[785]

---

[783] Case C-375/09 *Tele2 Polska* [2011] ECR I-3055, paras 28 and 29.

[784] *Ibid*., paras 22 and 23.

[785] Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161.

Be that as it may, the uncertainty left by *Tele2 Polska* could impede domestic courts to declare that certain conduct is objectively justified and, as a consequence, not abusive under Article 102 TFEU. Time will tell to what extent civil courts are prepared to explore the outer rims of domestic and EU law by entertaining pleas based on objective justification.

5 CONCLUSION

The burden of proof, the evidentiary burden and the standard of proof are key issues in competition litigation. This chapter examines how these concepts relate to the objective justification plea in cases based on Article 102 TFEU. The Commission and NCAs clearly bear the burden of proof in order to prove an infringement of Article 102 TFEU. However, the evidentiary burden on objective justification will initially be borne by the dominant firm. The evidentiary burden is then able to shift back and forth depending on whether one of the parties has discharged its burden.

It is submitted that the difficulty in meeting the standard of proof will vary according to the circumstances of the case. The lower the impact of the firm's conduct, the easier it will be to meet the required standard for an objective justification plea. In my view, the difficulty in meeting the requisite standard will also depend to a large extent on the type of objective justification that the dominant firm wishes to invoke.

It appears that the standard of proof will be relatively difficult to meet in a plea based on efficiency or public interest. These types of justification require a difficult balancing test that cannot be taken lightly – the loss in competition should be compensated either by clear efficiency gains or benefits to a public interest goal. The standard of proof ought to be easier to meet if it concerns a plea based on legitimate business conduct. This is especially clear if there is firm evidence that the conduct arises from objective necessity, in the sense that the dominant firm had no alternative way to act. This makes perfect sense: competition law should not require firms to do the impossible. In addition, dominant firms have the possibility to show that their conduct should be considered to be legitimate even if it harms their competitors. The defendant's main challenge will be to show that its conduct was proportionate to protect its interests.

Matters become more complex in a private law context. In a stand-alone action, the regular rules on burden and standard of proof apply, even though these may not be interpreted in such a way that would disable the *effet utile* of the private enforcement of EU competition law. In a follow-on action, a dominant firm will in principle no longer be able to invoke an objective justification. Its best chance to escape civil liability is by invoking domestic legal conditions that are not part of the objective justification plea, such as a lack of foreseeability. The only exception is where an objective justification applies in the domestic context as it can be differentiated from the context in which the Commission took its decision.

This chapter has attempted to provide guidance as to the burden and standard of proof vis-à-vis objective justification. Unfortunately no academic work can substitute for the law in action. The real proof is in actual practice, just like the proof of the pudding is in the eating.

CHAPTER V JUSTIFICATIONS IN EU MEMBER STATES*

1 INTRODUCTION

The previous Chapter has focused mainly on Article 102 of the Treaty on the Functioning of the European Union ('TFEU'). However, EU Member States also prohibit the abuse of a dominant position in their domestic legislation. The EU and domestic prohibitions both seek to ban anti-competitive unilateral conduct.[786] It is thus no surprise that National Competition Authorities ('NCAs') and domestic courts in EU Member States use the interpretation of Article 102 TFEU as a key focal point in the application of its national equivalent.

As noted in the previous Chapter, an abuse of a dominant position implies the existence of a *prima facie* abuse and the absence of an objective justification. But even though there is a wealth of literature on the concept of abuse, few publications examine justifications at the level of EU Member States.[787] The absence of a cross-border debate leaves this crucial part of dominance law in a rather benighted condition. This obscurity may, in turn, entail risks for a consistent and high-quality application of the objective justification concept throughout the EU.

---

[*] This chapter is a revised version of T. van der Vijver, 'Benighted we stand: justifications of prima facie dominance abuses in EU Member States', (2013) 9 European Competition Journal 465.

[786] See Recital 9 of Regulation 1/2003. Of course there are lengthy debates on the prohibition's precise objective – and for that matter, the objectives of competition law as a whole.

[787] There have been several high-quality publications on the concept of objective justification within the framework of the abuse of dominance, but they focus on EU law rather than the Member State level. See e.g. P.-J. Loewenthal, 'The Defence of "objective justification" in the application of Article 82 EC', (2005) 28 World Competition 455; A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC', (2007) 44 CMLRev 1727; E. Rousseva, 'The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?', (2006) 2 *The Competition Law Review* 27; E. Østerud, 'The Concept of Objective Justification' in: E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Kluwer Law International: Alphen aan den Rijn 2010), at 245.

In an effort to illuminate the concept of objective justification and its application at the Member State level, this chapter discusses competition law and practice in France, Germany, Ireland, Luxembourg, the Netherlands, Spain and the United Kingdom. The analysis explores legislation, case law, as well as guidance and decisional practice by NCAs. By discussing and comparing the available types of justification and the applicable legal reasoning, this chapter seeks to contribute to a better understanding of objective justification. A more thorough comprehension of the concept may provide valuable input for a debate that can hopefully improve the quality and consistency of competition practice on objective justification.

Having said what I plan to do, I should also note what this chapter does *not* aspire to. It does not provide a comprehensive overview of domestic competition practice on dominance abuses, but rather uses a selection of cases to illustrate key findings on objective justification. Most of the selected cases arise from public enforcement, as those proceedings are usually easier to find and compare than private enforcement actions. Furthermore, the chapter does not examine domestic prohibitions of unilateral conduct outside the scope of the prohibition of abuse within the meaning of Article 102 TFEU.[788] Another caveat is that, in many of the cases under review, the issue of objective justification played a relatively small role. Due to considerations of length, however, this study shall not discuss all legal and factual intricacies. As a consequence, the Chapter does not display all the peculiarities found in the domestic cases. The author hopes that readers will agree that, even in their simplified form, these cases still have interesting lessons to offer.

A final concern, as with any comparative analysis, is whether the study compares like with like.[789] Although there is a risk of taking competition law cases outside of their context, as they are often highly fact-specific, I do believe that it is possible to make a meaningful comparison. The chapter focuses on the available types of objective justification and the legal reasoning used, rather than the actual decisions on the facts. In addition, the domestic laws on abuse are not that dissimilar as they all have Article 102 TFEU (and its interpretation by the European Court of Justice, or 'ECJ') as a single point of reference. Indeed, Member State competition law is usually interpreted, as much as possible, in line

[788] An example is the French prohibition of the abuse of so-called 'economic dependence', where a dominant firm may not take advantage of customers or suppliers dependent on it (see Article L. 420-2 *Code de Commerce*).

[789] For a thorough analysis of the intricacies of comparative law, see M. Reimann & R. Zimmermann (ed), *The Oxford Handbook of Comparative Law* (OUP: Oxford 2006).

with EU competition law.[790] Finally, not only do I believe that a comparative analysis *can* be made, I also think it *should* be made. Only a comparison can reveal strengths and weaknesses of how Member States interpret objective justification, and show to what extent there are inconsistencies that should be considered.

Section 2 discusses Member State legislation and NCA guidance relevant to the concept of objective justification. Section 3 provides the bulk of the chapter, examining domestic case law and decisional practice by NCAs that deal with objective justification. Section 4 analyses the legal conditions that domestic courts and NCAs have applied to the various types of objective justification. Building upon the findings in this chapter, Section 5 identifies a number of promising practices. Section 6 offers a conclusion.

2 LEGISLATION & NCA GUIDANCE

2.1 Legislation

All the countries under review prohibit the abuse of a dominant position in their domestic legislation.[791] Similar to Article 102 TFEU, the legislative texts usually provide little insight on the concept of objective justification. Even where domestic legislation does require the absence of objective justification vis-à-vis particular examples of abuses, such as in Spain, it reveals neither the scope of such justifications nor the applicable legal conditions.[792]

[790] An example is Section 60(1) of the UK Competition Act 1998. This provision demands – so far as is possible, having regard to any relevant differences – interpretative consistency between EU and UK competition law.

[791] France: Article L. 420-2 of the *Code de Commerce*; Germany: Article 19(1) of the *Gesetz gegen Wettbewerbsbeschränkungen*; Ireland: Section 5(1) of the Competition Act 2002; Luxembourg: Article 5 of the *Loi du 23 octobre 2011 relative à la concurrence*; Spain: Article 6(1)(a) of the *Ley de Defensa de la Competencia* ('LDC'); the Netherlands: Article 24 of the *Mededingingswet*; UK: Section 18 of the Competition Act 1998 ('CA') (also known as the 'Chapter II' prohibition).

[792] See e.g. Spanish legislation, in particular subparagraphs 'b' and 'c' of Article 6(2) LDC. These provisions prohibit the limitation of production, distribution or technical development, to the *unjustified* prejudice of undertakings or consumers; and the *unjustifiable* refusal to meet the demands to purchase products or services.

Domestic legislation provides slightly more interpretative guidance insofar as it has codified elements of the objective justification plea in separate provisions. For example, Schedule 3 of the UK Competition Act 1998 provides a number of exclusions of the abuse prohibition. These exclusions apply, *inter alia*, if a legal requirement is applicable (paragraph 5(2) of Schedule 3), or if exceptional and compelling reasons of public policy are at stake (paragraph 7(4) of Schedule 3). Similarly, Section 7(2) of the Irish Competition Act permits conduct that seeks to comply with 'a determination made or a direction given by a statutory body'. Although these provisions do provide some clarity, Section 3 will show that cases in the UK and Ireland have, in fact, acknowledged a much wider range of justifications.

France appears to have the most holistic legislative treatment of objective justification. Article L. 420-4(I) of the Code de Commerce ('CdC') provides two key exemptions. The first exemption applies to practices that result from the application of a statutory provision or an implementing administrative text. Resembling a State action defence, the provision is said to require restrictive interpretation.[793] The second exemption applies if the dominant undertaking can show that its conduct ensured 'economic progress', while allowing customers a fair share of the resulting benefit. The exemption also requires that the conduct is indispensable to achieve the stated objective of economic progress and may not lead to the elimination of competition.

These conditions clearly mirror those of Article 101(3) TFEU, even though the latter provision does not directly apply to dominance abuses.[794] The wide scope of the French codification reflects the notion that no justification should be rejected *a priori*.[795] Landes suggests that the notion of 'economic progress' includes a wide range of elements such as the limitation of costs, the protection of the environment or

---

[793] J. Maitland-Walker (ed), *Competition Laws of Europe* (LexisNexis UK: London 2003), p. 125.

[794] However, see Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] ECR nyr, para 42. The ECJ transposed the conditions of Article 101(3) TFEU to Article 102 TFEU for the purposes of an efficiency balancing test.

[795] Even though some commentators suggest that competition authorities are reluctant to take non-competition objectives into account for fear of 'une perversion des règles de concurrence par des objectifs plus généraux'. See M.-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialens, *L'application en France du droit des pratiques anticoncurrentielles* (L.G.D.J. : Paris 2008), p. 286.

even the creation and retention of jobs.[796] Although I support a wide notion of the potential scope of justifications, one should be cautious that the justification does have a relevant nexus with the conduct under review. A dominant firm should not be able to justify anti-competitive conduct simply on the basis of its bloated size, with the alleged benefits that this entails for the retention of jobs at that firm.

2.2 NCA guidance

Generally speaking, the NCAs have not published much guidance on objective justification. In the author's opinion, more guidance would be desirable.[797] This could strengthen legal certainty and consistency of competition practice; especially if domestic courts consider the guidance to be persuasive. The UK Office of Fair Trading ('OFT') has referred to objective justification several times. An OFT guideline notes that a refusal to supply may be justified, *inter alia*, because of a customer's poor creditworthiness.[798] An answer by the OFT to a questionnaire from the International Competition Network also mentions other examples of justifications, such as the possibility that an obligation to supply would negatively affect innovation.[799] But even though the OFT guidelines are more elaborate than those in other Member States, they too leave many questions unanswered as to the type of justifications available as well as their scope and the applicable legal conditions. Considering the limited amount of NCA guidance, it is clear that we must turn to the examination of actual cases to understand how justifications of *prima facie* abuses are interpreted and applied in Member State competition practice.

---

[796] V. Landes, 'France' in: NautaDutilh (ed), *Dealing With Dominance: The Experience of National Competition Authorities* (Kluwer Law International: Alphen aan den Rijn 2004), p. 39. This position is nuanced by M.-C. Boutard Labarde et al. 2008 (*ibid.,* at p. 286), stating that '[l]es considerations sociales, telles que le maintain de l'emploi, sont peu intégrées'.

[797] Especially guidance that would be coordinated through the European Competition Network, to ensure consistency across EU Member States.

[798] OFT guideline of December 2004, Abuse of a dominant position, para 5.3, available at http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft402.pdf. See also, *inter alia*, the OFT draft competition law guideline for consultation of April 2004, assessment of conduct, available at http://www.oft.gov.uk/shared_oft/business_leaflets/competition_law/oft414a.pdf, para 8.7.

[799] OFT questionnaire submitted to the International Competition Network, 4 November 2009, available at http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/unitedkingdom.pdf.

3 ANALYSIS OF MEMBER STATE CASE LAW AND DECISIONAL PRACTICE

3.1 Introduction

This Section examines relevant case law and decisional practice in the Member States under review. The cases have been categorised according to three types of justifications.[800] The first is legitimate business behaviour. This category includes a situation where the dominant firm simply competes on the merits ('commercial freedom'), or that the dominant firm is forced to act in a specific way due to reasons external to it ('objective necessity'). A second type of justification is applicable if the efficiency benefits of the conduct under review outweigh its anti-competitive effects. Under the third category, dominant firms may rely on reasons of public interest to set aside a finding of abuse. Although this subdivision is undoubtedly imperfect,[801] I do believe it can enhance understanding of this concept and also facilitates a comparative study across Member States.

3.2 Legitimate business behaviour

3.2.1 Introduction

Justifications based on 'legitimate business behaviour' should have a broad scope. They reflect the notion that being in a dominant position is not abusive as such. Even dominant firms retain a degree of commercial freedom, as long as they do not go beyond the limits imposed by the 'special responsibility' incumbent upon them.[802] These types of cases should examine the nexus between the dominant position and the conduct under review. The weaker the link, the easier a justification can be condoned. A weak causal link makes it likely that a firm would have engaged in that conduct even without being in a dominant position, providing a strong indication that it competes on the merits. The following paragraphs provide various examples.

[800] For further explanation on this subdivision, see the previous chapter.

[801] Primarily because the precise delineation between these types may not always be clear. For example, there may be considerable overlap between conduct that falls within the 'commercial freedom' of a firm, and conduct that is considered to have a net efficient effect.

[802] See e.g. Case 322/82 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 57.

3.2.2 Commercial freedom – General

Notwithstanding the traditional concern for the plight of competitors in German competition law,[803] the Bundesgerichtshof ('BGH') has also relied on the dominant firm's commercial freedom in several cases.[804] In the *Strom und Telefon* judgments, the BGH found that local utilities did not abuse their dominant position by providing a combined offer of electricity and telephony services to consumers at a reduced basic fee.[805] The BGH held that the utilities had not transgressed their commercial freedom ('unternehmerischer Freiraum'),[806] noting that the dominant firms offered an attractively priced product.[807] The BGH considered that the conduct did not impair market access and still left customers with the option of buying electricity and telephony services separately.[808] Similarly, the *Adidas* judgment suggests that a dominant firm may refuse to supply if the refusal follows from the introduction of stricter distribution criteria, as long as these criteria are objective.[809] Finally, the *Gemeinsamer Anzeigenteil* case suggests a rationalization scheme shall be easier to justify if customers benefit from lower prices.[810]

Upholding quality standards may provide a relevant justification, even if this could exclude parties that are unable to meet those conditions. In the *Armor Hélicoptère* decision, the French NCA (currently named Autorité de la concurrence, or 'Autorité'), stressed that dominant firms are allowed to impose quality standards on its suppliers.[811] Similarly, in *Jaeger LeCoultre* (a case on sales restrictions related to spare parts of high-end watches), the Autorité emphasised that dominant firms have, in principle, the

---

[803] See e.g. A. Chiriţă, 'The analysis of market dominance and restrictive practices under German antitrust law in light of EC antitrust law', available at http://dro.dur.ac.uk/9488/1/9488.

[804] See e.g. Bundesgerichtshof judgment of 12 November 1991, *Aktionsbeiträge*, KZR 2/90. This judgment confirms that dominant firms are, in principle, free to decide with whom they deal.

[805] Bundesgerichtshof judgment of 4 November 2003, *Strom und Telefon I*, KZR 16/02; Bundesgerichtshof judgment of 4 November 2003, *Strom und Telefon II*, KZR 38/02.

[806] *Strom und Telefon I* (*ibid*), p. 8-9; *Strom und Telefon II* (*ibid*), p. 11-12.

[807] *Strom und Telefon II* (*ibid*), p. 11-12.

[808] *Strom und Telefon I*, *supra* note 805, p. 13.

[809] Bundesgerichtshof judgment of 30 June 1981, *Adidas*, KZR 19/80.

[810] Bundesgerichtshof judgment of 9 November 1982, *Gemeinsamer Anzeigenteil*, WuW BGH 1965.

[811] Autorité decision of 1 March 2000, *Armor Hélicoptère*, Case 00-D-13.

freedom to organise their distribution system according to their own wishes.[812] The Autorité noted that the restrictions that Jaeger LeCoultre imposed in the sale of spare parts were justified, as it helped to improve quality and promote the brand image. Similarly, the Spanish NCA (Comisión Nacional de la Competencia, or 'CNC') found the maintenance of a brand image relevant in the *Ryanair* case.[813] The CNC concluded that Ryanair's decision to stop allowing the sale of its tickets by online agencies was objectively justified,[814] as the agencies jeopardised Ryanair's credibility as a low-cost airline. In particular, the resellers made it difficult for Ryanair to maintain its pledge to reimburse twice the price difference with any cheaper ticket that its customers were able to find.[815]

Another way to explore the boundaries of a dominant firm's commercial freedom is by examining whether its behaviour is consonant with the normal business practice in that sector. An example is the UK *Flybe* case.[816] A complainant alleged that Flybe, an airline, had engaged in predatory behaviour by unprofitably entering the Newquay – London Gatwick route and related markets. The OFT closed the case on a number of grounds, *inter alia* because of a lack of dominance on the relevant route. In addition, the OFT found no evidence that Flybe departed from normal, albeit robust, competition.[817] The OFT rightfully took into account the wider context of the case, including the fact that Flybe was a new entrant instead of the incumbent operator, distinguishing *Flybe* from EU case law on predation.[818] The decision did not find that Flybe acted anti-competitively, holding that the 'initial losses experienced on

---

[812] Autorité decision of 28 July 2005, *Jaeger LeCoultre*, Case 05-D-46.

[813] CNC decision of 22 June 2009, *Facua/Ryanair*, Case S/0097/08.

[814] *Ibid.,* under the assumption that Ryanair held a dominant position.

[815] *Ibid.,* p. 6-7.

[816] OFT decision (undated), *Flybe*, Case MPINF-PSWA001–04, available at http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/OFT1286.pdf.

[817] *Ibid.,* para 3.13.

[818] *Ibid.,* para 1.5. The OFT referred to *AKZO* (*infra* note 894), *Tetra Pak II* (*infra* note 894) and *Wanadoo* (*infra* note 891).

entering a route are a result of normal commercial practice for an airline'.[819] The OFT considered such initial losses reasonable 'due to the need to stimulate market demand for the route'.[820]

Although dominant firms are accordingly allowed to engage in 'normal commercial practice', they may need to provide evidence that its actions were triggered by a competitive *rationale* rather than a wish to exclude competitors. The UK *Cardiff Bus* case concerned a below-cost 'no frills' bus service that the dominant firm introduced after the launch of a similar service by a new entrant.[821] The OFT rejected the argument that Cardiff Bus was simply market testing a new service at prices below average variable costs. The OFT observed that Cardiff Bus's introduction of a service at below-cost prices and on similar routes and times as a new entrant showed its anti-competitive purpose, rather than a wish to fulfil a 'legitimate commercial strategy'.[822] According to the OFT, Cardiff Bus's conduct showed no 'genuine attempt to market test new services',[823] for example because it had not conducted 'any predictive assessment' on its profitability.[824]

In several cases, the dominant firm attempted to justify its conduct by arguing that *a third* party had not abided by regular business conduct. For example, a refusal to deal may be justified if the dominant firm refuses supply if a customer has not paid its overdue bills, as the UK Court of Appeal acknowledged in *Leyland DAF*.[825] In *Lüsterbehangsteine*, the German Bundesgerichtshof considered that a dominant firm may cease supply if its customer has unlawfully copied its designs.[826]

---

[819] *Ibid.,* para 6.98-6.99. This finding was relatively novel. In an earlier judgment, the CAT held that there 'are as yet no decided cases as to whether a dominant undertaking may price below [AVC] for a period on the grounds that it is launching a new product'. See *Freeserve.com v Director General of Telecommunications* [2003] CAT 5, para 220.
[820] *Ibid*.
[821] OFT decision of 18 November 2008, *Cardiff Bus*, Case CE/5281/04.
[822] *Ibid.,* at 1.14-1.16, 7.18 and 7.32.
[823] *Ibid.,* at 7.23.
[824] *Ibid.,* at 7.27-7.31.
[825] See *Leyland DAF v Automotive Products* [1994] 1 BCLC 245. The ruling affirmed *Leyland DAF v Automotive Products* [1993] WL 964480 (Ch).
[826] Bundesgerichtshof judgment of 25 October 1988, *Lüsterbehangsteine*, WuW/E 2540.

A refusal to deal may also be justified if the *request* itself is considered to be unreasonable. In *CR Delta*, the Dutch NCA (currently named Autoriteit Consument en Markt, or 'ACM')[827] examined a complaint alleging that a refusal to supply certain data electronically was an abuse, as it allegedly imposed high costs on the complainant (as the complainant had to manually process the data). The ACM rejected the complaint. It considered CR Delta's refusal to be justified,[828] noting e.g. the unwillingness by the complainant to pay for the additional costs that CR Delta said it would incur by such electronic supply.[829] Similarly, in *Association of British Travel Agents*, the OFT rejected a complaint that British Airways had abused its dominant position by reducing the booking payments it made to travel agents for short haul flights.[830] BA's ticket sales through its own website were considered as a more efficient way of distribution.[831] The OFT found it reasonable to expect customers that choose to book through travel agents to pay for the extra services that they receive.[832]

A dominant firm's plea referring to unreasonable conduct by a third party is not always successful. In several cases such a plea failed on the facts. An example is the *Burgess* refusal to deal case. The UK Competition Appeal Tribunal ('CAT') found no evidence that the company requesting access had acted in a way that would have justified a refusal, for instance because it had been an unreliable payer 'or the like'. [833] Another example is *Aberdeen Journals*, where the CAT did not find predatory prices justifiable on the basis that a new entrant (allegedly affected by Aberdeen Journal's prices) was inefficient or behaved like a 'fireship'.[834] This refers to a company that would have been created simply to wreak

---

[827] Before 1 April 2013, the ACM was named Nederlandse Mededingingsautoriteit, or 'NMa'.

[828] ACM initial decision of 28 March 2003, Case 1205/*FRHS v CR Delta*, para 53.

[829] The ACM did not alter its earlier findings (*ibid.*) in its administrative appeal decision of 11 October 2004, Case 1205/*FRHS v CR Delta*.

[830] OFT decision of 11 December 2002, *The Association of British Travel Agents and British Airways*, Case CE/1471-02, at 46-47.

[831] *Ibid.,* at 44.

[832] *Ibid*.

[833] *J.J. Burgess & Sons v Office of Fair Trading* [2005] CAT 25, para 363. The CAT referred to Case 27/76 *United Brands v Commission* [1978] ECR 207. Although not mentioned by the CAT, a key difference between the two cases seems to be that in *United Brands* the dominant firm invoked regular commercial practice referring to its own conduct, whereas in *Burgess* the dominant firm referred to the supposed absence of regular commercial practice on the part of the undertaking requesting access.

[834] *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, para 450.

havoc and force a sale to Aberdeen Journals.[835] Accordingly, the CAT appears to have left open the possibility that such behaviour by a third party may be relevant while assessing a justification in a predation case.[836]

Similar pleas in other cases also failed because of a lack of evidence. In the *ATOC* decision, the Office of Rail Regulation ('ORR') observed that the dominant firm had not provided evidence of past system failures that could otherwise have justified its refusal to supply certain information.[837] In *Eléctrica del Llémana*, the Spanish Competition Tribunal ('Tribunal') examined an energy incumbent's refusal to supply additional electricity to a downstream firm.[838] The dominant undertaking argued that the refusal was caused by the downstream firm's poor quality of service. The Tribunal rejected this view, stating that the dominant firm had not provided concrete evidence of this claim. The Tribunal suggested that any possible non-compliance with contractual obligations should be dealt with by a private law court, but cannot in itself serve as an objective justification for a refusal to supply.

Finally, a dominant firm may also wish to dissociate itself from allegedly unlawful conduct by third parties. A noteworthy problem here is that a finding of 'illegality' is rarely a straightforward matter. A case is point is the UK *Floe* case. Vodafone had disconnected SIM cards it had provided to Floe, arguing that it sought to avoid the alleged unlicensed provision of mobile phone services by Floe – a criminal offense under UK law.[839] Telecoms regulator Ofcom agreed with Vodafone and rejected Floe's complaint.[840] On appeal, the CAT agreed with Ofcom that competition law does not, and cannot, require dominant undertakings to commit a criminal offence itself directly or indirectly by enabling another

[835] As argued by Aberdeen Journals (*ibid.,* para 194 *et seq*.).

[836] Also note that an objective justification was difficult to establish anyway considering the evidence of selective price-cutting (*ibid.,* para 358).

[837] ORR non-infringement decision of 17 November 2009, *Association of Train Operating Companies* ('*ATOC*'), at 166. Available at http://www.rail-reg.gov.uk/upload/pdf/rtti-decision-011209.pdf.

[838] Tribunal de Defensa de la Competencia judgment of 29 September 1999, *Eléctrica del Llémana*, Case 442/98.

[839] Section 1 of the Wireless Telegraphy Act 1949. I do not examine the possibility that Vodafone would itself have acted illegally by not disconnecting the SIM cards.

[840] Ofcom decision of 3 November 2003, *Floe Telecom*, paras 49 to 52, and 55 to 57. Available at http://www.ofcom.org.uk/static/archive/oftel/publications/mobile/2003/gsm1103.pdf.

undertaking to commit a criminal offence (in this case, through the provision of telecom services).[841] However, the CAT expressed doubts whether the law was sufficiently clear to state with certainty that Floe had violated it,[842] and remitted the matter back to Ofcom for further examination.[843] In its second decision, Ofcom reaffirmed that it considered Floe's activities to be unlawful.[844] In a second appeal, the CAT remained doubtful whether Vodafone truly believed at the time of the disconnection that Floe's conduct was illegal,[845] even though the case was finally decided on different grounds.[846] According to the CAT, a legal requirement can only be relied upon if the dominant firm has relied 'at the very least' on 'clear legal advice that it is so precluded'.[847] Vodafone produced no evidence of such advice.[848] I agree with the CAT's minimum requirement: in the absence of any documentation examining the alleged illegality, there is little reason to presume that its refusal indeed sought to achieve a benign objective. In a regulated sector, an additional requirement should be that the dominant firm engaged with the competent authorities about the alleged illegality[849] – even though, as *Floe* shows, agreement by the competent regulator is not always sufficient, as the courts may disagree about the alleged illegality.

In my view, if a dominant firm refuses to deal with a company that allegedly operates illegally, such illegality should be a relevant consideration when determining whether the refusal violates Article 102 TFEU. I believe this statement to be true even after the recent ECJ judgment in *Slovenská*.[850] The

---

[841] See *Floe Telecom v Ofcom* [2004] CAT 18, paras 289 and 333. Although the CAT does not expand upon this distinction, I believe that the former situation entails objective necessity; whereas the second situation is more appropriately seen as legitimate business behaviour.

[842] *Ibid.,* para 336.

[843] *Ibid.,* para 338.

[844] Ofcom decision of 28 June 2005, *Floe (re-investigation)*, Case: CW/00805/12/04, paras 247 and 334. Ofcom refers to this justification as 'legitimate commercial interest' (para 248).

[845] *Floe Telecom v Ofcom* [2006] CAT 17, para 367.

[846] *Ibid*., paras 352-353.

[847] *Ibid.,* paras 371-372.

[848] A later judgment by the Court of Appeal partially set aside the CAT's order, but did not rule upon the CAT's interpretation of objective justification. See *Ofcom v Floe Telecom* [2009] EWCA Civ 47.

[849] In *Floe*, *supra* note 841, the CAT noted at para 333: 'we accept that where the relevant authorities have pronounced that an activity is illegal, competition law cannot and does not require the dominant undertaking to participate in the furtherance of an illegal act'.

[850] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa* ('*Slovenská*') [2013] ECR nyr.

Slovenská case concerned three Slovakian banks that jointly terminated their business dealings with Akcenta, a financial institution from the Czech Republic. The Slovakian NCA found that the bank's coordinated action violated Article 101(1) TFEU. One of the banks appealed against this finding, arguing that Akcenta was operating illegally as it allegedly did not have the required licences. The ECJ held in a preliminary ruling that, when determining whether an agreement that restricts competition by object infringes Article 101(1) TFEU, it is irrelevant that a third party (such as Akcenta) was allegedly operating illegally.[851]

The *Slovenská* case does not seem to herald the end of the 'illegality defence' for the purposes of Article 102 TFEU. Competition law is more benign towards refusals to deal under 102 TFEU than to restrictions by object under Article 101(1) TFEU. The first is an exception to the rule that even dominant firms are free to decide with whom they deal or not, whereas the second type of conduct is considered 'injurious' to competition by its 'very nature'.[852] In addition, the illegality of the conduct in *Slovenská* was anything but evident,[853] and the ECJ took into account that none of the banks had challenged the legality of Akcenta's operations *before* they were investigated (suggesting that the outcome could have been different if they *had* challenged the legality earlier).[854] Finally, even though the ECJ does not mention it explicitly, the element of necessity also appears wanting: if the banks were so concerned with the third party's conduct, why did they need an agreement to withdraw their banking services and did not simply do so individually? In sum, there is ample reason not to transpose the reasoning in *Slovenská* to refusal to deal cases in Article 102 TFEU.

3.2.3 Commercial freedom – Legitimate differentiation

Several domestic cases examined whether a dominant firm's differentiation of prices (or unequal treatment otherwise) could be justified, and therefore does not constitute discrimination that would amount to an abuse.

---

[851] *Ibid.,* para 19.

[852] See e.g. Case C-226/11 *Expedia v Autorité de la concurrence* [2013] ECR nyr, para 36.

[853] Indeed, according to the Czech government, Akcenta did have the requisite licenses in the Czech Republic (*supra* note 850, para 15).

[854] *Ibid.,* para 19.

Two telling examples emanate from Dutch competition practice. The first example is *Interpay*, where retailer Superunie alleged that the price differentiation by debit card transaction company Interpay was abusive. The ACM rejected the complaint, as it found the differentiation to be objectively justified.[855] At a time when the success of Interpay's transaction system was still uncertain, Superunie's rival Ahold committed to large-scale investments and guaranteed that it would process a minimum number of transactions.[856] The ACM thus considered the additional discounts (that were, at the time, offered to other retailers as well) as an appropriate financial reward for the investments and risks;[857] and noted that a strict application of the abuse prohibition – as proposed by the complainant – would be detrimental to innovation.[858]

A second example from the Netherlands is *GasTerra*, where a collective of greenhouse farmers complained that gas wholesaler GasTerra charged discriminatory prices.[859] The ACM rejected the complaint, holding that GasTerra's differentiation of prices was not abusive as it reflected the varying needs of wholesale customers. Lower prices will be available for customers willing to commit to long-term contracts with little flexibility in gas off-take.[860]

In the *EPM/NMPP* case, the French Autorité examined the alleged discriminatory nature of a new pricing scheme of distributor NMPP. It found that the new differentiation was justified, as the pricing method was transparent, objective and cost-based.[861] It also took into account that the new scheme was introduced gradually. The Paris Court of Appeal upheld the decision,[862] noting that the rates charged

---

[855] ACM initial decision of 28 April 2003, Case 2978/*Superunie v Interpay*, para 40. In para 39, the ACM provides two examples of objective justification. First, a rebate could be justified because of ensuing cost benefits that are proportional to the amount of the rebate. Second, if a purchaser has borne specific investment risks they could provide an objective justification for special treatment by the dominant undertaking for a certain period of time.

[856] *Ibid.,* para 41.

[857] *Ibid.,* para 47.

[858] *Ibid.,* para 50. The ACM confirmed the rejection of the complaint in its administrative appeal decision of 29 June 2005, Case 2978/*Superunie v Interpay*.

[859] ACM initial decision of 26 June 2009, Case 5720/*Productschap Tuinbouw v GasTerra*.

[860] ACM administrative appeal decision of 28 April 2011, Case 5720/*Productschap Tuinbouw v GasTerra*, para 113.

[861] Autorité decision of 12 July 2007, *EPM/NMPP*, Case 07-D-23.

[862] Paris Court of Appeal judgment of 17 September 2008, Case 2007/14904.

were based on objective economic criteria.[863] The Court also observed that the introduction of new prices had a legitimate aim, namely to correct for the unfair effects of the earlier pricing scheme.

The UK *EWS* case is another price discrimination example, where the ORR held that rail company EWS had abused its dominant position by foreclosing its rivals from the market for the supply of coal to UK industrial users.[864] According to the ORR, EWS had used several means to achieve this aim, such as charging discriminatory prices for access and providing selective price cuts to (potential) customers of its competitors. The ORR found that EWS had advanced no credible objective justification,[865] stating: 'business considerations that in reality amount to anti-competitive behaviour cannot be used as justification for unequal treatment'.[866] It rejected EWS's reference to certain operational difficulties encountered by ECSL (the company requesting access), as those issues were not purely ECSL's fault and would, in any case, not be remedied by price discrimination.[867]

Finally, in *Napp*, the OFT held that pharmaceutical company Napp had abused its dominant position by charging excessive prices for certain drugs to patients in the community segment (i.e. after hospitalisation), after inducing doctors to prescribe these drugs at prices below costs while patients were still in hospital.[868] After hospitalisation patients usually keep using the same drugs. The CAT held that Napp produced no evidence that the selective discounts during hospitalisation were based on an economic justification such as cost savings,[869] and concluded that Napp's conduct could only be explained by a wish to exclude competitors.[870]

---

[863] *Ibid.,* page 6.

[864] ORR Decision of December 2006, *EWS*, available at http://www.rail-reg.gov.uk/upload/pdf/ca98_decision_ews-dec06.pdf.

[865] *Ibid.,* at B100.

[866] *Ibid.,* at B12. The ORR refers to Advocate General Kokott in her Opinion of 23 February 2006 in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para 114.

[867] *Ibid.,* at B134.

[868] OFT decision of 30 March 2001, *Napp*, Case CA98/2/2001.

[869] *Napp v Director General of Fair Trading* [2002] CAT 1, para 341.

[870] *Ibid.,* para 347.

3.2.4 Commercial freedom – The recovery of costs

UK competition law seems to accept that the recovery of (sunk) costs may justify an otherwise exclusionary practice. Examples include the *National Grid* and *Welsh Water* cases. In *National Grid*, UK energy regulator Ofgem[871] found that National Grid, an energy network company, had abused its dominant position in the market for the provision and maintenance of domestic-sized gas meters.[872] National Grid had entered into long-term contracts that allegedly withheld competitors from replacing its meters with less expensive and/or more technologically advanced meters. Ofgem held that such arrangements may be justified to allow for the recovery of customer specific sunk costs,[873] but did not accept that the contracts under review were necessary or proportionate.[874] The CAT dismissed National Grid's subsequent appeal,[875] laying particular emphasis on the disproportionate nature of the charges that switchers would have to pay for not continuing their contract.[876] The CAT also noted that there were alternative ways to cover sunk costs while still allowing replacement by competitors.[877] The Court of Appeal rejected a further appeal,[878] even though it did criticize the CAT's treatment of possible consumer benefits within the assessment of anti-competitive foreclosure, rather than under the separate heading of objective justification.[879]

A complaint by Albion Water triggered the *Welsh Water* case. UK water regulator Ofwat[880] investigated the price that Dŵr Cymru ('Welsh Water') set for access to its network.[881] Ofwat found no evidence that the prices under review were excessive, discriminatory or amounted to a margin squeeze. On appeal,

---

[871] Technically the Gas and Electricity Markets Authority ('GEMA'), but I shall refer to its more commonly used name.

[872] GEMA decision of 21 February 2008, *National Grid*, Case CA98/STG/06.

[873] *Ibid.,* at 4.26 and 4.131.

[874] *Ibid.,* at 4.132 and 4.186.

[875] Even though the CAT did lower the fine imposed on National Grid, see *National Grid v GEMA* [2009] CAT 14.

[876] *Ibid.,* at 93, 98 and 200.

[877] *Ibid.,* at 143.

[878] *National Grid v GEMA* [2010] EWCA Civ 114.

[879] *Ibid.,* at 86-87. The CAT seems to have done so after litigants National Grid and Ofgem agreed that this was an appropriate approach to follow (see the CAT's judgment, *supra* note 875, para 94).

[880] Formerly referred to as the Director General of Water Services.

[881] Ofwat decision of 26 May 2004, *Dŵr Cymru*, Case CA98/00/48.

the CAT did not agree with Ofwat's use of the Efficient Component Pricing Rule ('ECPR'), a pricing benchmark that takes the prevailing retail price and deducts the cost that the incumbent avoids by not making the supply in question.[882] The CAT did consider the 'recovery of infrastructure and common costs' as 'a reasonable objective'. However, the CAT did not agree with the use of a benchmark that would have the effect of eliminating all existing competition (including Albion Water, the only entrant in the UK water sector post-liberalisation) and preventing virtually any new market entry.[883] In addition, the CAT found that the absence of a margin between the wholesale and retail prices could not be objectively justified, since the evidence strongly suggested that the level of the upstream price was excessive.[884] The Court of Appeal rejected a subsequent appeal by Welsh Water.[885]

3.2.5 Commercial freedom – Meeting competition

A number of domestic predation cases examined the availability of a meeting competition defence, exploring the right for dominant firms to align their prices with those of their competitors. An example is *EWS*, where the ORR acknowledged that a meeting competition plea may be available to justify prices that are between average total costs and average variable costs, especially if the price cuts are introduced 'across the board'.[886] At the same time, the ORR held that 'a desire by a dominant undertaking to win business by matching or beating the price of a competitor cannot in itself negate a finding of abusive intent'.[887] The ORR seemed cognisant of the importance of context in order to determine whether below-cost prices that seek to meet competition are abusive or not. Relevant context includes an analysis of the market position of the dominant firm, the likely effects of the conduct, the degree of selectivity of the relevant prices and the subjective intention of the dominant

---

[882] *Albion Water v Water Services Regulation Authority* [2006] CAT 23, at 44, 48 and 941.

[883] *Ibid.,* at 836. See also *Albion Water v Water Services Regulation Authority* [2006] CAT 36, at 308.

[884] *Albion Water*, *supra* note 882, at 874.

[885] *Dŵr Cymru v Albion Water* [2008] EWCA Civ 536. The Court of Appeal noted that it considers objective justification as a separate step from the margin squeeze test itself, at 106. See, similarly, the Court of Appeal ruling in *National Grid*, *supra* note 879, at 86-87.

[886] *EWS*, *supra* note 864, at C202.

[887] *Ibid.,* at C203. Note that abusive intent is a requirement for prices between average total costs and average variable costs to be considered contrary to Article 102 TFEU, see *AKZO*, *infra* note 894, para 146.

firm.[888] On the facts of the case, the ORR concluded that EWS's prices could not be objectively justified, *inter alia* because they selectively targeted its rival's largest customer.[889]

By contrast, the French Autorité did accept a meeting competition defence on the facts in *Bouygues*. Telecom company Bouygues requested the Autorité to impose interim measures in response to alleged predatory pricing by France Télécom. The Autorité did not find an abuse, concluding that France Télécom was simply aligning its prices to those of its rivals in the competitive mobile telephony market.[890]

The acknowledgment of a right to align prices, even if they are below costs, is worthy of note because the ECJ's *Wanadoo* ruling suggests that such a plea does not exist for the purposes of EU law.[891] However, the author believes that the *EWS* and *Bouygues* decisions provide useful nuances to – and are not necessarily inconsistent with – the *Wanadoo* ruling. The *EWS* decision acknowledges that an in-depth analysis of the relevant context may show that below-cost pricing to meet competition can actually be pro-competitive instead of abusive. There is no reason to assume that *Wanadoo* disallows dominant undertakings from aligning their prices to those of competitors if this does not negatively affect competition.

As to the *Bouygues* case, the Autorité's approach seems to have been influenced by the fact that the case concerned an application for interim relief. Such cases necessarily involve a limited examination of the appropriate cost benchmark, which makes it riskier to attach legal consequences to prices that are allegedly below costs. Indeed, in its more expansive investigation in *GlaxoSmithKline*, the Autorité did reject a meeting competition defence, as it found that GlaxoSmithKline's predation strategy had the

---

[888] *Ibid.,* at C204.

[889] *Ibid*., at C205. Subsequent court rulings in a follow-on action for damages by the CAT and the Court of Appeal focus on the issue of causation, but do not provide relevant observations on the question of objective justification. See *Enron Coal Services (in liquidation) v EWS* [2009] CAT 36 and *Enron Coal Services (in liquidation) v EWS* [2009] EWCA Civ 647.

[890] Autorité decision of 23 December 1999, *Bouygues/France Télécom*, Case 99-MC-12.

[891] See Case T-340/03 *France Télécom v Commission* ('*Wanadoo*') [2007] ECR II-107, para 182; as confirmed by Case C-202/07 P *France Télécom v Commission* ('*Wanadoo*') [2009] ECR I-2369, para 47.

effect of hindering the entry of certain generic drugs.[892] More generally, the Autorité suggested in that case that the meeting competition defence is, in principle, not available to a dominant firm.[893] Like *EWS*, the Autorité's decisions thus show the importance of context while examining a meeting competition plea.

A meeting competition defence should require particularly persuasive reasoning if prices are not only below average total costs, but also below average variable costs. In *Tetra Pak II*, building upon its precedent in *AKZO*, the ECJ held that such prices 'must always be considered abusive'.[894] This statement implies that prices below average variable costs can never be justified. The more recent *Wanadoo* and *Post Danmark* judgments, however, suggest that the ECJ has become more permissive in its approach. Although prices below average variable costs must 'in principle' be regarded as abusive,[895] the dominant firm may argue that it had 'economic justifications other than the elimination of a competitor'.[896]

Notwithstanding *Wanadoo* and *Post Danmark*, the precise scope of available justification pleas vis-à-vis prices below average variable costs remains unclear. This is why the Irish *Drogheda Independent Company* ('*DIC*') case is of interest. In *DIC*, the Irish Competition Authority ('ICA')[897] examined whether prices for advertising space could be justified even though they were below average variable costs.[898] Assuming that DIC held a dominant position,[899] the ICA observed that it had a 'business justification' for its prices.[900] The ICA considered that DIC's conduct was designed to meet competition and had

---

[892] Autorité decision of 14 March 2007, *GlaxoSmithKline*, Case 07-D-09.

[893] *Ibid.,* at 179.

[894] Case C-333/94 P *Tetra Pak International v Commission* ('*Tetra Pak II*') [1996] ECR I-5951, para 41; Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, para 71.

[895] Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] nyr, para 27. See also *Wanadoo*, *supra* note 891, para 109, where the ECJ suggested that prices below average variable costs are *prima facie* abusive (instead of abusive as such).

[896] See *Wanadoo* (*ibid.,* para 111) and *Post Danmark* (*ibid.,* para 27).

[897] Officially the Irish NCA is called The Competition Authority, but I think the use of that name would be confusing in a comparative article such as this one.

[898] ICA decision of 7 December 2004, *Drogheda Independent Company*, Case COM/05/03.

[899] The ICA was not convinced that DIC actually held a dominant position.

[900] *Ibid.,* paras 2.53 and 2.55. The ICA's assessment of a business justification seems to focus on an alternative explanation as to what motivated the relevant behavior.

benefitted consumers by offering more choice and better quality of local newspapers. In sum, the ICA saw no obvious adverse effect that resulted from DIC's prices.[901] The *DIC* decision is a fine example how an in-depth examination of the relevant context can show that practices that appear abusive at first sight may not be abusive after all. Caution is warranted, however. NCAs should be particularly meticulous in their analysis when they consider justifications that EU case law seems to allow only in exceptional circumstances.[902]

3.3 Objective necessity

Objective necessity can be a compelling type of justification, but should be applied with care. In my opinion, objective necessity ought only be accepted if circumstances leave the dominant with no possibility to act otherwise. Some domestic cases seem to have used the concept of objective necessity even in the absence of such impossibility,[903] but I think such an approach risks rendering the whole idea of 'necessity' superfluous.[904]

An example of *force majeure* is the *Aberdeen Journals* case, where the OFT investigated below-cost pricing of advertising space.[905] Although Aberdeen Journal's prices were at some point below average

---

[901] *Ibid.,* para 2.64.

[902] Also consider that the *DIC* decision was taken in 2004, *before* the ECJ laid down its rulings in *Wanadoo* (*supra* note 891) and *Post Danmark* (*supra* note 895).

[903] For example, the *Saint-Honorat* (*infra* note 949) and *Total* (*infra* note 941) cases in France refer to 'objective necessity', but I believe they are more properly understood as applications of a public interest plea, because the dominant firm could still have acted otherwise (as discussed in paragraph 3.5). Another example is the decision in *Flybe* (*supra* note 816, at 6.99), where the OFT examined whether an airline can justify below-cost pricing on a new route. Although the OFT does refer to 'objective necessity', its analysis does not emphasize Flybe's (lack of) alternatives, but rather focuses on whether Flybe's conduct can be seen as 'normal commercial practice'.

[904] See also Guidance on the Commission's enforcement priorities in applying Article [102] of the [TFEU] to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7, para 29: 'The question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking'.

[905] In July 2001, the OFT laid down its first decision (OFT decision of 16 July 2001, *Aberdeen Journals*, Case CA98/5/2001). In March 2002, the CAT set aside the decision on procedural grounds (*Aberdeen Journals v Director General of Fair Trading* [2002] CAT 4). According to the CAT, the OFT had provided insufficient reasoning for its

variable costs,[906] the OFT did accept an objective justification for the period in which Aberdeen Journals incurred high costs due to a threat of industrial action.[907] The *prima facie* predatory prices were seemingly caused by exceptionally high costs, rather than low prices targeted at excluding competition.[908] There is a sound reason to condone prices below average variable costs if it is truly impossible for the dominant firm to prevent the *prima facie* abuse. Allowing such a justification can be aligned with EU case law, as the ECJ's predation case law is based on the premise that the dominant firm sets its prices *by choice*.[909]

Objective necessity may also exist if the dominant firm refuses supply because of a lack of available capacity. An example is the Luxembourg *Tanklux* case, where the NCA ('Conseil de la Concurrence', or 'Conseil') found that insufficient capacity justified a refusal by a manager of a port facility to provide fuel storage capacity.[910] Similarly, the Spanish Competition Tribunal held in *Pharma/Glaxo* that a refusal to supply may be justified if a client suddenly and substantially increases its orders to such an extent that the dominant firm cannot meet its request.[911]

In my view, objective necessity requires more than simply stating in general terms that the available capacity is insufficient (as the Conseil seems to have done in *Tanklux*). Such a plea should explain why the dominant firm could not have acted in a less anti-competitive manner. Perhaps a simple readjustment in capacity allocation could have avoided the exclusion. Indeed, the German NCA

---

market definition. The OFT's second decision confirmed its earlier findings, and included a more elaborate treatment of the market definition (OFT decision of 25 September 2002, *Aberdeen Journals (remitted case)*, Case CA98/14/2002). The CAT upheld the second OFT ruling (*Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11).

[906] The OFT presumes this conduct to be abusive in accordance with the *AZKO* case (*supra* note 894). See the OFT decision of 25 September 2002 (*ibid*), paras 175-180.

[907] *Ibid.,* para 205.

[908] One could also wonder if the prices under review were capable of excluding competition, and thus whether they were *prima facie* abusive in the first place.

[909] See, eg *AKZO* and *Tetra Pak II* (*supra* note 894).

[910] Conseil decision of 3 August 2009, *Tanklux*, Case 2009-FO-02. See also Conseil decision of 23 April 2007, *Rock Fernand Distributions*, Case 2007-FO-01.

[911] Tribunal de Defensa de la Competencia ruling of 13 October 2004, *Spain Pharma/Glaxo*, Case R 611/2004.

(‘Bundeskartellamt’, or ‘BKartA’) displays a strict approach towards insufficient capacity in its *Scandlines* decision. The decision notes that such a plea requires compelling evidence, and may be rejected if the refusal results in the removal of all competition at the downstream level.[912] I support a rigorous analysis of alleged capacity constraints. However, once it appears that those constraints are genuine, there is little reason to examine the effects on competition (as the BKartA seems to have done in *Scandlines*) as objective necessity implies that the dominant firm had no alternative course of action.

Objective necessity may also exist if the State forces the dominant firm to act in a particular way. As was shown above, the UK and Irish Competition Acts explicitly provide for such a situation. The CAT confirmed in *Floe* that competition law does not require a dominant firm to act illegally; in such cases a dominant firm can rely on its lack of alternatives.[913] Otherwise, however, I have not found cases examining this topic in any more detail.

3.4 Efficiency

3.4.1 Introduction

The following paragraphs discuss various cases that assessed whether efficiency benefits could justify a *prima facie* abuse. The plea requires that, on balance, the conduct under review entails efficiency benefits that lead to an increase in consumer welfare. Allowing such a plea is consistent with ECJ case law, notably the *British Airways* and *Post Danmark* judgments.[914]

3.4.2 Domestic cases on efficiencies

Tenants of storage facilities triggered the Luxembourg *Tanklux* case, complaining *inter alia* that they were required to deal with a transport company pre-selected by port manager Tanklux.[915] The Conseil disagreed with the complaint, finding the requirement to be justified based on several grounds,

[912] Bundeskartellamt decision of 27 January 2010, *Scandlines*, Case B9-188/05. For the reasoning on objective justification, see pages 49 *et seq*.

[913] *Supra* note 841.

[914] *British Airways*, *supra* note 866. See also Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] ECR nyr, para 42.

[915] *Tanklux*, *supra* note 910, paras 51-52.

including its efficiency benefits. According to the Conseil, regular contacts between a limited number of companies can bring down costs and thus produce considerable efficiency benefits.[916]

In the *Canal+* decision, the French Autorité focused on the question whether Canal+, a pay-TV company, abused its dominant position by tying its flagship Canal+ product with other TV content.[917] The Autorité found that the tie produced cost savings,[918] and provided consumers the benefit of receiving only one invoice and of obtaining both services through one decoder.[919] The Autorité concluded that Canal+ had not abused its dominant position. The Paris Court of Appeal upheld the Autorité's decision, confirming that the conduct lead to cost reductions and efficiency gains.[920] Another relevant decision from the Autorité is *Coca-Cola*, triggered by a complaint against Coca-Cola's new pricing scheme with a tiered structure.[921] The Autorité held that the new scheme lead to efficiencies and produced distribution costs savings that could be passed on to clients and consumers.[922]

Of course, the efficiency plea does not always succeed. Although the OFT saw no reason for further action in the *Flybe* predation case (introduced in Section C.2.b), it did reject Flybe's efficiency plea. First, the OFT did not find that the claimed efficiencies were fully attributable to Flybe.[923] Second, the OFT considered that if Flybe were to become the sole operator of the relevant route, the current efficiencies would not be sufficient to offset the long-term detrimental effects that would result.[924] This approach is worthy of note, as it allows the efficiency analysis to take into account future effects instead of merely considering effects that have already materialised. Although I agree that this is the most comprehensive and correct approach vis-à-vis the efficiency approach, it is clear that quantification of all the potential effects will be anything but easy.

---

[916] *Ibid.,* para 56.

[917] Autorité decision of 18 March 2005, *Canal+*, Case 05-D-13.

[918] *Ibid.,* para 67.

[919] *Ibid*.

[920] Paris Court of Appeal judgment of 15 November 2005, *Canal+*, Case 2005/08308, page 9.

[921] Autorité decision of 18 April 2003, *Coca-Cola*, Case 03-D-20.

[922] *Ibid.,* para 54-55.

[923] *Flybe*, *supra* note 816, at 6.97.

[924] *Ibid.,* at 6.104 and 6.108.

Another issue is how the benefits should be distributed. There is obviously little reason to condone an efficiency defence in the absence of *any* net benefit to consumer welfare. The *Genzyme* case, on an alleged margin squeeze, offers an example. Genzyme produced a drug and also provided homecare services, delivering that drug to patients in their homes. A complaint by an alternative provider of homecare services alleged that it was left with an insufficient margin to viably compete. Both the OFT[925] and the CAT[926] agreed that Genzyme had entered into an illegal margin squeeze. The CAT rejected Genzyme's argument that its conduct led to efficiencies, because the concept of objective justification requires that benefits not only accrue to the dominant undertaking, but to customers as well.[927]

Perhaps a more difficult question is whether the mere existence of *any* net benefit to consumer welfare is sufficient for the efficiency plea, or if it also requires that consumers must at least receive a 'fair' share of the resulting benefits. French statutory law indeed contains such a fair share requirement, but the other jurisdictions under review do not make clear how large the benefit to consumer welfare must be. In my view, the proportionality (*stricto sensu*) criterion, as examined in Section 4.4 below, could be used to reject a justification if the benefit to consumer welfare is blatantly unfair compared to the benefits that accrue to the dominant firm.

Finally, a common weakness of the cases described above is that the efficiency reasoning tends to be too generic. The cases should include a clear balancing act between pro- and anti-competitive effects. Decisions would also gain in clarity if NCAs and domestic courts explicitly mention which *type* of efficiencies they consider particularly relevant for their examination (i.e. allocative, productive and dynamic efficiency).[928] For example, cases such as *Tanklux* and *Coca-Cola* could have made clear that productive efficiency cost savings were considered to outweigh a possible decline in allocative efficiency.

---

[925] OFT decision of 27 March 2003, *Genzyme*, Case CA98/3/03.

[926] *Genzyme v OFT* [2004] CAT 4.

[927] *Ibid.,* para 583. The CAT also considered that Genzyme's conduct bereft patients of a choice between homecare providers, see paras 585 and 612.

[928] In essence, allocative efficiency implies output maximization; productive efficiency implies cost minimization and dynamic efficiency implies innovation maximization. These various types of efficiency are often at odds: for example, cost minimization can have an adverse effect on innovation. For a further explanation of these types of efficiencies, see e.g. A. Jones & B. Sufrin, *EC Competition Law* (OUP: Oxford 2008), at 8.

3.5 Public interest

3.5.1 Introduction

Several domestic cases have accepted public interest grounds as a reason to justify *prima facie* abusive conduct. These cases can offer valuable lessons for our understanding of such justifications, considering the lack of clear ECJ guidance.[929] In my view, it makes sense that NCAs and domestic courts acknowledge that competition law does not exist in a vacuum, and that non-competition interests may be able to trump the finding of an abuse. However, the plea does require careful analysis to ensure that it is not used simply as a pretext for anti-competitive conduct.

3.5.2 Security & safety standards

The *Hilti* case raised the question whether the protection of security and safety standards could justify a *prima facie* abuse under Article 102 TFEU. Although the General Court rejected this plea on the facts, it did not reject the possibility to invoke such considerations as a matter of law.[930] Similarly, in the UK *Genzyme* case (introduced in Section 3.4.2 of this Chapter), the dominant firm tried to justify the exclusion of an alternative provider of homecare services by stating that it was unfit to deliver such services. The CAT rejected this submission, as the National Health Service had approved the new entrant as a capable and competent homecare provider.[931]

However, some domestic cases *did* accept the need to uphold safety or security standards as a justification. Two examples originate from the ORR's decisional practice. The ORR's *Portec* decision was triggered by a complaint from NTM, a supplier of grease for use in trackside lubricators.[932] NTM alleged that Portec (a supplier of both trackside lubricators and grease) had unlawfully demanded lengthy field

---

[929] See e.g. Case T-30/89 *Hilti v Commission* [1990] ECR II-163 and Case T-83/91 *Tetra Pak International v Commission* [1994] ECR II-755. The ECJ upheld both judgments. For an elaborate examination of public policy's relevance as to Article 101 TFEU, see C. Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford and Portland, Oregon: 2009).

[930] See *Hilti* (*ibid.*).

[931] *Genzyme*, *supra* note 926, para 612.

[932] ORR decision of 12 August 2005, *NTM v Portec*, paras 168-185. Available at http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/orr.pdf.

trials (instead of the standard tests) before allowing the use of NTM's grease in Portec's new trackside lubricator.[933] In its assessment of a possible objective justification,[934] the ORR referred extensively to a report that found the performance of various greases to be substandard. The poor performance risked ineffective protection of trackside lubricators, leading to operational and safety hazards.[935] The ORR concluded that the need for extended field trials was objectively justified.[936]

In *P. Way & Suretrack*, complainants alleged that the London Underground Group ('LUG') had abused its dominant position by not allowing them to supply safety critical personnel.[937] The ORR found insufficient evidence that LUG's policy adversely affected competition or consumers.[938] But even if there would have been such evidence, the ORR held that safety reasons justified LUG's conduct.[939] The ORR considered LUG's safety policy as 'fair and objective', notably because its criteria sought to directly address safety failings identified in a report following the 1999 Ladbroke Grove rail accident.[940]

In *Total*, the French Autorité did not regard the refusal by oil company Total to provide access to its sea-line (an off-shore docking platform) as abusive.[941] Besides the fact that the Autorité did not consider the sea-line to be an essential facility, it held that Total's conduct could be objectively justified in any case. Total refused to provide access if a party requesting access did not comply with certain security rules on verification and acceptance of boats. These so-called 'vetting rules', designed to minimize the risk of accidents, were not published and thus unknown to third parties.[942] The Autorité accepted Total's argument that its vetting rules need not be disclosed, as it was customary for oil companies not to do so

---

[933] *Ibid.,* para 11.

[934] *Ibid.,* paras 168-185.

[935] *Ibid.,* paras 168, 178 and 179.

[936] *Ibid.,* para 184.

[937] ORR non-infringement notice of 23 June 2004, *Suretrack Rail Services Ltd and P. Way Services Ltd*, available at http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/suretrackrailservices.pdf.

[938] *Ibid.,* para 65.

[939] *Ibid.,* paras 61-65.

[940] *Ibid.,* paras 64-65.

[941] Autorité decision of 20 November 2008, *Total*, Case 08-D-27, para 32.

[942] *Ibid.,* para 26.

for reasons of security.[943] The case aptly shows the importance of context, in particular as to the degree that a dominant undertaking can rely on the fact that the conduct under review is simply normal business practice in its sector.

In *Tanklux*, the Luxembourg Conseil examined the requirement for tenants of a port facility to deal with a pre-selected transport company. It observed that domestic law requires operators of petroleum storage facilities, such as Tanklux, to manage all potential security issues.[944] The Conseil found that Tanklux's pre-selection of a single transport company would facilitate safety management.[945]

Finally, the *Scandlines* decision by the BKartA shows that a plea based on security standards to justify a refusal to provide access may be rejected in the absence of concrete evidence that the refusal was genuinely based on such worries.[946] In the BKartA's view, the alleged security issues seemed solely based on the fear of competition and of losing customers rather than actual safety concerns. The BKartA also appears to have taken into account that, in this case, the refusal resulted in a complete lack of competition on the downstream market for the provision of ferry services.

3.5.3 Public interest – other reasons

Several cases mention the potential relevance of public interest concerns other than upholding security or safety standards. In the Luxembourg *Tanklux* case, for instance, the Conseil found the pre-selection of one particular transport company benefitted the national interest, as it was 'likely' to contribute to the security of Luxembourg's energy supply.[947]

Maintaining the security of energy supply was also invoked in the Dutch *SEP* case. The case involved a refusal by electricity transmission grid SEP to provide access to new entrant Hydro Energy. The ACM rejected the argument that the security of supply would be at risk, as bilateral agreements between SEP

---

[943] *Ibid.,* para 33.

[944] *Tanklux*, *supra* note 910, para 51.

[945] *Ibid.,* paras 51-52.

[946] *Scandlines*, *supra* note 912.

[947] *Tanklux*, *supra* note 910, para 58.

and energy companies should have been able to solve any potential production planning difficulties.[948] As SEP could have resorted to less anti-competitive alternatives, the ACM rejected the justification plea.

Finally, in the *Saint-Honorat* case, the French Autorité reviewed a refusal by the organization in charge of traveling services to the island of Saint-Honorat to accept third parties to deliver such services as well.[949] The Autorité considered that the refusal was justified, considering the unique geography and privacy of the island, and the need to ensure the control of the flow of visitors by the island's only inhabitants, a local congregation.[950]

4 ASSESSING OBJECTIVE JUSTIFICATION PLEAS

4.1 Introduction

The analysis of domestic case law and decisional practice has shown that many factors can influence the availability of an objective justification. The type of procedure is one of them. The French *Bouygues* decision[951] and the UK *Getmapping* ruling[952] suggest that a dominant firm may find it relatively easy to rely on objective justification where a third party seeks interim relief. In *Getmapping*, for instance, Laddie J held that the conduct by the dominant firm must be 'clearly unjustified'.[953] Other cases in France[954] and the UK[955] indicate, however, that the lessons of *Bouygues* and *Getmapping* cannot be

---

[948] ACM administrative appeal decision of 27 March 2000, Case 650/*Hydro Energy v SEP*, para 98. In its decision, the ACM sides with the views of the advisory committee. The Trade & Industry Appeals Tribunal ('CBb') upheld the ACM decision, but did lower the fines substantially. See CBb judgment of 28 May 2004, LJN: AP 1336, para 6.3.

[949] Autorité decision of 8 November 2005, *Saint-Honorat*, Case 05-D-60.

[950] The Paris Court of Appeal rejected an appeal against the decision; see its judgment of 4 July 2006, Case 2005/23732.

[951] *Supra* note 890.

[952] *Getmapping v Ordnance Survey* [2002] UKCLR 410.

[953] *Ibid.,* at 52. In *Suretrack Rail Services v Infraco* [2002] EWHC 1316 (Ch), Laddie J mentioned a test where 'no rational and fair person could justify the relevant conduct'.

[954] Autorité decision in *GlaxoSmithKline, supra* note 892, at 179.

easily transposed to situations outside the scope of proceedings for interim relief. Apart from the type of procedure, several substantive elements should be considered as well. This shall be the focus of the following paragraphs, which follow the structure of the proportionality test as is often used in EU law. This test includes an examination of (i) whether the conduct has a legitimate aim and is suitable to achieve that aim; (ii) is necessary for achieving that aim ('the necessity test') and (iii) whether there is no disproportional balance between the interests of the parties involved ('the proportionality test *stricto sensu*').

4.2 Legitimate aim & suitability

A dominant firm cannot rely on objective justification in the abstract, but should make clear why the goal it pursues is legitimate. In my view, such a legitimate aim should relate to one of the 'types' of objective justification described earlier, i.e. considerations based on legitimate business behaviour, efficiencies or public interest. None of the cases in this study seem to have rejected a particular legitimate aim as such,[956] displaying the wide scope of available goals that a dominant firm may, in principle, legitimately pursue. Notwithstanding this wide scope, an objective justification plea shall be more persuasive if the dominant firm invokes a clearly delineated objective. A precise description of the legitimate aim allows the conduct under review to be subjected to an accurate legal test.

Timing can be a crucial factor when assessing a legitimate aim. A justification is less persuasive if the dominant firm is unable to produce any evidence that it sought to achieve a legitimate aim *before* engaging in the *prima facie* abusive conduct. The *Cardiff Bus* case offers an example, as the dominant firm was unable to produce evidence showing the will to conduct a market test.[957] Another revealing example is *Purple Parking*. Two parking services companies accused Heathrow Airport Limited ('HAL') of

---

[955] OFT decision in *Genzyme*, *supra* note 925, at 352. See also the High Court judgment in *Purple Parking and Meteor Parking v Heathrow Airport* [2011] EWHC 987 (Ch), at 234.

[956] In *EWS* (*supra* note 864, at C253), the ORR did appear very skeptical of EWS's plea that EWS simply sought to secure additional revenue. The ORR noted: 'The fact that a dominant undertaking wishes to secure additional revenue in this way, regardless of whether or not the additional business is profitable, cannot generally act as a justification for adopting methods that depart from normal competitive practices and have the effect of strengthening its dominant position'.

[957] *Supra* note 821.

an abuse, as HAL decided to deny them access to the forecourts at various airport terminals.[958] HAL argued that its refusal sought to remedy various congestion, safety, security and environmental issues.[959] The High Court rejected the plea, finding that the 'real motivation' for HAL's conduct was not based on the alleged justifications that 'had never really occurred to anyone in the decision-making process'. [960] Careful analysis of the evidence should reveal the 'real motivation' for the conduct. Apart from timing, differentiated treatment may also be suspect. If HAL genuinely wanted to reduce congestion, there is no clear reason why it should have excluded two rival parking operators while leaving its own parking venture unaffected.

The question whether the conduct is suitable to attain the relevant goal may also play a part. In *EWS*, the ORR considered that the price differentiation under review would not be able to remedy the alleged operational difficulties by the company requesting access.[961] Suitability was also highly relevant in *Purple Parking*, as the High Court rejected the plea that the exclusion of two parking operators would work towards solving the apparent congestion issues. Notwithstanding these examples, most cases have focused on the question if the conduct was *necessary* – rather than suitable – to achieve the stated aim.

4.3 Necessity & availability of alternatives

A necessity test examines whether a legitimate aim could have been achieved through alternative, less anti-competitive, means. To my mind, a separate necessity test has little added value if a situation of *force majeure* has been established, as the acceptance of that plea means that the dominant firm had no alternative ways to act.[962]

A necessity test is relevant, however, vis-à-vis a public interest plea. Several domestic cases denied such a plea because the dominant firm had less anti-competitive alternatives available to achieve its desired objectives. In cases such as *Genzyme* (UK)[963] and *Scandlines* (Germany),[964] the exclusionary conduct

[958] *Supra* note 955.

[959] *Ibid.,* at 179.

[960] *Ibid.,* at 189, 195-196 and 204.

[961] *Supra* note 864.

[962] See e.g. *Aberdeen Journals*, *supra* note 444.

[963] *Supra* note 931.

under review was not considered indispensable to uphold safety and security standards. Another example includes the *Purple Parking* ruling. Mann J rejected an objective justification plea, noting that there were alternative solutions to deal with congestion and potential security issues short of refusing access to rival parking operators.[965] Similarly, in *Mainova*, the BKartA held that an electricity network company had abused its dominant position by refusing to deal with other energy companies.[966] According to the decision, Mainova's refusal was unnecessary for the protection of the security of supply.[967] The decision appears to require a dominant firm to choose the conduct that is capable of achieving its legitimate aims with the least possible 'hindrance' to other market participants.[968]

The necessity test is also relevant if a dominant firm wishes to invoke efficiencies as a justification. There is no reason to condone an efficiency plea if the conduct under review is not indispensable for the claimed efficiencies to materialise (as was found, for example, in *Flybe*),[969] because the efficiencies would have arisen even in the absence of the *prima facie* abuse.

Unfortunately, several domestic cases on public interest and efficiencies do not provide a clear analysis of indispensability, making their reasoning less persuasive. For example, in the *Saint-Honorat* case, the French Autorité accepted a ban for third parties to deliver traveling services to the Saint-Honorat island, but did not explain why there were no other means to protect the island's apparently unique character.[970] Another example is *P. Way & Suretrack*, in which the ORR upheld a justification based on security benefits without explaining why excluding various companies from delivering so-called 'safety critical personnel' (rather than simply requiring them to abide by certain quality standards) was indispensable to safeguard security standards.[971] Several domestic cases that have accepted an

[964] *Supra* note 946.

[965] *Supra* note 955, at 209 and 227-228.

[966] Bundeskartellamt decision of 8 October 2003, *Mainova*, Case B11–12/03.

[967] The Dutch *SEP* case contains similar reasoning, see *supra* note 948.

[968] Bundesgerichtshof judgment of 22 September 1981, *Original-VW Ersatzteile II*, KVR 8/80.

[969] *Supra* note 816.

[970] *Supra* note 949.

[971] *Supra* note 937.

efficiency plea similarly lack a clear necessity test: notable examples include the French *Total* decision[972] and the Luxembourg *Tanklux* decision.[973]

Analysis of the necessity criterion should take a less prominent role when a dominant firm invokes its commercial freedom. Such freedom implies that the dominant firm is not necessarily required to opt for a particular course of action, such as the one with the least anti-competitive impact. This position appears to be supported by several of the cases under review, such as *Ryanair* (Spain),[974] *Interpay* (the Netherlands),[975] as well as *Armor Hélicoptère*[976] and *Jaeger LeCoultre* (France).[977]

On the other hand, some cases do suggest that the necessity test is not wholly irrelevant when examining a plea based on commercial freedom. In *Burgess*, the justification plea failed, partly because the CAT considered that the dominant firm still had a wealth of solutions available – other than a refusal to deal – to solve its strenuous business relationship with the firm requesting access.[978] Similarly, in *National Grid*, both Ofgem and the CAT considered that National Grid had several alternatives to cover sunk costs without completely foreclosing the market.[979]

4.4 Proportionality & reasonableness

The proportionality criterion, *stricto sensu*, involves a balancing exercise between the various interests at stake. It can be particularly useful to explore the outer rims of a dominant firm's commercial freedom. This method allows a balanced approach between the interests of the dominant firm and the effects on competition. In *Krankentransportunternehmen II*, the German Bundesgerichtshof examined a health insurer's refusal to deal with a private provider of patient transports, because it wanted to

---

[972] *Supra* note 941.

[973] *Supra* note 910.

[974] *Supra* note 813.

[975] *Supra* note 856.

[976] *Supra* note 811.

[977] *Supra* note 812.

[978] *Supra* note 833, paras 364-365.

[979] National Grid could have done so by still allowing replacement of gas meters by competitors. See Ofgem decision in *National Grid, supra* note 872, at 4.186, and CAT ruling in *National Grid*, *supra* note 875, at 143.

preserve the market exclusively for public providers of such transports. The Bundesgerichtshof rejected the justification plea, as the refusal had a disproportionate adverse effect on competition by raising a significant barrier to entry.[980] In *EWS*, the ORR rejected a justification plea as it found EWS´s price differentiation to be disproportionate.[981] Finally, in *National Grid*, the CAT emphasized that the arrangements under review were disproportionate, as they involved high charges for switchers and led to a foreclosure effect that was 'too severe' to be justified by National Grid's 'admittedly legitimate interest'.[982]

In several other cases, however, the dominant firm did meet the proportionality test (*stricto sensu*). In the German *Lufthansa* case, the dominant firm was not found to have acted disproportionately, thus removing the need of an in-depth examination.[983] Before cancelling certain commissions paid to travel agencies, Lufthansa allowed them ample time for readjusting their business. The *EPM/NMPP* decision of the French Autorité offers another example that a dominant firm will find it easier to justify a new pricing scheme if it is introduced gradually.[984] Turning back to *Lufthansa*, the BKartA also found no adverse effect on competition, because travel agencies would be able to charge their customers directly for their services. The OFT used similar arguments to reject a complaint that British Airways had abusively reduced the booking payments to travel agents.[985] The OFT found it reasonable to expect customers that choose to book through travel agents to pay more to cover the additional costs and to enjoy the benefits of the extra services that they provide.[986]

The OFT´s decision also suggests that a dominant firm will find it easier to meet the proportionality test if its conduct is considered to be 'reasonable'. For example, in *Leyland DAF*, the UK High Court found a

---

[980] Bundesgerichtshof judgment of 12 March 1991, *Krankentransportunternehmen II*, WuW/E 2707. See, similarly, Bundesgerichtshof judgment of 7 October 1980, *Neue Osnabrücker Zeitung*, KZR 8/80.

[981] *Supra* note 864, at B134.

[982] *Supra* note 875, at 98.

[983] Bundeskartellamt press release of 26 July 2004, *Lufthansa*, available at http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2004/2004_07_26.php.

[984] Autorité decision of 12 July 2007, *EMP/NMPP*, Case 07-D-23.

[985] *Supra* note 830, paras 46-47.

[986] *Ibid.,* at 44.

refusal to supply to be justified, as the party requesting supply had not paid its bills.[987] In *Floe*, Ofcom found that a refusal to deal served a legitimate interest, because the refusal prevented the provision of a service that was allegedly contrary to UK law.[988] Finally, the Irish High Court noted in the *Irish League of Credit Unions* ('*ILCU*') case that, while examining a refusal to deal, 'fair play' and 'equitable considerations' 'must have some importance' while considering an objective justification plea.[989] Indeed, it seems that 'reasonable' conduct can be largely equated with conduct that strikes an equitable balance between the interests of various market participants – hence its conceptual proximity with proportionality *stricto sensu*.

5 PROMISING PRACTICES

From the examination above, I distil a number of promising practices that I think will lead to a better and more consistent application of the objective justification concept in the EU. A first observation is that it does not seem necessary to enact objective justification in domestic legislation. It is not codified in Article 102 TFEU either, and the jurisdictions under review that have no such codification seem to have little difficulty incorporating the concept into their competition practice.

However, where such (partial) codification *does* exist, NCAs and domestic courts should clarify whether the justification they examine is derived from domestic legislation or rather an interpretation of objective justification as meant by the ECJ. They rarely make this distinction clear. More generally, NCAs should provide more transparency by publishing guidance on their interpretation of objective justification. In my view, the guidance ought to focus on the types of available justifications and the

---

[987] *Supra* note 825.

[988] *Supra* note 844, para 248. Ofcom considered its approach to be in line with Case 27/76 *United Brands v Commission* [1978] ECR 207, para 189.

[989] Irish High Court 22 October 2004, decision by Kearns J. [2004] IRLHC 330, at page 85. Although the Irish Supreme Court overturned the High Court ruling on the basis of market definition (Irish Supreme Court 8 May 2007, [2005] No. 077), it did not rule upon Kearn J.'s observations on objective justification. At page 86, Fennelly J. suggests that a justification will be more difficult to uphold in the case of 'super-dominance', a concept that Fennelly also applied in his capacity as Advocate-General in Case C-395/96 P *Compagnie Maritime Belge* [2000] ECR I-1365, para 136.

appropriate legal conditions. Ideally, NCAs should discuss the substance of such guidance within the framework of the European Competition Network to avoid undue divergences between Member States. Next to providing such guidance, NCAs and domestic courts should attempt, in individual cases, to make a clear distinction between the analysis of the *prima facie* abuse and the objective justification plea. Although such a distinction will not always be easy to make, it does have the potential of improving analytical clarity – as the UK Court of Appeal also emphasised in *National Grid*.[990]

Justifications should only be accepted on the basis of specific and persuasive evidence explaining the reason why the dominant firm acted in a particular way (*Scandlines* offers a prime example).[991] Conversely, it should be rejected if the dominant firm supports its justification plea only by generic reasoning and fails to clearly explain the link between the justification and the *prima facie* abuse (contrary to the decision in *Tanklux*).[992]

As to the available types of justification, NCAs and domestic courts have often relied on a notion of legitimate business behaviour. Such a justification can accommodate the commercial freedom of dominant firms, and accordingly should not have pre-defined limitations. An analysis of such a justification should pay heed to the relevant nexus between the dominant position and the conduct under review: the more likely it is that the dominant firm would also have engaged in that conduct *without* being in a dominant position, the easier a justification can be applied. A plea based on legitimate business behaviour shall be more persuasive if the dominant firm can provide evidence that, at the time when the relevant decision was taken, it sought to achieve a regular business objective rather than an anti-competitive purpose.

There ought to be a particularly convincing case if a justification plea is based on a reasoning that has been awarded only limited scope in the ECJ's case law. Notable examples are the meeting competition defence,[993] and the possibility to legitimately price below average variable costs.[994]

---

[990] *Supra* note 878.

[991] *Supra* note 912.

[992] *Supra* note 910.

[993] See e.g. *EWS* (*supra* note 864) and *Bouygues* (*supra* note 890).

[994] See e.g. *Aberdeen Journals* (*supra* note 442).

As to the applicable legal conditions, an analysis of potentially less anti-competitive conduct would be inappropriate, as that would defeat the very idea of commercial freedom. At the same time, several domestic cases – rightfully, in my view – acknowledge the importance of a proportionality test *stricto sensu*, and often also assess whether the dominant firm's conduct is reasonable.[995]

I believe that objective necessity can be a particularly forceful form of legitimate business behaviour, provided it is properly understood as an actual impossibility for the dominant firm to act otherwise – for instance in the case of government compulsion or a situation of *force majeure*.[996] A refusal to deal triggered by a lack of capacity could also be subsumed under this heading, but only if there is a genuine constraint on the dominant firm that cannot be resolved through less anti-competitive means.[997] While examining an objective necessity, the suitability and necessity conditions should take centre stage. Once those hurdles have been taken, there is little reason to examine proportionality *stricto sensu*, as the analysis has already pointed out that the dominant firm could not have acted differently.

Another type of justification is an efficiency plea. This plea is likely to gain importance in a more effects-based understanding of dominance law.[998] NCAs and domestic courts should make clear what type of efficiencies they deem relevant, and how they strike a balance between various pro- and anti-competitive effects. Moreover, the dominant firm must show that the conduct under review is indispensable to achieve the pro-competitive effects. Many domestic cases, however, simply state in general terms that the conduct will lead to certain efficiencies, but fail to make an explicit balancing test.[999] This allows much room for improvement. I recognize that an elaborate quantification of effects will often prove highly difficult. However, at the very least, NCAs and domestic courts should clearly explain why they decided that one effect should be considered greater than the other, for example by an approximation of the magnitude of the relevant effects.

[995] See e.g. *Krankentransportunternehmen II* and *Neue Osnabrücker Zeitung* (*supra* note 980), and *EWS* (*supra* note 864).

[996] See e.g. *Aberdeen Journals* (*supra* note 442).

[997] See e.g. *Scandlines* (*supra* note 912).

[998] Commission guidance on Article 102 TFEU enforcement priorities, OJ [2009] C 45/7-20.

[999] See e.g. *Tanklux* (*supra* note 910) and *Coca-Cola* (*supra* note 921).

Thirdly, dominant firms may also rely on public interest to justify their conduct. In a number of domestic cases, NCAs have acknowledged the importance to uphold safety and security standards.[1000] A public interest plea should make clear what objective the conduct seeks to attain and why it should prevail over competition concerns (so, in other words, why the dominant firm is right to go beyond its legal requirements vis-à-vis a particular public interest). The conduct should be suitable and necessary to the stated aim. In addition, if the dominant firm engaged in conduct that differentiates between its own (downstream) operations and third parties, it should clarify why working towards the public interest leaves its own activities unaffected.[1001] The quality of domestic decisions and judgments would increase if they would include a systematic analysis of these elements.

6 CONCLUSION

This chapter has sought to shed light on the concept of objective justification at the Member State level through the examination of domestic cases. The cases have shown the importance of objective justification for the purposes of competition law at the EU Member State level. The examination has revealed that the types of justification identified in the previous chapter – legitimate business behaviour, efficiency and public interest – are all present in domestic cases. In particular, there have been many cases exploring the degree of commercial freedom (in my view part of 'legitimate business behaviour') that dominant undertakings are still considered to have. In addition, several domestic cases – in particular decisions by NCAs – have relied on public interest concerns to condone *prima facie* abusive conduct; an interesting finding considering the scepticism that many have on the relevance that public interest can play in abuse cases.

The domestic cases serve as a source of inspiration for further debate on this issue. Such a debate would hopefully create more clarity on the available types of justifications and the applicable legal conditions at the domestic level. The chapter counsels in favour of NCA guidance, preferably through international fora such as the ECN, to mitigate the risk of an undue divergent approach towards justifications. Such guidance is likely to improve the quality and consistency of decisions and rulings, and would strengthen

[1000] See e.g. *Portec* (*supra* note 932), *P. Way & Suretrack* (*supra* note 937), *Total* (*supra* note 941) and *Tanklux* (*supra* note 910).

[1001] The dominant firm failed to do so in *Purple Parking*, *supra* note 955.

legal certainty. It is time to take objective justification out of its benighted situation and into the area where it belongs – shone upon by the limelight of the competition law arena.

CHAPTER VI JUSTIFICATIONS IN THE COMMON LAW WORLD[•]

1 INTRODUCTION

As the previous chapters have shown, in the EU a dominant firm may invoke a justification for *prima facie* abusive conduct. This chapter will show that several jurisdictions outside of the EU have, similarly, accepted that a firm with market power may offer a justification for unilateral conduct that would otherwise be contrary to the competition rules.[1002] In order to obtain a better understanding on how jurisdictions around the world deal with the justification concept, this chapter examines the laws of various countries: Australia, Canada, Hong Kong, South Africa, Singapore and the United States.

The examination focuses on legislative texts, cases and – where available – guidance documents by National Competition Authorities (NCAs) of the countries under review. The chapter seeks to clarify, discuss and compare how these jurisdictions deal with justifications. The jurisdictions have been selected because of various commonalities that facilitate a comparison between them. They share a common law tradition[1003] and boast similar prohibitions of anti-competitive unilateral conduct.[1004] In addition, the economies of these countries are global or regional leaders, suggesting that their legal regimes have an impact well beyond their respective borders.

• A revised version of this chapter has been published as T. van der Vijver, 'Justifications and anti-competitive unilateral conduct: an international analysis', (2014) 37 World Competition 27.

[1002] See e.g. Brian A. Facey and Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey*, 70(2) Antitrust L.J. 513, 521 (2002-2003).

[1003] Of course common law reception varies from country to country: South Africa, for example, has also had notable influence from the civil law tradition through Roman Dutch law. Although this study focuses on common law countries, it does not examine the common law doctrine of restraint of trade, but rather the interpretation of competition statutes enacted in the jurisdictions under review.

[1004] The chapter does not examine cases on price discrimination since such conduct is usually regarded to be separate from the standard prohibition of unilateral anti-competitive conduct; notably in US (see also *infra* note 1174) and South African competition law.

Of course a comparative analysis must take into account that there are many underlying differences between these jurisdictions. Canada and the US have had a competition regime for over a century, whereas Hong Kong's competition rules have been enacted as recently as 2012. In addition, a competition regime cannot be detached from the context in which it functions. The historical, economic and societal backgrounds of the competition regimes under review vary substantially, and (should) have an impact on the interpretation and the objectives of competition law.

In South Africa, for example, the competition rules were not only designed to promote economic efficiency, but also to ensure *inter alia* that small and medium-sized enterprises have a fair opportunity to participate in the economy; and compensate for the imbalances caused by Apartheid.[1005] By contrast, in Singapore there is a strong focus on stimulating efficiency and innovation.[1006] Australian competition law focuses on the welfare of Australians,[1007] but also expresses concern for the plight of small businesses.[1008] A 2007 report by the International Competition Network provides a broad overview of the many different types of goals that competition law regimes throughout the world seek to achieve.[1009] Justifications of otherwise illegal unilateral conduct, being an integral part of competition law, should be interpreted consistently with the law's stated objectives.

Apart from their stated objectives, the competition regimes under review differ in many other respects as well. To name but one example, anti-competitive unilateral conduct may lead to an award of treble

[1005] Sections 2(a), 2(e) and 2(f) of the South African Competition Act.

[1006] Section 6(1)(a) of the Singaporean Competition Act provides that the Competition Commission shall have the function 'to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore'.

[1007] Section 2 CCA, which also mentions the means to achieve this goal: 'the promotion of competition and fair trading and provision for consumer protection'.

[1008] See e.g. Senate Inquiry into the Effectiveness of the Trade Practices Act 1974 in protecting small business (March 2004), available at http://www.aph.gov.au/binaries/senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/report/report.pdf.

[1009] See the International Competition Network's Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, May 2007, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf.

damages (US),[1010] or simply an order to discontinue the conduct under review (Canada).[1011] It is submitted that the first case warrants a more prudent and less expansive interpretation of competition law than the second. Notwithstanding these differences, however, it is possible – and worthwhile – to draw comparisons as to the way these jurisdictions deal with justifications of otherwise illegal unilateral conduct. Stripped down to their core, the unilateral conduct laws clearly share a common focus. They all purport to examine 'the nature and purpose of the acts that are alleged to be anticompetitive and their impact on competition in the market, while taking into account business and/or efficiency justifications for such acts'.[1012]

Even though this point of departure still leaves many divergences, I do think that it provides sufficient common ground to build on. The jurisdictions under examination have comparable legal backgrounds, which facilitates a joint discussion of their legal reasoning on a particular topic. More importantly, all the jurisdictions under review have embraced the idea that a defendant may invoke a justification for otherwise prohibited unilateral conduct. Apparently the possibility to invoke a justification appeals to common legal sense, as a way to fine-tune the application of the prohibition. No type of justification should, *a priori*, be precluded as a matter of law. Only a thorough examination of all known factors[1013] can reveal whether a particular justification plea is acceptable within the specific circumstances of that case.

The driving force behind this chapter is the realization that, even though the importance of justifications related to anti-competitive unilateral conduct is well established, there is little sign of a true international debate on this topic. This chapter therefore seeks to provide insights for future debate by exploring common ground and relevant differences on this topic. The chapter shall first give an account of the jurisdictions under review, examining Australia (Section 2), Canada (Section 3), Hong Kong (Section 4), Singapore (Section 5), South Africa (Section 6) and, finally, the US (Section 7). Section 8

[1010] See Section 4 of the US Federal Clayton Act. See, also, *Eastman Kodak Co. v Southern Photo Man. Co*., 273 US 359 (1927).

[1011] Under Canadian federal competition law. Such an order is made by the Competition Tribunal on the basis of Section 79(1) of the Competition Act.

[1012] Facey and Assaf 2002-2003, *supra* note 1002, at 521.

[1013] *Canada Pipe*, *infra* note 1075, at 88.

provides various comparative notes, including lessons for EU law, while paragraph 9 makes some concluding remarks.

2 AUSTRALIA

2.1 Introduction & legislation

In Australia, Section 46(1) of the Competition and Consumer Act 2010 (CCA), formerly known as the Trade Practices Act 1974, prohibits a corporation with (i) a substantial degree of power in a market, to (ii) take advantage of that power (iii) for the purpose of: (a) eliminating or substantially damaging a competitor, (b) preventing market entry or (c) deterring or preventing a third party from engaging in competitive conduct. Such conduct is also referred to as the 'misuse' of market power.

The statutory text of the CCA does not explicitly mention the possibility to invoke a business justification for conduct that falls within the scope of Section 46(1) CCA. However, Section 46(4A(b)) CCA does provide that the courts may have regard to the 'reasons' for such conduct, seemingly allowing courts to have regard to an alternative, pro-competitive, motive for the conduct. In addition, Section 51 CCA provides a 'State action' defence, holding *inter alia* that the prohibition does not apply if the relevant conduct is specifically authorised by an Act or regulation.

Apart from the express provisions in the CCA, case law unambiguously shows the possibility to invoke efficiency or other business justifications. The key cases shall be examined below.

2.2 Case law

The Australian public enforcement procedure is as follows. The Australian Competition & Consumer Commission (ACCC) may bring cases to the trial judge in case of an alleged violation of the CCA. Appeals are subsequently open to the Full Federal Court (FFC) and, finally, to the High Court.

Several Australian cases on misuse of market power, especially those on refusals to deal, make clear that a defendant may invoke a justification plea.[1014] The scope of potential justifications appears to be relatively broad. As Marshall has noted,[1015] justifications for a refusal to deal have been accepted for several reasons, including the protection of legitimate trade and business interests,[1016] to prevent the unauthorised use of the defendant's material and to maintain the integrity of its licensing system,[1017] as a response to inappropriate product labelling and to rationalize the distribution chain,[1018] and to secure payment of a debt.[1019]

The *Queensland Wire* case showed some of the contours of business justifications.[1020] The High Court examined Queensland Wire's claim that BHP had misused its market power by effectively refusing to supply[1021] Y-Bar, a steel product. The Court made clear that, once it is established that a firm has a substantial degree of market power, the issue is whether it has taken advantage of that power for one of the proscribed purposes,[1022] requiring a causal link between the market power and the conduct under

---

[1014] See e.g. Brenda Marshall, *The Resolution of Access Disputes Under Section 46 of the Trade Practices Act*, 22(1) University of Tasmania Law Review 9, 38 (2003), referring to various authors who attach much relevance to the examination of a possible legitimate business reason. See also e.g. *Pont Data Australia v ASX Operations*, FCA 30 (9 February 1990), per Wilcox J., at 100, referring to (but not giving much guidance on) the concept of 'legitimate commercial interests'. See also *ACCC* v *Australian Safeway Stores* [2003] FCAFC 149 (30 June 2003). At 330, the Full Federal Court suggested that issues relating to the quality of the product, reliability of supply or 'other legitimate business consideration' could be relevant for the assessment of an exclusive dealing arrangement.

[1015] Brenda Marshall, *Refusals to Supply Under Section 46 of the Trade Practices Act: Misuse of Market Power or Legitimate Business Conduct?*, 8 Bond Law Review 182, 193 (1996); Marshall 2003 (*ibid.*), at 43.

[1016] *Top Performance Motors v Ira Berk (Queensland),* [1975] ATPR 40-004.

[1017] *Australasian Performing Rights Association v Ceridale,* [1990] ATPR 41-042.

[1018] *Berlaz v FineLeather Care Products,* [1991] ATPR 41-118.

[1019] *Natwest Australia Bank v Boral Gerrard Strapping Systems,* [1992] ATPR 41-196.

[1020] *Queensland Wire Industries v BHP*, [1989] HCA 6. See also F. Hanks & P.L. Williams, 'Queensland Wire Industries v BHP, Judgment of the High Court of Australia', (1990) 27 Common Market Law Review 151; K. McMahon, 'Refusals to supply by Corporations with Substantial Market Power', (1994) 22 Australian Business Law Review 7, 29-30; Marshall 1996, *supra* note 1015, at 183.

[1021] Queensland Wire argued that it was a constructive refusal because of particularly high prices.

[1022] *Queensland Wire*, *supra* note 1020, per Mason C.J. and Wilson J., at 22.

review.[1023] This means that a firm will not be found to have taken advantage of its market power if it can show that it would have acted in the same way *absent* its market power.[1024] On the facts of the case, the High Court was not convinced that BHP would have refused to supply absent its market power, and concluded that it had misused its market power.[1025]

Hanks and Williams have suggested that the *Queensland Wire* judgment requires that the notion of 'taking advantage' must be seen in terms of efficiency.[1026] I prefer a broader reading: nowhere did the High Court state that quantifiable efficiencies should be the exclusive means of assessment. The High Court *did* try to make the point that 'taking advantage' is 'morally indifferent'.[1027] It does not require hostile intent,[1028] nor does it demand morally blameworthy conduct.[1029] The judgment makes clear that the High Court regards competition, 'by its very nature', as a 'deliberate and ruthless' process. Indeed, 'little criticism can be made of the conduct involved' if 'success is due to no more than superior skill and efficiency'.[1030] This means that companies, even those with market power, are allowed to injure their competitors.[1031]

[1023] *Queensland Wire* (*ibid*.), at 24. I.e. the conduct must be made possible by the absence of competition; considered by the Trade Practices Commission as the 'true test' of Section 46 CCA. See its report *Misuse of Market Power: Section 46 of the Trade Practices Act: Background Paper* (February 1990), at 33.

[1024] *Queensland Wire* (*ibid.*), per Mason CJ and Wilson J, at 28. See also *Rural Press v ACCC*, [2002] FCAFC 213, confirmed by the majority of the High Court in *Rural Press v ACCC*, [2003] HCA 75. See further Marshall 1996, *supra* note 1015, at 189, referring e.g. to possible explanations of a firm's refusal to supply in competitive conditions. Finally, see F. Hanks and P.L. Williams, 'Implications of the Decision of the High Court in Queensland Wire', (1990) 17(4) Melbourne University Law Review 437, 445-446.

[1025] Also note that BHP apparently 'did not offer a legitimate reason for the effective refusal to sell', see *Queensland Wire* (*ibid*.), per Mason C.J. and Wilson J., at 29.

[1026] Hanks & Williams 1990, *supra* note 1024. See also Marshall 2003, *supra* note 1014, at 40-41. She argues that efficiencies should be considered under the 'taking advantage' requirement. In her view, a wider range of justification pleas is available vis-à-vis the 'purpose' requirement.

[1027] *Queensland Wire*, *supra* note 1020, per Deane J, at 3.

[1028] *Ibid*., per Mason C.J. and Wilson J., at 22.

[1029] *Ibid*., per Deane J, at 2-3.

[1030] *Ibid*., per Toohey J, at 27.

[1031] *Ibid*., per Mason C.J. and Wilson J., at 24.

The *Melway Publishing* case, concerning an exclusive distributorship that resulted in a refusal to deal, confirms that the acceptance of a justification means that a firm has not misused its market power.[1032] The case also shows the relevance of examining whether the conduct under review can only be explained by way of the firm's market power. Applying the commercial conduct test of *Queensland Wire*, the Trial Judge and the majority of the FFC rejected a business justification plea. Both instances considered that a firm in a competitive market would not have refused this particularly large order, and thus observed a link between Melway's market power and its refusal to supply.[1033]

However, in an opinion dissenting from the FFC majority, Heerey J held that Melway had *not* taken advantage of its market power. Heerey J cautioned that courts 'should be very reluctant to tell the operators of businesses how to make commercial decisions'.[1034] On the facts, his Honour held that Melway had a legitimate business purpose for its refusal, as it simply wanted to continue the distribution model that predated its position of market power.[1035]

Upon a further appeal, the majority of the High Court held that Melway had not taken advantage of its market power.[1036] It largely endorsed Heerey J's dissenting opinion and seemingly attached much relevance to an economic analysis of the conduct under review. Referring to US precedent,[1037] the majority considered Melway's refusal as a legitimate termination of a distribution agreement. The majority found no relevant connection between Melway's market power and its distribution system (as the latter already existed).[1038] This is a potent argument. If the company would not have behaved

---

[1032] *Robert Hicks v Melway Publishing,* [1998] FCA 1379 (30 October 1998) (Trial Judge); *Melway Publishing v Robert Hicks,* [1999] FCA 664 (20 May 1999) (Full Federal Court).

[1033] *Melway* (*ibid*.), per Sundberg and Finkelstein JJ, at 44.

[1034] *Ibid*., at 19.

[1035] *Ibid*., per Heerey J, at 18-25.

[1036] *Melway Publishing v Robert Hicks,* [2001] HCA 13, per Gleeson CJ, Gummow, Hayne and Callinan JJ. At 104, Kirby J notes that the Court did unanimously agree that the conduct was covered by one of the proscribed purposes, as it prevented the respondent from engaging in competitive conduct.

[1037] *Ibid*., at 18. The majority refers to *Burdett Sound Inc v Altec Corporation*, 515 F.2d 1245 (5th Cir. 1975). See also *United States* v *Colgate & Co*, 250 US 300 at 307 (1919); *Byars v Bluff City News*, 609 F 2d 843 at 854 (6th Cir. 1979).

[1038] *Ibid*., at 61, 62, 66-68.

differently without its market power, there is little ground to conclude that it has taken advantage of that market power.

A dissenting opinion by Kirby J suggested that the majority had given too much leeway for unilateral conduct.[1039] At the same time, his Honour agreed that, as a matter of principle, there may several legitimate reasons for a refusal to supply. Such may be the case, for example, if the party requesting supply is considered (as):[1040]

- 'incompetent to handle a product that in some hands might be dangerous;
- a person with a poor credit record or with unacceptable business ethics;
- unqualified to offer essential after-sales service;
- liable to damage the reputation of the supplier;
- being unable to maintain accurate records;
- prone to engage in deceptive advertising or unfair practices; or
- likely to breach persistently the reasonable terms of a distribution agreement.'

On the facts, Kirby J did not find any of the justifications listed above to be applicable.[1041] However, his Honour gives no clear explanation why the enumeration given above should be considered exhaustive. The red thread of the list appears to be 'reasonable' or 'normal' business behaviour that any company, irrespective of its market power, would engage in. I agree that, if such a link between conduct and market power is completely absent, one cannot conclude that a company has misused its market power.

A final relevant case is *Boral Besser Masonry* (*BBM*). According to the ACCC, BBM had engaged in predatory pricing with the purpose to exclude a competitor.[1042] The Trial Judge, Heerey J, dismissed the ACCC's application, holding that BBM did not have market power[1043] and, in any case, had not taken advantage of that power. Heerey J considered that a business *rationale* could be 'a factor' indicating

---

[1039] *Ibid*., per Kirby J, e.g. at 103.

[1040] *Ibid*., at 104. His Honour cites various cases and academic articles.

[1041] *Melway*, *supra* note 1036, per Kirby J, at 117. His Honour argues that his approach is consistent with overseas approaches, referring, *inter alia*, to Joined Cases C-6/73 & C-7/73, *ICI and Commercial Solvents v Commission*, [1974] ECR 223; and *United States v Aluminum Co of America*, 148 F 2d 416 (1945).

[1042] *ACCC v BBM,* [1999] FCA 1318 (22 September 1999).

[1043] *Ibid*., at 155.

that there is no misuse of market power.[1044] His Honour also observed that if a company *without* market power 'would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power'.[1045] Heerey J observed that selling below avoidable cost, even for a prolonged period, can be a rational business decision as it may simply be the expression of ruthless competition.[1046] I agree that below-cost pricing is not necessarily anti-competitive, especially if it is a loss-minimizing strategy. An examination of the counterfactual, being the situation in the absence of market power, may shed light on a company's *rationale* for entering into particular conduct. However, it should be remembered that predatory conduct is *only* harmful to competition in the presence of market power – thus weakening the value of the counterfactual for determining whether the practice should be condoned or not. It should also be examined whether the conduct under review is capable of excluding equally efficient competitors.

On appeal, the FFC disagreed with the Trial Judge's findings.[1047] The Judges held unanimously, yet in separate opinions, that BBM had violated Section 46 CCA. Finkelstein J noted that there is a strong inference of predation if a dominant firm persistently prices below average variable cost, and that it is for the dominant firm to show that there was a legitimate purpose for its conduct.[1048]

In a further appeal, the majority of the High Court overturned the FFC's ruling.[1049] The majority held that BBM did not have substantial market power,[1050] but, even if it did, had not taken advantage of that power for a proscribed purpose. The majority seemed sceptical to prohibit a practice of cutting prices to

---

[1044] *Ibid*., at 158.

[1045] *Ibid*.

[1046] *Ibid*., at 175.

[1047] *ACCC v BBM*, [2001] FCA 30 (27 February 2001).

[1048] Even though, in Finkelstein J's view, there is no cost below which prices should be *per se* illegal (*ibid*., at 269).

[1049] *BBM v ACCC,* [2003] HCA 5 (7 February 2003). Kirby J's dissenting opinion criticizes 'those who want to dissect the concepts in s 46' (at 382), but does not offer further insights into the issue of justifications.

[1050] *Ibid.,* per McHugh J, at 198.

below costs,[1051] and considered that evidence on the subjective intent to hurt competitors is little helpful in deciding whether the firm has taken advantage of its market power.[1052]

Furthermore, Gleeson CJ and Callinan J noted that there may be several legitimate business reasons to sell below costs. For example, the defendant may wish to bear short-term losses in the hope that market circumstances would improve, or has to deal with sunk or historic costs.[1053] I agree with the majority's apparent broad interpretation of 'legitimate business considerations', but think that the opinion could have been much clearer about the applicable legal conditions.

Without such a framework, it is difficult to gauge whether or not conduct is considered legitimate. At the moment, one is left with the impression that the High Court is simply inclined to provide a wide margin of discretion for conduct by firms with market power, with the result that their conduct will *ex post facto* usually be considered legitimate. Some commentators couch this approach in terms of efficiency.[1054] Although I agree that providing much discretion to companies with market power may very well lead to efficiencies, the term can be misleading as the judgments discussed above did not seem to engage in an actual examination of effects.

3 CANADA

3.1 Introduction & legislation

The Combines Investigation Act of 1910 introduced the Canadian prohibition of monopolization, as it was then called. The prohibition remained largely unchanged until the entry into force of the Canadian Competition Act (CA) in 1986.[1055] The law prior to 1986 contained mainly criminal sanctions that also

[1051] *Ibid.,* per Gaudron, Gummow and Hayne JJ, at 159: 'the Act has never contained any specific and comprehensive prohibition of a practice of cutting prices to below cost'.

[1052] *Ibid.*, per Gleeson CJ and Callinan J, at 122-123.

[1053] *Ibid.*, at 70.

[1054] Hank & Williams 1990, *supra* note 1024.

[1055] M. Trebilcock, R.A. Winter, P. Collins & E.M. Iacobucci, *The Law and Economics of Canadian Competition Policy*, Toronto, Buffalo & London: University of Toronto Press 2003, at 504.

applied to unilateral anti-competitive conduct such as predation. Because of weak criminal enforcement, the abuse of dominance is currently targeted by a non-criminal sanction regime. I shall focus on the law *post*-1986.

Section 79 CA prohibits the abuse of dominance. Section 79(1) CA provides that the Competition Tribunal (CT), on application by the Commissioner of the Competition Bureau ('Competition Bureau'), may prohibit conduct where it finds that there is (a) market power, (b) an anti-competitive act and (c) a substantial negative effect on competition in a market. Although Section 79(1) CA does not explicitly mention the possibility to invoke a justification for otherwise abusive conduct, other provisions do provide clues as to the type of pleas that the dominant firm may put forward.

Section 78(1) CA provides a non-exhaustive enumeration with examples of abusive conduct. The examples include predation, margin squeeze and the temporary introduction of 'fighting brands' to discipline or eliminate a competitor. Several of the examples explicitly require an anti-competitive purpose, suggesting that there is no abuse absent such a purpose.

Furthermore, Section 79(4) CA requires the Competition Tribunal, in its assessment of anti-competitive effects, to consider whether the practice can be subsumed under 'superior competitive performance'. The provision seems to allow companies to argue that they simply competed on the merits, and that their success is due to superior efficiency rather than anti-competitive behaviour. In addition, Section 79(5) CA provides that the exercise of Intellectual Property rights will not violate the competition rules.

Another example is Section 75 CA, which deals with refusals to deal. Section 75(1)(c) CA holds that a refusal shall only be problematic if the company requesting supply is willing an able to meet 'usual trade terms' in respect of 'payment, units of purchase and reasonable technical and servicing requirements'.[1056] Reversely, if a company requesting supply does not abide by such terms, a refusal to supply by a dominant company can be justified.

[1056] Section 75(3) CA.

Although the statutory text does not explicitly provide other reasons to condone behaviour, the following paragraphs will show such reasons do in fact exist – especially where they promote efficiencies.[1057]

3.2 Case law

The enforcement of Canadian competition law takes place by the Competition Bureau[1058] or a private party bringing a case before the Competition Tribunal. Subsequently an appeal may be lodged before the Federal Court of Appeal (FCA). If allowed, a further appeal may be brought before the Canadian Supreme Court. Before discussing the landmark *Canada Pipe* judgment by the FCA, it is apt to examine three rulings by the Competition Tribunal to provide sufficient context on the issue of justifications. These judgments are *Nielsen*, *Tele-Direct* and *NutraSweet*.

The *Nielsen* case focused on the use of exclusive contracts to deny (potential) competitors access to scanner data used for market tracking services.[1059] The Tribunal examined whether the exclusive agreements were based on a valid 'business justification' rather than an anti-competitive purpose.[1060] The Tribunal held that it may consider 'any credible efficiency or pro-competitive business justification'. I believe that this terminology aptly reflects the wide range of available justification pleas. The Tribunal also noted that the justification plea must be weighed 'in light of any anti-competitive effects' with the aim 'to establish the overriding purpose' of the challenged act.[1061] I agree that such a balancing test is indeed instructive by accommodating all the different grounds and implications that can be attributed to the conduct under review.[1062]

[1057] See Trebilcock *et al*., *supra* note 1055, at 528: 'efficiency considerations are crucial to deciding whether an act has the requisite anti-competitive purposes to be classified as an "anti-competitive act" pursuant to section 79'.

[1058] Formally speaking, Competition Tribunal cases were brought by the Director of Investigation and Research or, more recently, the Commissioner of Competition.

[1059] *Canada (Director of Investigation and Research) v D&B Companies of Canada* ('*Nielsen*'), [1995] CT-1994-001.

[1060] *Ibid*., at 67.

[1061] *Ibid*., at 69. Confirmed by *Tele-Direct* (*infra* note 1063), at 259.

[1062] As long as 'purpose' is not simply equated with subjective intent, which does not seem to be the case.

The *Tele-Direct* ruling largely confirmed these principles.[1063] The Competition Bureau argued that Tele-Direct (a company active in the telephone directory market) had behaved anti-competitively, in particular by tying advertising space to sales services and refusing to deal with advertising consultants. The Tribunal used a weighing exercise, holding that a business justification is a relevant factor to decide whether an act is, on balance, anti-competitive or not – other relevant factors include subjective intent and the actual effects arising from the conduct.[1064] The Tribunal may reject a business justification if the impugned act is not 'in the public interest' or 'socially beneficial'.[1065] I agree that there is no clear reason to condone anti-competitive behaviour if the alleged benefits only accrue to the firm with market power.[1066] On the facts, the Tribunal accepted that Tele-Direct's conduct was justified in order to protect certain commercial interests, such as securing payment for its services.[1067] The Tribunal also found that the conduct was justified because it facilitated customers to understand with whom they are dealing; even though this plea had not actually been raised by Tele-Direct.[1068]

The *NutraSweet* case revolved around various contract clauses between NutraSweet and its customers for the purchase of aspartame, an artificial sweetener.[1069] Allegedly these contract arrangements required or induced exclusivity, creating barriers for NutraSweet's (potential) competitors. NutraSweet held that the arrangements were justified, arguing that risks and costs are reduced if only a single supplier holds inventory.[1070] Although the Tribunal did accept that efficiencies are relevant while assessing whether conduct can substantially lessen competition, it rejected NutraSweet's plea on the facts. The Tribunal held that '[i]t can always be claimed that the risk and cost of holding plant and

---

[1063] *Canada (Director of Investigation and Research) v Tele-Direct*, [1997] CT-1994-003.

[1064] *Ibid.*, at 259 (referring to *Nielsen*, *supra* note 1059). The Tribunal confirmed this position in *Air Canada*, *infra* note 1086, at 55.

[1065] *Ibid.*, at 215-216 and 248-249.

[1066] An interesting example in UK competition law is *Genzyme v OFT*, [2004] CAT 4, at 583.

[1067] *Tele-Direct*, *supra* note 1063, at 349-350. Here, the Tribunal examines Tele-Direct's refusal to deal with consultants who do not accept responsibility for payment for the advertising.

[1068] *Ibid.*, at 357-358. In a minority view, Roseman J. held Tele-Direct had not advanced 'any valid business justification' (*ibid.*, at 359-360).

[1069] *Canada (Director of Investigation and Research) v The NutraSweet*, [1990] CT-1989-002.

[1070] *Ibid.*, at 90. The Tribunal considered that the impugned conduct leaves (i) customers, on balance, better off and (ii) that the customers pass on these cost savings to consumers.

inventory are reduced if there is a single supplier rather than several.'[1071] Such a plea thus requires specific evidence, for instance on the special characteristics of the company's industry.[1072] The Tribunal also rejected NutraSweet's plea that the contracts were necessary to prevent competitors from free riding on its investments.

Even though the three cases discussed above continue to be relevant, the *Canada Pipe* judgment is currently the leading Canadian case on justifications. The Competition Bureau argued that Canada Pipe foreclosed competition by offering rebates to distributors in exchange for exclusive purchasing agreements. The Tribunal disagreed, accepting Canada Pipe's submission that the conduct under review led to higher sales volumes and allowed it to 'maintain in inventory smaller, less profitable but nevertheless important products'.[1073] The Tribunal thus concluded that the practice under review produced efficiencies and did not lead to any exclusionary effects.[1074]

On appeal,[1075] the FCA held that, even though evidence of subjective intent is not required for the purposes of paragraph 79(1)(b), intention is an important element. The FCA observed that 'a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein'.[1076] The FCA thereby confirmed and clarified the Tribunal's earlier approach in *Nielsen* and *Tele-Direct* that a business justification can establish the 'overriding purpose'.[1077]

The FCA rejected, however, the Tribunal's earlier ruling in *Canada Pipe* to the extent that it relied primarily upon consumer welfare benefits to establish a business justification while assessing whether the act was anti-competitive. The FCA made a sharp distinction between the finding of an 'anti-

[1071] *Ibid*.

[1072] *Ibid*.

[1073] *Canada (Commissioner of Competition) v Canada Pipe*, [2005] CT-2002-006, at 212. Apparently the Competition Tribunal considered these arguments more persuasive than those in *NutraSweet*, *supra* note 1069, at 90.

[1074] *Ibid*., at 256-60.

[1075] *Canada (Commissioner of Competition) v Canada Pipe,* [2006] FCA 233.

[1076] *Ibid*., at 87-88.

[1077] *Ibid.,* at 73, 87 and 88.

competitive act' (paragraph 79(1)(b)) and the question whether the practice substantially lessens competition on the market (paragraph 79(1)(c)). The FCA considered that, although the effects on consumers may 'be relevant in assessing the credibility and weight of a professed business justification', such evidence is 'largely irrelevant' for the purposes of the paragraph 79(1)(b) assessment, and is more appropriately considered under paragraph 79(1)(c).[1078]

The FCA further held that the examination of paragraph 79(1)(b) must focus on the effect on a competitor rather than the wider effects on economic efficiency or consumer welfare.[1079] This appears to be an overly formalistic reading of what constitutes 'anti-competitive acts', and seems to have little ground in business reality. A firm with market power may hurt its competitors simply because it is more efficient or competes more vigorously, instead of acting anti-competitively. The rejection of a justification plea in such a context risks chilling the very competitive behaviour the Competition Act seeks to protect.[1080] However, the FCA's reasoning may still allow for an overall effects-based approach to the extent that the effects upon other market participants are only considered by way of a *prima facie* finding of an illegal unilateral act[1081] – after which any efficiencies may still be fully taken on board under paragraph 79(1)(c).[1082] If an act has a net efficient effect, it is difficult to see how it could substantially lessen competition at the same time – thus failing the test set by paragraph 79(1)(c).

Apart from the question whether *Canada Pipe* can be interpreted more or less formalistically, the FCA does provide a clear enumeration as to the legal conditions that should apply for the purposes of this provision. It requires (i) a credible efficiency or pro-competitive rationale for the relevant conduct, showing the relevance of the underlying purpose. In addition, the justification must be (ii) attributable to the respondent. Finally, the justification must (iii) relate to and (iv) counterbalance the anti-

---

[1078] *Ibid.*, at 79.

[1079] *Ibid.,* at 68. According to the FCA, the inquiry under paragraph 79(1)(c) should relate to the broader state of competition (*ibid.,* at 83).

[1080] See G. Addy, J. Bodrug & C. Tingley, 'Abuse of Dominance in Canada: Reflections on 25 Years of Section 79', (2012) 25(2) Canadian Competition Law Review 276, 289-290.

[1081] One should consider that *any* exclusionary act may lead to a reduction of consumer welfare *through* the harm inflicted upon other market participants.

[1082] Indeed, the FCA suggests that the effects on consumers are more appropriately considered under paragraph 79(1)(c). See *Canada Pipe* (FCA), *supra* note 1075, at 79-83.

competitive effects and/or subjective intent of the conduct.[1083] On the facts of the case, the FCA concluded that the Tribunal had insufficiently shown why Canada Pipe had a legitimate explanation to engage in the impugned conduct.[1084]

Other Canadian cases on justifications include the following. The *Xerox* case made clear that a refusal to deal may be justified if an upstream supplier's decision to vertically integrate is dictated by reasons of economic efficiency or if it is the norm in the industry.[1085] It shows that the examination of a justification plea should, *inter alia*, pay heed to what are considered normal business practices in a particular business sector.

The *Air Canada* ruling concerned Air Canada's response to the entry of competitors of certain routes by engaging in selective capacity increases and price decreases in a manner that did not cover avoidable costs.[1086] The Competition Bureau accepted that so-called 'network benefits' could constitute a legitimate business justification for operating a flight below average avoidable costs.[1087] In the Competition Bureau's view, a legitimate business justification is also related to efficiency or actions that favour competition.[1088] It referred to the 1981 *Consumer's Glass* judgment. That judgment considered that below-cost prices can be justified if they are part of a loss-minimizing strategy such as selling excess, obsolete or perishable products below cost.[1089] For its part, the Tribunal confirmed that legitimate business justification is one of the elements to determine whether a practice is an anti-competitive act contrary to section 79 CA.[1090]

[1083] *Canada Pipe* (*ibid*.), at 73.

[1084] *Ibid.*, at 91.

[1085] *Canada (Director of Investigation and Research) v Xerox (Canada)*, [1990] CT-1989-004. The Tribunal did, however, reject the justification plea on the facts.

[1086] *Commissioner of Competition v Air Canada*, [2003] CT-2001-002, at paragraph 1-2.

[1087] *Ibid*., at 35.

[1088] *Ibid*., at 50-51. The Commissioner gives the example of the operation of a flight at the end of the end in order to position it for the following day, a so-called 'balancing' or 'positioning' flight.

[1089] *R. v Consumers Glass Co. Ltd.*, [1981] 57 C.P.R. (2d) 1 (Ont. H.C.J.).

[1090] *Air Canada*, *supra* note 1086, at 55.

In *Laidlaw*,[1091] a case concerning various allegedly exclusionary contractual clauses, shows that a justification plea requires cogent evidence. The Tribunal was not convinced that these clauses, taken as a whole, had an 'identifiable efficiency rationale'.[1092] The Tribunal rejected the efficiency justifications invoked by Laidlaw, observing that the clauses only had the effect of retaining customers and excluding competitors.[1093] The Tribunal also held that actions are presumed to have intended the effects that actually occur in the absence of evidence showing otherwise.[1094]

Finally, the *B-Filer* ruling shows how a regulatory framework may provide a justification.[1095] The applicant in *B-Filer* argued that the termination of banking services by its bank was an illegal refusal to deal. The Competition Tribunal rejected the application, finding that it did not make sufficiently clear that the refusal to deal had an adverse effect on competition.[1096] But even if such an effect had been shown, the bank would still not necessarily have breached the Competition Act. A refusal to deal may be caused by a customer's failure to meet usual contractual terms or by a dominant firm's wish to comply with a regulatory framework. In such a case, the refusal to deal does not result from 'insufficient competition',[1097] but rather from an 'objectively justifiable business reason'.[1098] On the facts, the refusal could be justified as a continuation of the banking services would have exposed the Bank to various legal, regulatory and reputational risks.[1099] The *B-Filer* judgment thus shows the breadth of potential justification pleas that are available under Canadian competition law.

[1091] *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd*, [1992] CT-1991-02.

[1092] *Ibid*., at 91.

[1093] *Ibid*., at 93-96. The Tribunal held: 'The tying of the customers to Laidlaw operates to exclude other competitors from the market'. The Tribunal also took into account that the relevant services only represented a minor cost for customers, which means there is little incentive to contest price increases.

[1094] *Ibid*., at 96.

[1095] *B-Filer Inc. et al. v The Bank of Nova Scotia*, [2006] CT-2005-006. Note that this case concerned Section 75 CA, that deals specifically with refusals to deal, rather than the general prohibition of dominance abuses in Section 79 CA.

[1096] *Ibid*., at 2.

[1097] *Ibid*., at 193.

[1098] *Ibid*., at 147.

[1099] *Ibid*., at 148.

3.3 Competition Bureau guidance

The Competition Bureau has published various documents that provide guidance on the topic of justifications. I shall focus on those elements that have not already been discussed, as the guidance relies to a great extent on the case law discussed above.[1100]

3.3.1 The 2009 draft enforcement guidelines

In January 2009, the Competition Bureau published a draft update of its 2001 enforcement guidelines ('the 2009 draft').[1101] Largely inspired by the FCA ruling in *Canada Pipe*, the 2009 draft contains an elaborate discussion of business justifications. The document upholds a particularly wide notion of justifications, stating that it could include any activities that seek to minimize costs or that improve a firm's business.[1102] If a firm's conduct leads to efficiencies as well as anti-competitive effects, the Bureau will examine the credibility and likelihood of any efficiency claims before assessing the overall purpose of these activities. The Bureau also requires that the conduct is necessary for achieving the claimed efficiencies.[1103]

3.3.2 The 2012 enforcement guidelines

In September 2012, the Competition Bureau published a final version of its new enforcement guidelines on the abuse of dominance, replacing the 2001 guidelines ('the 2012 guidelines').[1104] The 2012

[1100] Such as the Predatory Pricing Enforcement Guidelines, published by the Competition Bureau in July 2008, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02713.html.

[1101] See the 2009 draft guidelines http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html. This document gives much more clarity on 'business justifications' than the enforcement guidelines of July 2001. See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01251.html.

[1102] 2009 draft guidelines (*ibid*.), page 17. The Bureau adds: 'Beyond this definition, there may be general business justifications that are not strictly credible efficiencies or pro-competitive rationales, but might nevertheless be accepted as valid by the Tribunal'.

[1103] *Ibid*. The Bureau adds: 'When assessing any cost-related business justification, the Bureau will focus on verified efficiencies that do not arise from anti-competitive reductions in output or service'.

[1104] Competition Bureau, *Enforcement Guidelines: The Abuse of Dominance Provisions* (September 2012), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html .

guidelines no longer contain the thorough discussion of legitimate business justifications that was found in the 2009 draft.

However, the 2012 guidelines still appear to give a broad interpretation of business justifications. Pro-competitive aims that shall be taken into account include 'reducing the firm's costs of production or operation, or improvements in technology or production processes that result in innovative new products or improvements in product quality or service'.[1105] In its assessment of the overriding purpose of an alleged anti-competitive act, the Competition Bureau shall examine:[1106] (i) the credibility of any efficiency or pro-competitive claims, (ii) its link to the alleged anti-competitive practice, and (iii) the likelihood of these claims being achieved.

Although the 2012 guidelines thus provide *some* clarity on how the Competition Bureau seeks to implement case law on justifications in its enforcement policy, it remains unclear why it has vacated the elaborate treatment of justifications in the 2009 draft.[1107] The lack of guidance as to how the Competition Bureau will apply this concept has an adverse impact on legal certainty.[1108]

[1105] *Ibid*., at 11.

[1106] *Ibid*.

[1107] This issue drew criticism, *inter alia*, from the Canadian Bar Association. See the Association's comments on a March 2012 draft text that, with few major changes, eventually led to the September 2012 guidelines, available at http://www.cba.org/cba/submissions/pdf/12-34-eng.pdf, at 6 and 15.

[1108] *Ibid*., at 15. For similar remarks, see e.g. J.B. Musgrove and A. Neil Campbell, 'More abuse?: the Competition Bureau proposes revised guidelines on abuse of dominant market position', available at http://www.mcmillan.ca/more-abuse--the-Competition-Bureau-proposes-revised-guidelines-on-abuse-of-dominant-market-position.

4 HONG KONG

4.1 Introduction

After years of intense debate, the Legislative Council of the Hong Kong Special Administrative Region ('Hong Kong') adopted the final text of the Competition Ordinance in June 2012.[1109] The Secretary for Commerce and Economic Development will decide the exact date on which the Competition Ordinance (CO) will enter into force.[1110] The CO establishes the Competition Commission (HKCC) as an investigative body and the Competition Tribunal as an adjudicative body. Section 35 of the CO provides that the HKCC will issue guidelines to indicate the manner in which it expects to interpret and give effect to the conduct rules. Only after the guidelines have been finalized will the substantive provisions enter into force. At the time of writing, no enforcement action has yet taken place, as the guidelines have not yet been finalized. As a consequence, the analysis below is limited to the legislative text.

4.2 Legislation

Section 21(1) of the CO prohibits the abuse of a substantial degree of market power in Hong Kong. The prohibition is also referred to as the 'second conduct rule'.[1111] Section 21(2) CO provides two examples of abuses: (i) predatory behaviour and (ii) limiting production, markets or technical development to the prejudice of consumers. The legislative text refers to 'market power', which in economic theory is a more gradient concept than the rather binary legal notion of dominance. Hopefully the HKCC will specify in its guidelines if the second conduct rule will indeed be applied according to a sliding scale approach, where firms with a high degree of market power will be scrutinized more severely compared to firms with a weaker degree of market power.

The CO does not contain a general provision on justifications within the framework of the second conduct rule. However, it does contain a number of exclusions and exemptions that the second conduct

---

[1109] The Hong Kong Competition Ordinance, as passed in June 2012, is available at http://www.legco.gov.hk/yr11-12/english/ord/ord014-12-e.pdf.

[1110] Section 1(2) CO.

[1111] Section 21(4) CO. The 'first conduct rule' prohibits anti-competitive agreements between undertakings, see Section 6 CO.

rule would otherwise prohibit. Schedule 1 of the CO provides various exclusions. The second conduct rule does not apply to conduct that seeks to comply with a legal requirement.[1112] In addition, the conduct rules do not apply to an undertaking entrusted with the operation of services of general economic interest in so far as the conduct rule would obstruct the performance of those services.[1113]

Subdivision 2 of division 3 of the CO specifies various exemptions from the conduct rules. The Chief Executive in Council (the head of the Hong Kong government) may exempt specific conduct from the application of the second conduct rule, provided that there are exceptional and compelling reasons of public policy. The exemptions apply in the event of public policy issues[1114] and Hong Kong's international obligations.[1115]

The exemptions and exclusions mentioned by the CO primarily relate to State intervention, giving the Hong Kong executive an important role to determine the scope of such justifications. A key challenge shall be to create guidance that clearly explains what dominant firms may expect under these headings. In addition, the HKCC should make clear to what extent companies may rely on justifications *other* than the exclusions and exemptions mentioned by the CO. Perhaps it can look for inspiration in other jurisdictions, such as the enumeration provided by Kirby J in *Melway*.

Although the CO is not particularly clear on justifications, the legislative text does suggest that they shall not be easily condoned. Section 22 CO provides that, where conduct has more than one object or effect, *including* the object or effect to prevent, restrict or distort competition, such conduct will be considered to *solely* have such an anti-competitive object or effect.

It seems that this provision is likely to limit the availability of justifications within the scope of the second conduct rule. A justification should only become relevant if the conduct under review has at least *some* anti-competitive 'object' or 'effect'. But if, on the basis of Section 22 CO, such a *prima facie* finding leads to the conclusion that the conduct *solely* had an anti-competitive 'object' or 'effect', there

[1112] Section 2(2) of Schedule 1 CO.

[1113] Section 3 of Schedule 1 CO.

[1114] Section 31 CO.

[1115] Section 32 CO.

appears to be no room left for a justification plea stating e.g. that the pro-competitive effects outweighed the anti-competitive effects.

The HKCC should make clear that justifications are available even beyond of the scope of the statutory exemptions and exclusion, in order to avoid an overly broad application of the second conduct rule. Other jurisdictions with similar legislative acts, such as Singapore and the UK,[1116] have also acknowledged the relevance of a justification plea even in the absence of a comprehensive codification of that principle. As to Section 22 CO, the HKCC may indicate that conduct will only be seen as anti-competitive by 'object' or 'effect' if a contextual analysis, *including* an examination of possible justification, has shown such to be the case. This may be a way to consider justifications while still respecting the framework of the legislative text.

5 SINGAPORE

5.1 Introduction & legislation

Section 47 of the Singaporean Competition Act (SCA), as of January 2006, prohibits the abuse of a dominant position in Singapore. Section 47(2) SCA provides a non-exhaustive list of examples of abusive conduct:

- 'predatory behaviour towards competitors;
- limiting production, markets, or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts'.

Apart from the suggestion in Section 47(2)(d) SCA that the 'nature' or 'commercial usage' can justify a tying arrangement, Section 47 contains no general reference to justifications of otherwise abusive

[1116] For an examination of Singaporean competition law, see below. See also the UK Competition Act 1998.

conduct. The SCA does, however, provide various exclusions of the competition rules insofar they are related to conduct required by the government.

The Third Schedule of the SCA excludes certain activities from the scope of Section 47 SCA. The Schedule contains a general reference to services of general economic interest, but also refers to specific activities such as the supply of piped potable water. In addition, the Third Schedule of the SCA makes clear that Section 47 SCA does not apply in the following cases: (i) if the conduct seeks to comply with a legal requirement, or (ii) if the Singaporean Minister for Trade and Industry has issued an order indicating that the conduct is necessary for exceptional and compelling reasons of public policy.

Such ‘State action’ provisions show that the Singaporean executive plays an important role in determining the SCA’s scope of application. The absence of an enumeration of the applicable legal conditions suggests that the legislator has attempted to provide the executive with ample discretionary powers, similar to the statutory text in Hong Kong. This may risk arbitrary application. Policy guidelines may be able to improve legal certainty and, in draft, could foster a debate on what kind of conduct should (or should not) be condoned in the name of public policy.

As the statutory text of the SCA provides little guidance on objective justification, it is wise to turn to different sources. The Competition Commission of Singapore (CCS), the enforcement body of the SCA, has published particularly useful guidance on the issue of objective justification. The following paragraph examines these guidelines.

5.2 Guidelines

In 2007, the CCS published guidelines on the prohibition of the abuse of dominance in Singapore. According to these guidelines, Section 47 SCA prohibits unilateral conduct only if it is unrelated to competitive merit.[1117] The guidelines cautiously state that the CCS ‘may consider’ the possibility of an

[1117] CCS guidelines on the Section 47 prohibition (2007), at 2.1, available at http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/s47_Jul07FINAL.pdf.

objective justification while assessing an alleged abuse.[1118] The guidelines refer to two types of an objective justification.

First, the guidelines mention the possibility to justify conduct based on 'legitimate commercial interest'.[1119] For example, poor creditworthiness of the buyer or capacity constraints may justify a refusal to supply.[1120] The CCS also suggests that a dominant firm is not allowed to take more restrictive measures than are necessary to achieve the legitimate interest.[1121] Such a necessity criterion should be used with caution, as it may prove overly burdensome. For example, a dominant firm that wishes to discontinue supply based on poor creditworthiness of its customer will almost surely fail the necessity test, as there will usually be less restrictive measures available (such as requiring a bank guarantee).

A second possibility for a justification applies if the dominant undertaking is able to demonstrate that its conduct has countervailing benefits.[1122] Seemingly a broad range of gains may be subsumed under this heading. The main question should be whether the dominant firm has succeeded in providing a coherent narrative as to why the benefits that it relies on should be deemed relevant in the specific circumstances of that case. Again the dominant undertaking will have to show that its conduct is proportionate to the claimed benefits. Such conduct will not be allowed if its 'primary purpose' is to harm competition.[1123]

Apart from the two types of justifications introduced above, the guidelines also mention justifications while discussing various types of abuses. In its treatment of predation, the CCS notes that prices below

---

[1118] *Ibid*., at 4.4. See for an earlier reference to justifications, C. Tay Swee Kian, 'New Developments in Competition Law in Singapore', (2006) 27 Business Law Review 120, 122.

[1119] *Ibid*., at 4.4.

[1120] *Ibid*., at 11.26. See also the CCS answers to a questionnaire by the International Competition Network on the issue of refusal to deal (November 2009), available at http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/singapore.pdf, at 7.

[1121] CCS guidelines, *supra* note 1117, at 4.4.

[1122] *Ibid*. See also the CCS answers to a questionnaire by the International Competition Network, *supra* note 1120, at 7.

[1123] *Ibid*.

average variable costs, even though presumed to be abusive,[1124] may still be objectively justified.[1125] The CCS guidelines refer to three legitimate commercial reasons in particular, such as in the event of short-run promotions.[1126] Other types of *prima facie* abuses that can be justified include discounts[1127] and discriminatory practices.[1128]

It should be applauded that the CCS has endeavoured to provide clarity on justifications of otherwise prohibited unilateral conduct. It is also appealing that the CCS steers clear of a formalistic approach, and instead focuses on the overall context and the likely effects of the conduct under review. This may lead to fewer hard-and-fast rules, but it does bring more business reality into the enforcement of competition law.

5.3 Case law

The Singaporean public enforcement procedure in Singapore is similar to that of the UK. The CCS can adopt an infringement decision if it finds that a company has acted contrary to the SCA. Such a decision can be appealed to the Competition Appeal Board (CAB).[1129] A further appeal is open to the High Court,[1130] and finally to the Court of Appeal – Singapore's highest court.

The 2010 *SISTIC* decision was the first case in which the CCS found an abuse.[1131] The decision held that SISTIC, the dominant ticketing company in Singapore, contravened Section 47 SCA by foreclosing competition in the ticketing services market through a web of exclusive agreements.[1132]

[1124] *Ibid*., at 11.4.

[1125] *Ibid*., at 11.6.

[1126] *Ibid*., at 11.6.

[1127] *Ibid*., at 11.12.

[1128] *Ibid*., at 11.16.

[1129] Sections 71 and 72 SCA.

[1130] Section 74 SCA.

[1131] CCS decision of June 2010, *SISTIC*, available at http://www.ccs.gov.sg/content/dam/ccs/PDFs/Public_register_and_consultation/Public_register/Abuse_of_Dominance/SISTIC%20Infringement%20Decision%20(Non-confidential%20version).pdf.

Referring to its own guidelines, the CCS devotes an entire chapter on the examination of objective justification.[1133] The CCS examined whether the following conditions applied: [1134]

1. The conduct was in defence of a legitimate commercial interest,
2. The firm has not taken more restrictive measures than were necessary,
3. The restriction resulted in certain benefits;
4. The restrictions are proportionate to the claimed benefits.

On the facts, the CCS rejected SISTIC's plea that exclusivity was necessary to maintain investments, holding that it is competition, rather than immunity from competition, that fosters investment and innovation.[1135] In addition, the CCS held that SISTIC failed the necessity test,[1136] as it had not demonstrated that its investments were (i) specific and (ii) directly attributable to the exclusivity agreements.[1137] The approach by the CCS makes sense, as there is no reason to condone behaviour because of benefits that would have arisen even without that conduct. The CCS also noted that the conduct under review does not meet the proportionality test, as third-party event promoters (a group which it considers one of the 'stakeholders') do not benefit from the discounts.[1138] It is unclear why the CCS has relied on this observation. As the SCA statute is clearly geared towards encouraging efficient market conduct,[1139] it is unclear why every stakeholder should necessarily benefit from the conduct under review.

[1132] The CCS found that SISTIC was the dominant ticketing service provider in Singapore with a persistent market share of around 85-95%.

[1133] See Chapter 8 of the *SISTIC* decision, *supra* note 1131. This chapter provides several references to case law by the European Court of Justice.

[1134] *Ibid*., at 8.1.2. The CCS refers to at 4.4 of the CCS guidelines (*supra* note 1117).

[1135] *Ibid*., at 8.2.2. and 8.2.3. The CCS refers to the Second Reading speech for the Competition Bill on 19 October 2004.

[1136] *Ibid*. See e.g. at 8.2.12. and 8.2.13. Unfortunately large parts are left blank due to confidentiality.

[1137] *Ibid*., at 8.2.8. The CCS refers to the Commission's guidance on enforcement priorities, at 30.

[1138] *Ibid*., at 8.3.6.

[1139] See Section 6(1)(a) SCA.

On appeal, the CAB confirmed the CCS's findings on the facts of the case.[1140] Crucially, the CAB found that the exclusive agreements under review had an adverse effect on competition and did not have any net economic benefit.[1141] As the exclusivity arrangements had no legitimate purpose, the CAB concluded that SISTIC had indeed abused its dominant position.

6 SOUTH AFRICA

6.1 Introduction

Perhaps more than with the other jurisdictions, it is fitting to discuss the wider context in which the South African competition rules came into being.[1142] During the Apartheid regime, major corporations – exclusively under white ownership – were often heavily protected by the State, leading to high concentration levels and limited competition.[1143] After the fall of Apartheid, the 1998 Competition Act was introduced to benefit society, *inter alia* by providing more opportunities for smaller firms.[1144] History has left a mark on the type of dominance cases brought in South Africa, where most of the cases that have been brought relate either to (formerly) State-owned companies (such as South African

[1140] Competition Appeal Board decision of 28 May 2012, *SISTIC v CCS*, at 287, available at http://www.mti.gov.sg/legislation/Documents/SISTIC%20Appeal%20-%20CAB%20Decision%20(1%20June%202012)%20-%20Redacted.pdf.

[1141] *Ibid*., at 318.

[1142] The introduction makes use of a publication by the Competition Commission and Competition Tribunal to celebrate the tenth anniversary of the South African Competition Act: *Unleashing Rivalry: Ten years of enforcement by the South African competition authorities* (2009), available at http://www.comptrib.co.za/assets/Uploads/Reports/unleashing-rivalry.pdf.

[1143] *Ibid*., at 2. See also the preamble of the South African Competition Act, which reads that: 'apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti- competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans'. For a further assessment, see e.g. V. Chetty, *The place of public interest in South Africa's competition legislation: some implications for international antitrust convergence*, paper submitted for the 53rd Spring Meeting by the ABA Section of Antitrust Law (2005), available at http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/spring/05/aba-paper.pdf.

[1144] See Section 2 SACA, noting the purpose of the Act.

Airways, Telkom and Sasol) or to companies that have otherwise been extensively supported by government (such as Senwes). In such a context, a company cannot be said to have achieved its market power through superior efficiency. It is therefore understandable that the Act has a relatively tough stance on the abuse of dominance.

6.2 Legislation

Section 8 of the South African Competition Act (SACA) prohibits the abuse of dominance.[1145] The provision brings forward several of examples of abuses, covering both exclusionary and exploitative abuses. It is prohibited for a dominant firm to:

- 'charge an excessive price to the detriment of consumers;
- refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
- engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act.' This subsection is followed by a list of five exclusionary practices, such as tying and predation.

Section 8 SACA does not provide a general reference to the possibility of justifications. Section 8(a) SACA appears not to allow any justification, whereas Section 8(b) SACA seems to allow dominant firms to argue that providing access to an essential facility is not economically feasible. By contrast, Sections 8(c) and 8(d) SACA provide a broad possibility to justify otherwise prohibited conduct on the ground that it has a technological, efficiency or other pro-competitive gain. The main difference between the two subsections is that Section 8(c) SACA places the burden to negate a justification on the complainant, whereas the burden under Section 8(d) SACA is on the respondent.[1146]

[1145] See, more generally, the anniversary document by the Competition Commission and Competition Tribunal, *supra* note 1142, at 3. The South African Competition Act 'drew heavily from laws in jurisdictions such as Canada, Australia and the European Union'.

[1146] *Competition Commission v South African Airways* ('*SAA I*'), [2005] Case 18/CR/Mar01, at 99.

6.3 Case law

Competition law enforcement in South Africa takes place as follows. The South African Competition Commission (SACC) – or another appellant – may bring competition cases before the Competition Tribunal (SACT). A further appeal is possible before the Competition Appeal Court (CAC). Although competition cases usually do not go beyond this point, the Supreme Court of Appeal may review a judgment by the CAC. A final appeal is possible before the Constitutional Court if a constitutional issue is at play.

South African case law shows particular concern for the effects of the conduct under review. In the *SAA II* judgment, a case dealing with various incentive schemes, the Competition Tribunal noted that an anti-competitive effect could manifest itself in two ways: either by direct evidence of an adverse effect on consumer welfare or, alternatively, by evidence that the exclusionary act has a substantial or significant foreclosure effect.[1147]

If there is evidence that certain conduct has an anti-competitive effect,[1148] the dominant firm may invoke efficiency gains that outweigh those effects.[1149] In *Senwes*,[1150] the SACT confirmed that such a plea calls for a balancing exercise between pro- and anti-competitive effects.[1151] The evidence on

[1147] *Nationwide Airlines and Comair v South African Airways* ('*SAA II*'), [2010] Case 80/CR/SEPT06, at 183.

[1148] *Ibid*., at 189. For instance due to higher prices and/or reduced choice.

[1149] *Ibid*., at 240.

[1150] *Competition Commission v Senwes*, [2009] Case 110/CR/Dec06. Senwes, dominant in the South African grain storage market, had allegedly made it impossible for storage users to compete with its downstream trading operations. For an analysis of the Tribunal judgment, see L. Kelly & T. van der Vijver, 'Less is more: *Senwes* and the concept of "margin squeeze" in South African competition law', (2009) 126 South African Law Journal 246. Subsequently, the case went to the Competition Appeal Court, the Supreme Court of Appeal and the Constitutional Court. Finally, the parties settled the case by a Competition Tribunal Order of 25 April 2013, *Competition Commission v Senwes*, Case 110/CR/Dec06.

[1151] *Ibid*., at 170. This may include a quantitative analysis of the anti-competitive effects at stake; see *SAA I*, *supra* note 1146, at 110.

efficiencies must have a minimum level of credibility. The CAC held that if the proof is of 'dubious quality', there is no need to enter into a balancing exercise.[1152]

Quite rightly, the case law requires a 'logical nexus' between the efficiency claims and the mechanism according to which the conduct leads to the alleged benefits.[1153] This means that the exclusionary conduct must be necessary, or a *sine qua non*, for the pro-competitive gains to be realized.[1154] This condition was not met in the *Patensie* case, which involved an agricultural cooperative that induced its members not to deal with a competitor.[1155] The SACT held that the respondent had not shown that the exclusionary act was necessary for the alleged benefits of raising capital or achieving scale economies.[1156]

Apart from efficiencies *stricto sensu*, the statutory justifications in Sections 8(c) and 8(d) SACA clearly allow other benefits as well. Conduct may be condoned based on its 'technological' or 'other pro-competitive gain[s]', allowing for the consideration of a wide range of alleged benefits. In *SAA I*, for instance, the SACT agreed to consider quality benefits as producing pro-competitive benefits, even though it rejected the plea on the facts.[1157] Another example is the *BATSA* judgment.[1158] The case concerned agreements between tobacco company BATSA and retailers that allowed BATSA to determine the position and space allocation for its own cigarette brands and those of competitors in dispensing units at the retailer's premises. Although the Tribunal did not engage into a balancing test in the *BATSA* case (as it did not find anti-competitive effects), it did suggest that the notion of pro-competitive benefits is relatively broad. In *BATSA*, such benefits included the free provision of cigarette

---

[1152] *Senwes v Competition Commission*, [2009] Case 87/CAC/FEB09, at 70. See also *South African Airways v Comair and Nationwide Airlines*, [2011] Case 92/CAC/MAR10, at 147. The CAC noted that there was no credible evidence of any efficiency achieved through the incentive schemes under review.

[1153] *SAA I*, *supra* note 1146, at 256.

[1154] *Patensie v Competition Commission*, [2003] Case 16/CAC/Apr02, at page 30.

[1155] *Competition Commission v Patensie*, [2002] Case 37/CR/Jun01.

[1156] *Ibid.*, at 99-105.

[1157] *SAA I*, *supra* note 1146, at 248-250.

[1158] *Competition Commission & JTI v BATSA*, [2009] Case 05CRFeb05.

dispensing units by BATSA and maintenance of an orderly point of sale.[1159] The Tribunal concluded that BATSA chose a legitimate form of competition – namely that for retail shelf space and positioning.[1160]

Apart from a balancing test to weigh pro- and anti-competitive effects, South African competition law also seems to allow dominant firms to engage in 'normal' or 'reasonable' business conduct (what was earlier termed 'legitimate commercial conduct'). Even dominant firms still have a degree of commercial freedom. Such a plea is particularly persuasive if the dominant firm abides by generally accepted business standards. In *York Timbers*,[1161] the CAC confirmed that even exclusionary behaviour can still be seen as a 'normal [act] of competition'.[1162] In that case, the dominant firm did not abuse its dominance, because its conduct simply sought to improve the terms of its contracts – instead of extending its market power.[1163]

Another example is the *Bulb Man* judgment, in which the applicant sought interim relief against the refusal of a supplier to keep supplying on the terms that they had previously agreed upon.[1164] The SACT considered that the refusal was more probably caused by a 'breakdown in the business relationship', rather than 'an attempt to wield market power or to exclude the applicant for an anti-competitive end'.[1165] It appears that, in the assessment of anti-competitive effects, commercial considerations such as a lack of trust may provide reason to accept a 'legitimate business justification' for the refusal.[1166]

The SACT's *Telkom* judgment offers a further confirmation that a justification plea may be available beyond those mentioned in Section 8 SACA. The case concerned, *inter alia*, a refusal to provide access with the aim of excluding independent value added network service (VANS) providers.[1167] Telkom

---

[1159] *Ibid*., at 314.

[1160] *Ibid*., at 282.

[1161] *York Timbers v SA Forestry Company*, [2001] Case 09/CAC/May01, at 6.9.

[1162] *Ibid*., at 6.9.

[1163] *Ibid*., at 8.3 and 8.4. See, for the earlier ruling, *York Timbers v SA Forestry Company*, [2001] Case 15/IR/Feb01, at 91 and 97.

[1164] *The Bulb Man (SA) v Hadeco*, [2006] Case 81/IR/Apr06.

[1165] *Ibid*., at 61.

[1166] *Ibid*., at 57.

[1167] *Competition Commission v Telkom SA,* [2012] Case 11/CR/Feb04.

argued that its refusal was justified, as the VANS providers were allegedly engaged in conduct contrary to the South African Telecommunications Act, thereby invoking the so-called 'illegality defence'.[1168] The SACT rejected the plea on the facts. An examination by the South African telecom regulator ICASA had revealed that the VANS providers had not engaged in illegal activities.[1169] But even in the absence of such a finding by the regulator, the SACT would have rejected the plea as Telkom had been inconsistent and selective in its refusal – freezing some, but not all, of the networks that it considered illegal.[1170] The SACT thus appears open to consider an illegality defence as a matter of law, and is right to be sceptical of such a plea if the dominant firm cannot offer a sound reason for the selectivity of its behaviour.[1171]

In sum, the *York Timbers*, *Bulb Man* and *Telkom* cases above confirm that (even apart from efficiencies) exclusionary conduct can be justified if it is based on perfectly acceptable reasons, such as a 'normal' or 'reasonable' business conduct or the illegality defence.

7 UNITED STATES

7.1 Introduction & legislation

The 1890 Sherman Act is the key US statute governing federal antitrust law. Section 2 of the Sherman Act prohibits anti-competitive unilateral conduct, referring to the act of monopolization or the attempt to monopolize.

[1168] *Ibid*., at 31. Cf. UK law, where telecom regulator Ofcom clearly endorsed the illegality defense. See Ofcom decisions of 3 November 2003 and 28 June 2005 in *Floe Telecom*. The UK Competition Appeal Tribunal agreed with that position in principle. However, on the facts of the case, it held that it was anything but clear that the firm requesting access had acted illegally. See *Floe Telecom v Ofcom*, [2004] CAT 18, at 289, 333 and 336; *Floe Telecom v Ofcom* [2006] CAT 17, at 352-353.

[1169] *Ibid*., at 87 and 94.

[1170] *Ibid*., at 88. The evidence thus suggested that the refusal was a matter of commercial strategy, rather than legal compliance.

[1171] Selectivity has also been found relevant in cases in other jurisdictions. See e.g. the judgment by the High Court of England & Wales in *Purple Parking and Meteor Parking v Heathrow Airport* [2011] EWHC 987 (Ch).

The Sherman Act does not elaborate on the legal requirements of monopolization, nor does it refer to any possible justifications. It is clear, however, that if an entity in a regulated sector acts in compliance with a detailed statutory scheme, it may be shielded from antitrust scrutiny by the doctrine of implied immunity.[1172] In addition, the case law has shown that a monopolist may invoke so-called 'valid business reasons'[1173] to justify conduct that would otherwise have been prohibited under Section 2 of the Sherman Act.[1174] The following paragraph discusses what this concept means for the purposes of US federal antitrust law.

7.2 Case law

In terms of procedure, a plaintiff may bring a federal antitrust case before a District Court. Such a plaintiff is usually a private party, but can also be one of the enforcement agencies of US federal antitrust law; namely the Federal Trade Commission ('FTC') or the Antitrust Division of the Department of Justice ('DoJ'). A subsequent appeal is open to a Circuit Court. If granted certiorari, a further appeal is open to the US Supreme Court.

The seminal US Supreme Court judgment in *Grinnell* has made clear that a claim based on Section 2 of the Sherman Act requires evidence of 'the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'[1175] Such an exercise of monopoly power involves 'specific intent'[1176] to behave anti-

[1172] See e.g. *United States v National Assn. of Securities Dealers, Inc*., 422 US 694 (1975); *Gordon v New York Stock Exchange, Inc*., 422 US 659 (1975).

[1173] Also referred to as 'legitimate business justification', see T.A. Piraino, Jr., 'Identifying Monopolists' Illegal Conduct under the Sherman Act', (2000) 75 NYU L. Rev. 847. At 851, the author proposes a standard for refusal to deal cases where the hurdle of a finding of *prima facie* monopolization is relatively low, and the examination of a justification plea takes centre stage.

[1174] The analysis does not cover justifications of conduct that would otherwise be prohibited under different laws, such as the prohibition of price discrimination under the Robinson Patman Act.

[1175] *United States v Grinnell Corp.*, 384 US 563, 571 (1966). This position was confirmed*, inter alia*, by *Eastman Kodak* v *Image Technical Services, Inc.,* 504 US 451 (1992); *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 US 585, 596 (1985).

[1176] Also referred to as 'monopolistic' intent.

competitively, implying that the defendant's conduct cannot be explained by a 'valid business reason or concern for efficiency'.[1177] A defendant can provide a pro-competitive justification for its conduct once a *prima facie* case under Section 2 of the Sherman Act has been established.[1178] If accepted, a legitimate business reason can offset a finding of 'specific intent',[1179] by providing an alternative explanation for the monopolist's predominant motivation.[1180]

If a plaintiff has carried its initial burden of showing a restraint on competition,[1181] the defendant bears the burden of persuasion that its conduct can be justified by a business purpose.[1182] A business justification has to be 'credible' rather than simply 'plausible'.[1183] The plea shall be accepted if a

---

[1177] So '[i]f there is a valid business reason for [the defendant's] conduct, there is no antitrust liability', *High Tech. Careers v San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993). See also, *inter alia*, *LePage's v 3M*, 324 F.3d 141 (3rd Cir. 2003); *Great Western Directories v Sw. Bell Tel. Co*., 63 F.3d 1378, 1385-86 (5th Cir. 1995); *Midwest Radio Co., Inc. v Forum Pub. Co*., 942 F.2d 1294, 1297-1298 (8th Cir. 1991); *Oksanen v Page Memorial Hosp*., 945 F.2d 696, 710 (4th Cir. 1991) (en banc); *Becker v Egypt News Co*., 713 F.2d 363, 366 (8th Cir. 1983) at 370.

[1178] Facey and Assaf 2002-2003, *supra* note 1002, at 566-567.

[1179] *Times-Picayune Publ. Co. v United States*, 345 US 594, 627 (1953); *United States v Columbia Steel Co*., 334 US 495 (1948). See also *Eastman Kodak Co. v Southern Photo Material Co*., 295 F. 98 (5th Cir. 1923), Aff'd 273 US 359 (1927) and *Six Twenty-Nine Prods., Inc. v Rollins Telecasting*, *Inc*. 365 F.2d 478, 486 (5th Cir. 1966). See also A.Y. Kapen, 'Duty to cooperate under Section 2 of the Sherman Act: Aspen Skiing's slippery slope', (1986-1987) 72 Cornell L. Rev. 1047, 1062. He explains that anti-competitive intent is inferred from proof of adverse effects and that, subsequently, '[t]he monopolist can negate this inference only by establishing a valid business justification for its conduct.' See also See B. Hawk, 'Attempts to Monopolize - Specific Intent as Antitrust's Ghost in the Machine', (1973) 58 Cornell L. Rev. 1121, 1163.

[1180] *Times-Picayune* (*ibid.*), at 622 and 627. See also S.C. Salop, 'Preserving Monopoly: Economic Analysis, Legal Standards and Microsoft', (1999) 7 George Mason Law Review 617. He advocates a test based on the company's primary purpose.

[1181] *Capital Imaging v Mohawk*, 996 F.2d 537 (2nd Cir. 1993). In *Jefferson Parish*, 466 US at 31, 104 S.Ct. at 1568, the US Supreme Court also held that an 'actual adverse effect on competition' must be shown.

[1182] *Aspen Skiing*, *supra* note 1175, at 608-611. According to the Court, the petitioner had failed to offer any efficiency justification for its conduct. For an analysis of the implications of *Aspen*, see e.g. Kapen 1986-1987 (*supra* note 1179); and J.B. Baker, 'Promoting innovation competition through the Aspen/Kodak rule', (1998-1999) 7 George Mason Law Review 495.

[1183] *Eastman Kodak*, *supra* note 1175, at 478-79.

defendant can show that pro-competitive benefits outweigh the anti-competitive effects.[1184] This does not necessarily entail an actual weighing of effects,[1185] but appears to require an examination 'of whether the challenged action purports to promote or to destroy competition.'[1186] Once the defendant has discharged its burden of showing a valid business justification, the burden shifts to the plaintiff to prove that the justification brought forward is 'pretextual'.[1187]

US case law offers few discernable legal tests applicable to justifications. Some judgments did suggest that the objectives proffered by a defendant could not have been achieved through less anti-competitive means.[1188] Other judgments, however, have cast doubt on the relevance of such a test. For example, in *Trinko*, the US Supreme Court held that the Sherman Act 'does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition'.[1189] This statement appears to have an impact for justifications: the more commercial liberty is awarded to a monopolist, the wider the scope becomes of a potential business justification plea.

The importance of this link clearly emerged from *Byars v Bluff City News*. The Sixth Circuit held that '[a] finding of anti-trust liability in a case of a refusal to deal should not be made without examining reasons which might justify the refusal to deal', because 'we must give [monopolists] some leeway in making

---

[1184] *California ex rel. Harris v Safeway*, *Inc*., 651 F.3d 1118, 1133 n.10 (9th Cir. 2011). However, see *United States v Microsoft Corporation*, 253 F.3d 34 (DC Cir. 2001), where the plaintiff had to show that the anti-competitive effects outweighed the pro-competitive effects.

[1185] For example, the D.C. Circuit Court did not do so in *Microsoft* (*ibid*., at 59), even though it did attach much weight to the effects of the practices under review.

[1186] *Capital Imaging*, *supra* note 1181.

[1187] See e.g. *Morris Commc'ns Corp. v PGA Tour, Inc*., 364 F.3d 1288, 1295 (11th Cir. 2004). An example where an efficiency justification was found to be 'pretextual' is *United States v Dentsply Int'l, Inc*., 399 F.3d 181, (3rd Cir. 2005) at 197.

[1188] *Eastman Kodak*, *supra* note 1175, at 483. *California Dental Association v FTC*, 128 F 3d 720 (9th Cir. 1997); rev'd 526 US 756 (1999).

[1189] *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, LLP, 540 US 398 (2004), 124 S.Ct. at 883. For an analysis of this judgment, see e.g. H.A. Shelanski, 'The case for rebalancing Antitrust and Regulation', (2011) 109 Michigan Law Review 683; E.D. Cavanagh, 'Trinko: A Kinder, Gentler Approach To Dominant Firms Under The Antitrust Laws', (2007) 59 Maine Law Review 111.

business decisions'.[1190] Other judgments by Circuit Courts affirmed that a lawful monopolist should be 'free to compete like everyone else'[1191] and is 'encouraged to compete aggressively on the merits'.[1192] In *Trinko*, the US Supreme Court followed this line of reasoning by holding that the opportunity to charge monopoly prices is precisely what attracts business acumen.[1193] Lower courts have often relied on *Trinko* to justify a refusal to provide access, especially if the plaintiff is considered to be a 'free rider'.[1194]

This hands-off approach seems induced by a wish not to chill pro-competitive behaviour. It raises questions as to the continued relevance of case law that required benefits not only to accrue to the monopolist. For example, earlier judgments had rejected business justification pleas that were simply based on the desire to maintain a monopoly market share[1195] or on the monopolist's promotion of its (economic) self-interest alone.[1196] The *laissez-faire* approach may also partly explain why US Antitrust, for all its preoccupations with efficiency, rarely enters into an actual balancing test of effects. Instead, the focus is on providing ample commercial freedom for monopolists that allow them to engage in conduct that is almost automatically associated with efficiency.

Various precedents seem to confirm the importance of commercial freedom as a justification. For example, as to a work protected by IP law, the First Circuit considered a monopolist's 'desire to exclude others' from this work 'a presumptively valid business justification for any immediate harm to consumers.'[1197] In the *Brunswick* case, which focused on a scheme of discounts, the Eighth Circuit simply

---

[1190] *Byars*, *supra* note 1037, at 862. Kapen (*supra* note 1179, at 1070) noted that the US Supreme Court in *Aspen Skiing* 'apparently ignored the need to allow monopolists some discretion in making business decisions'.

[1191] See *Olympia Equipment Leasing Company v Western Union Telegraph Company*, 797 F.2d 370 (7th Cir. 1987).

[1192] *Foremost Pro Color, Inc. v Eastman Kodak Co*., 703 F.2d 534, 544 (9th Cir. 1983).

[1193] *Trinko*, *supra* note 1189, 124 S. Ct. at 879.

[1194] J.A. Keyte, 'The Ripple Effects of Trinko: How It Is Affecting Section 2 Analysis', (2005) 20 Antitrust 44, 46.

[1195] *Data Gen. Corp. v Grumman Sys. Support Corp*., 36 F.3d 1147, 1183 (1st Cir. 1994). In *Aspen Skiing* (*supra* note 1175, at 608-11), the Court found no *rationale* for the conduct under review other than a wish to eliminate the plaintiff as a competitor. See also *Otter Tail Power Co. v United States*, 410 US 366, 378 (1973).

[1196] *Otter Tail* (*ibid*.), at 389. The Court transposed the reasoning that it had applied earlier vis-à-vis Section 1 of the Sherman Act in *United States v Arnold, Schwinn & Co*., 388 US 365, 375 (1967). For a more recent confirmation of this line of reasoning, see *LePage, supra* note 1177, at 153, 154 and 163.

[1197] *Data General*, *supra* note 1195, at 1187.

referred to the business justification that Brunswick was 'trying to sell its product.'[1198] In *Grinnell*, the First Circuit held that an exclusive dealing arrangement was justified considering the desire to achieve 'a stable source of supply', 'a stable, favorable price' and 'production planning that was likely to lower costs.'[1199] In addition, in terms of a predation case, no inference of predatory intent arises when the defendant shows that below-cost price level was reached defensively,[1200] or where the price cuts constituted a legitimate competitive response to market conditions.[1201]

Furthermore, a defendant may bring forward a valid business reason in the context of a refusal to deal case (*Aspen Skiing*),[1202] and in the presence of exclusionary conduct (*Eastman Kodak*[1203]). Examples of valid business reasons included the prevention of free-riding,[1204] 'engineering factors' that prevented the defendant from entering into a wholesale contract,[1205] and the abandonment of an unprofitable operation.[1206] Courts have also accepted a defendant's reluctance to deal with other firms on the following grounds:

- The customer is unable to maintain accurate records.[1207]
- The customer has engaged in deceptive advertising or unfair practices.[1208]

[1198] *Brunswick*, 207 F.3d 1039, 1062 (8th Cir. 2000).

[1199] *Barry Wright Corp. v ITT Grinnell Corp.*, 724 F.2d 227, 236-237 (1st Cir. 1983).

[1200] *General Foods Corporation*, 103 FTC 204 (1984).

[1201] *Richter Concrete Corp. v Hilltop Concrete Corp.*, 691 F 2d 818 (6th Cir. 1982).

[1202] *Aspen Skiing*, *supra* note 1175, at 602-605, 608-611, where the US Supreme Court found that the defendant had failed to offer any 'efficiency justification' for its conduct. See also *US Football League v National Football League,* 842 F.2d 1335, 1359 n.21 (2nd Cir. 1988). Note that in *Trinko*, supra note 1189, the US Supreme Court held that it had never acknowledged the essential facilities doctrine.

[1203] *Eastman Kodak*, *supra* note 1175, at 453 and 483-486.

[1204] *Cont'l T.V., Inc. v GTE Sylvania Inc.*, 433 US 36, 55 (1977). In this case the Supreme Court referred to 'legitimate business purpose'. See also *Int'l Rys. of Cent. Am. v United Brands Co.*, 532 F.2d 231, 239-40 (2nd Cir. 1976), cert. denied, 429 US 835 (1976). This ruling states that proof of a company's reasonable steps to preserve its business interests does not, without more, raise a genuine issue of material fact under Section 2 of the Sherman Act, and appears comparable to the ECJ ruling in Case 27/76 *United Brands v Commission* [1978] ECR 207.

[1205] *Otter Tail*, *supra* note 1195, at 378.

[1206] *Intern'l Railways of Cent. America v United Brands*, 532 F.2d 231, 239-40 (2nd Cir. 1976), cert. denied, 429 US 835 (1976).

[1207] *Byars*, *supra* note 1037.

- The defendant has moral or ethical concerns with the customer.[1209]

The US approach should be applauded for giving no pre-defined limits of what may constitute a valid business reason, enabling a wide range of possible pleas that take due account of the relevant context. At the same time, US courts could step up their effort in making clear what legal requirements apply when a company invokes such justifications. At the moment the examination of valid business reasons seems to be too dependent on an *ad hoc* examination, providing limited legal certainty for future cases.

7.3 Guidance

The Antitrust Division of the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) could equally step up their efforts to clearly explain their views of valid business reason for the purposes of Section 2 of the Sherman Act, as current guidance documents provide little insight.

The DoJ's guidance on single firm conduct under Section 2 of the Sherman Act of September 2008 does provide a number of references to the concept of valid business reason.[1210] For example, the guidance document notes that the DoJ is open to consider an efficiency defence within the context of a predation case. Overall, however, the document provides limited guidance on the DoJ's own views of this topic. In addition, the 2008 guidelines were not endorsed by the FTC and were withdrawn in May 2009. They have not yet been replaced by another comprehensive guidance document. Hopefully the DoJ and FTC will be able to provide a joint guidance document on Section 2 that also deals with justifications.

[1208] *Homefinders of America Inc v Providence Journal Co*, 621 F 2d 441 (1980).

[1209] *America's Best Cinema Corp v Fort Wayne Newspapers, Inc.* 347 F Supp 328 (1972), concerning a refusal to accept advertisements of X-rated films.

[1210] DoJ single firm conduct guidelines of September 2008, at 71, available at http://www.justice.gov/atr/public/reports/236681.pdf. This may be the case if 'the conduct is part of a firm's procompetitive efforts to promote or improve its product or reduce its costs and may, in the long term, reduce the price consumers pay for its goods and services or increase the value of those goods or services'.

8 COMPARATIVE NOTES

8.1 Introduction

In a study that spans a variety of jurisdictions with many diverging characteristics, it is tempting to focus on their differences rather than their commonalities. In my opinion, such a focus would risk missing the forest for the trees. The analysis above has shown that, despite the obvious differences, there are also many cross-border similarities. The paragraphs below examine the elements that I found particularly interesting.

8.2 Cross-border influences

Several of the judgments discussed above refer explicitly to foreign case law justifications of *prima facie* anti-competitive conduct. Such references confirm that it is possible to transpose lessons and best practices regarding justifications across borders.

Australian case law on unilateral conduct provides many references to US and EU case law.[1211] US case law has been particularly influential, prompting Williams to note: 'the [Australian] High Court, has in effect, adopted the business justification test used in the United States'.[1212] More generally, South African competition law also seems relatively open to overseas jurisprudence,[1213] referring to case law in the EU,[1214] the UK[1215] and the US.[1216] In Singapore, the CCS used the legal test mentioned by the European Commission's guidance on enforcement priorities in its *SISTIC* decision.[1217]

[1211] See e.g. *Queensland Wire*, *supra* note 1020, at 23 (referring to *Olympia Leasing*, *supra* note 22); *Melway*, *supra* note 1032, at 26 (referring to *Aspen Skiing*, *supra* note 1175); *BBM*, *supra* note 1049, at 138 (referring to Case C-395/96 P *Compagnie Maritime Belge v Commission* [2000] ECR I – 1365) and 249 (referring to Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461).

[1212] M. Williams, *Section 46 of the Trade Practices Act 1974: Misuse of Market Power - A modern day catch 22?*, 22 Queensland Law Society Journal 377, 384 (1992).

[1213] Indeed, the South African Competition Act 'drew heavily from laws in jurisdictions such as Canada, Australia and the European Union'. See the anniversary document, *supra* note 1144, at 3.

[1214] E.g. *SAA I*, *supra* note 1146, at 35, referring to *Commercial Solvents*, *supra* note 1041.

[1215] E.g. *Senwes*, *supra* note 1150, at 142, referring to *Genzyme*, *supra* note 1066.

It should be applauded that some judges and NCAs are open to consider interpretations of foreign jurisdictions, and apply such interpretations if they find them persuasive. An open-minded approach is likely to enhance the quality of their case law, as it infuses domestic competition law with well-considered deliberations from overseas institutions that have tackled similar issues in the past. Strong cross-border influences may also support substantive convergence, thus facilitating legal certainty and consistency across borders.

8.3 The legal framework of justifications

Justifications exist to exonerate conduct that is considered acceptable behaviour, even though it may be *prima facie* anti-competitive. It is thus wise to consider what type of conduct competition law does *not* seek to prohibit.

It is clear that US law prohibits a monopolist from wilfully acquiring or maintaining monopoly power only when it competes on some basis other than the merits.[1218] Similarly, Canadian law allows conduct that results from 'superior competitive performance'.[1219] In addition, Singaporean and South African law seem to permit conduct that is related to 'competitive merit'[1220] or 'competition on the merits'.[1221]

I agree that competition law should allow firms to compete on the merits. It reflects the idea that competition law does not bar firms to compete vigorously simply because they have market power. Prohibiting such conduct would have a serious competition chilling effect, and would come close to banning market power as such. Justifications can play a valuable part in exempting conduct that is seen

---

[1216] E.g. *SAA I*, *supra* note 1146, at 116, referring to *Microsoft* (*supra* note 1184); at 118, referring to *Brooke Group Ltd. v Brown & Williamson Tobacco Corp*., 509 US 209 (1993); at 121, referring to *Lorain Journal Co. v United States,* 342 US 143 (1951) and *Otter Tail* (*supra* note 1195).

[1217] *SISTIC*, *supra* note 1131, at 8.2.8; referring to at 30 of the Commission's guidance on Article 102 TFEU [ex 82 EC] enforcement priorities, OJ [2009] C 45.

[1218] *Aspen Skiing*, *supra* note 1175.

[1219] Subsection 79(4) Canadian Competition Act.

[1220] CCS guidelines, *supra* note 1117, at 2.1.

[1221] *SAA I*, *supra* note 1146, at 313.

as competition on the merits, as shall be shown below.[1222] Australian competition law has a commendable approach, as it puts great weight on the causal link between a firm's market power and its conduct. A weak link indeed provides a strong indication that a firm is simply competing on the merits in a way that it would also have done absent its market power.[1223]

This brings us to the role that justifications play in the legal analysis of unilateral conduct. Some jurisdictions have made this role perfectly clear. For example, in US law, a valid business justification may provide an alternative explanation why the firm was not 'predominantly motivated' by its monopolistic intent.[1224] A justification plea under Singaporean law, if accepted, connotes that the 'primary purpose' of the firm was not anti-competitive.[1225] Similarly, in Canada, unilateral conduct shall be allowed if the 'overriding purpose' is not anti-competitive.[1226]

One should be cautious to not equate the notion of such 'purpose' with subjective intent. Australian and Canadian law are particularly clear that subjective anti-competitive intent is not required for conduct to be prohibited, even though it may be taken into account as a relevant circumstance.[1227] Similarly, in US antitrust intent 'is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct'.[1228] In my view, this should also mean that the *lack* of subjective anti-competitive intent is, in itself, insufficient to serve as a justification, even though it can be relevant while assessing a justification plea. A finding of subjective intent to hurt competitors is of limited value in jurisdictions that explicitly encourage firms, even those with market power, to compete aggressively. US and Australian law, for

[1222] Another possibility is that such conduct falls outside the scope of competition law in the first place.

[1223] Even though the conduct may still have an anti-competitive effect precisely because of the market power.

[1224] *Times-Picayune*, *supra* note 1179, at 622 and 627.

[1225] CCS guidelines, *supra* note 1117, at 4.4.

[1226] See e.g. *Canada Pipe*, *supra* note 1075, at 87, and the Canadian Competition Tribunal's judgments in *Nielsen*, *supra* note 1059), at 69 and *Tele-Direct* (*supra* note 1063), at 259.

[1227] In terms of Australian law, see Kirby J in *Rural Press*, *supra* note 1024; *Queensland Wire*, *supra* note 1020, per Mason C.J. and Wilson J., at 22. In terms of Canadian law, see *Tele-Direct*, *supra* note 1063, at 259.

[1228] *Microsoft*, *supra* note 1184, at 58-59.

example, consider a firm's wish to harm its competitors as one of the hallmarks of competition, rather than an indication of anti-competitive conduct.[1229]

In addition, case law should make clear that an alternative 'purpose' can not only set aside a finding of anti-competitive intent, but a finding of anti-competitive effect as well; a position clearly set out in Canadian case law.[1230] In my view, this is a commendable approach as it shows that a justification can apply in two distinct ways. If it concerns a plea based on commercial freedom, one should focus on whether a dominant firm's overriding purpose was truly anti-competitive or not. However, in terms of an efficiency plea, the examination should concentrate on effects. If the conduct under review does not have a net anti-competitive effect, one may – with hindsight – then conclude that the primary purpose was pro-competitive.

Finally, competition law should clarify who bears the evidentiary burden showing a justification. After an act has been identified as *prima facie* anti-competitive, the evidentiary burden to prove a justification should, first, be put on the defendant. The defendant is the most likely party to have the requisite information and has the greatest incentive to offer a comprehensive justification plea. Canadian,[1231] South African[1232] and US[1233] case law have confirmed this approach. Considering this allocation of the evidentiary burden, courts should be hesitant to entertain pleas that have not been raised by the defendant, as was seemingly done by the Canadian Competition Tribunal in *Tele-Direct*.[1234] As to the appropriate standard of proof, Canadian and US law make clear that the justification plea must be

[1229] For US law, see e.g. *Olympia Leasing* (*supra* note 22), *Eastman Kodak* (*supra* note 1192) and *Trinko* (*supra* note 1189). For Australian law, see e.g. *Melway*, dissenting opinion by Heerey J, *supra* note 1032, at 19. The High Court agreed with the approach by Heerey J, *supra* note 1036.

[1230] See also *Canada Pipe*, *supra* note 1075, at 87. According to the FCA, the relevant effects under paragraph 79(1)(b) are those on competitors.

[1231] *B-Filer*, *supra* note 1095. On the other hand, see the submission by the Canadian Bar Association, *supra* note 1107, at 16, noting that 'the business justification doctrine is not a defence'.

[1232] *SAA I*, *supra* note 1146, at 243.

[1233] *Aspen Skiing*, *supra* note 1175, at 608.

[1234] *Tele-Direct*, *supra* note 1063, at 357-358.

credible.[1235] Indeed, a justification plea should go beyond merely asserting that there was 'some' justification for the plea.[1236]

8.4 Available types of justification

8.4.1 Introduction

The analysis of statutory provisions, case law and NCA guidance has not revealed clearly pre-defined limitations to the types of pleas that can function as a justification. I agree that the law should not *a priori* preclude firms to invoke a particular justification plea that befits their situation. This does not, and should not, mean that every single justification plea will be treated alike. It simply means that only an in-depth examination of the relevant context can reveal whether such a plea should be accepted.[1237] There is one important proviso, however. The success or failure of a justification plea should not depend on factors that seem irreconcilable with the stated objectives of a jurisdiction's competition law. For instance, if a jurisdiction only attaches relevance to efficiencies, harm to competitors should not be a factor in rejecting a justification plea.[1238]

The case law examination above has revealed several broad descriptions as to the available types of justification. In US law, a defendant may justify its conduct either based on 'concern for efficiency' as well as 'valid business reason'.[1239] Similarly, the Canadian Competition Tribunal held that it is open to efficiency pleas as well as any other 'pro-competitive business justification'.[1240] Likewise, Sections 8(c) and (d) of the South African Competition Act not only take into account efficiency benefits, but 'technological' and 'other pro-competitive gain[s]' as well. Finally, guidelines by the Singaporean regulator CCS mention that a dominant firm may justify conduct either based on its 'benefits' or because

---

[1235] *Eastman Kodak*, *supra* note 1175, at 478-79. See also e.g. Canadian Competition Tribunal rulings in *Nielsen* (*supra* note 1059) and *Tele-Direct* (*supra* note 1063).

[1236] Contrary e.g. to the Canadian Competition Tribunal's finding in *NutraSweet*, *supra* note 1069.

[1237] Canadian competition law seems particularly sensitive to context. See e.g. *NutraSweet* (*ibid*.), at 90. See also *Canada Pipe*, *supra* note 1075, at 88.

[1238] Apart from the question whether attaching relevance to the impact on competitors is desirable in the first place.

[1239] See the case law cited at *supra* note 1177.

[1240] See e.g. *Nielsen*, *supra* note 1059.

of the ‘legitimate commercial interest’ at play. [1241] The following paragraphs shall first examine the efficiency plea, and subsequently discuss other possible justifications.

8.4.2 Efficiencies

The efficiency plea is the most widely used justification in the case law of the jurisdictions under review. The plea should succeed if the conduct under review has greater pro-competitive than anti-competitive effects. This relevance of efficiencies is clearly acknowledged in Australia,[1242] Canada,[1243] Singapore,[1244] South Africa[1245] and the US.[1246]

However, the precise role of these efficiencies often remains unclear. Although an efficiency analysis conceptually calls for an effects analysis, I have not found cases on unilateral conduct in which the courts actually engage in a balancing test. This is perhaps understandable, as it is difficult for courts and regulators to provide a reliable quantification. The US Supreme Court already noted this problem in its 1949 *Standard Oil* ruling, suggesting that courts are ‘ill-suited’ to the task of weighing pro- and anti-competitive effects.[1247] This is particularly the case for dynamic efficiencies, as the extent to which conduct contributes to innovation is inherently difficult to gauge.[1248] More fundamentally, courts and regulators may be hesitant to decide potential conflicts between effects on allocative efficiency (welfare maximisation), productive efficiency (cost minimisation) and dynamic efficiency (innovation maximisation).[1249] From a court’s perspective, there may not be a clear reason to favour one type of

---

[1241] CCS guidelines, *supra* note 1117, at 4.4.

[1242] Hanks & Williams 1990, *supra* note 1024.

[1243] See e.g. the Canadian cases *Canada Pipe*, *supra* note 1075; and *Nielsen*, *supra* note 1059.

[1244] *SISTIC*, *supra* note 1131.

[1245] See e.g. Sections 8(c) and 8(d) of the SA Competition Act, and the South African Competition Tribunal rulings in *Senwes* (*supra* note 1150) and *SAA I* (*supra* note 1146).

[1246] See e.g. *Safeway*, *supra* note 1184: the concept of ‘valid business reasons’ includes efficiency benefits.

[1247] *Standard Oil Co. of California v United States*, 337 US 293, 311 (1949).

[1248] OECD Policy Roundtable, *The Role of Efficiency Claims in Antitrust Proceedings*, (2012), available at http://www.oecd.org/daf/competition/EfficiencyClaims2012.pdf. At 7-8, the document stresses the importance of dynamic efficiencies. *SISTIC* (*supra* note 1131) is an example of a case where dynamic efficiencies were relevant.

[1249] OECD 2012 (*ibid*.).

efficiency over the other. In addition, a court may struggle with deciding whether it should focus on consumer welfare or total welfare.[1250]

These difficulties may explain why courts, even if they appear to attach great weight on effects,[1251] rarely examine what precise welfare effects the conduct under review has had.[1252] Instead, courts have often preferred a looser examination, working with a less detailed approximation of effects. For example, in *SAA I*, the South African Competition Tribunal held it simply requires 'some notion' of the quantitative effects.[1253] The examination focuses on whether a practice *tends* to have pro-competitive effects or not. The more value a jurisdiction attaches to efficiency and effects, the stronger the case must be founded in economic price theory.[1254]

Another possibility is that courts may use a proxy for efficiencies. US case law suggests that conduct by companies with market power is associated with efficiency as long as it takes place within the realm of the commercial freedom afforded to them. This may explain why US cases have often examined

---

[1250] A. Neil Campbell and J. William Rowley, 'The Internationalization of Unilateral Conduct Laws – Conflict, Comity, Cooperation and/or Convergence?', (2008-2009) 75(2) Antitrust L.J. 267, 319-320. See also OECD 2012 (*ibid*.), at 5-7, noting that economists are split over this issue. For example, Oliver Williamson supported a total welfare approach, whereas Alfred Marshall advocated a consumer welfare approach.

[1251] Or even where courts explicitly state that an efficiency plea calls for a balancing exercise between pro- and anti-competitive effects, see *Senwes*, *supra* note 1150.

[1252] See e.g. *Microsoft*, *supra* note 1184. For a critical view of the added value of efficiency balancing within merger law, see e.g. W. Rosenfeld, *Superior Propane: the case that broke the law*, available at http://www.goodmans.ca/docs/SuperiorPropane.pdf. At 1, Rosenfeld notes: 'The Canadian experience in elevating efficiencies to a level which outranks anti-competitiveness has been confused, costly, and proven ultimately unacceptable'. See, differently, Campbell and Rowley 2008-2009, *supra* note 1250, at 319. They do favour an approach based on efficiencies and argue that, because such efficiencies are usually not properly addressed, the subsequent result has been a 'piecemeal, ad hoc treatment of an issue of fundamental importance'.

[1253] *SAA I*, *supra* note 1146, at 110. At the same time, the Competition Tribunal seems to gradually put more emphasis on a comprehensive analysis of effects.

[1254] See also Eleanor M. Fox, 'Eastman Kodak Company v Image Technical Services, Inc. – Information Failure as Soul or Hook', (1993-1994) 62 Antitrust L.J. 759, 767.

whether the conduct under review 'purports to promote or to destroy competition',[1255] instead of actually engaging into a balancing test.[1256] Australian law seems to take a similar approach.[1257]

Finally, the case law analysis also offers food for thought as to the applicable legal test vis-à-vis an efficiency plea. Of course the defendant must be able to show that efficiencies exist, as shown e.g. by the Canadian Competition Tribunal's judgment in *Laidlaw*[1258] and the Competition Commission of Singapore's *SISTIC* decision.[1259] The most important requirement, however, is that the relevant benefits would not have arisen absent the conduct under review. There is no reason to accept anti-competitive conduct on the basis of efficiencies if those benefits would have materialized anyway. A clear example is the South African Competition Appeal Court ruling in *Patensie*, noting that the efficiencies relied upon must directly relate to and be dependent upon the conduct under review.[1260] Similarly, the *SISTIC* decision suggests that the necessity test is also relevant for the purposes of Singaporean competition law, as the proclaimed benefits must be 'directly attributable' to the conduct under review.[1261] Other jurisdictions would do well in providing more guidance as to the applicable legal conditions.

8.4.3 Justifications other than efficiencies

The examination of this chapter has revealed that justifications have a much wider scope than simply encompassing efficiencies. It usually concerns conduct that, in its specific context, can be considered as legitimate business behaviour. In Hong Kong and Singapore, legislation provides that the prohibition of unilateral anti-competitive conduct does not apply if a compelling reason of public policy is at stake.[1262] Both jurisdictions award their respective executive bodies with a high level of discretion to determine the scope of the public policy exemption, and would benefit from guidance making clear how the executive intends to make use of this discretion in order to reduce the risk of arbitrary application.

[1255] See *Capital Imaging*, *supra* note 1181.

[1256] *Microsoft*, *supra* note 1184.

[1257] *Queensland Wire*, *supra* note 1020.

[1258] *Laidlaw supra* note 1091, at 91.

[1259] *SISTIC*, *supra* note 1131.

[1260] *Patensie*, *supra* note 1154, at 30. See also *SAA I*, *supra* note 1146, at 256.

[1261] *SISTIC*, *supra* note 1131, para.8.2.8.

[1262] Subdivision 2 of division 3 of the Hong Kong Competition Ordinance and the Third Schedule of the Singapore Competition Act.

Australian, Hong Kong and Singaporean legislation also clearly provide that the conduct shall not be forbidden if it seeks to comply with a legal requirement.[1263] In addition, US case law has confirmed that the doctrine of implied immunity may shield an entity that seeks compliance with another statute from antitrust scrutiny.[1264] Similarly, in Canada and South Africa, a refusal to deal is likely to be justified if the company requesting supply does not comply with its regulatory obligations.[1265] I agree that unilateral conduct should not be prohibited if a firm with market power does not act out of free will, but rather out of necessity to abide by its legal obligations.[1266]

Apart from these exemptions, however, the jurisdictions under review have also acknowledged the relevance of what I term 'legitimate commercial conduct'. The jurisdictions under review refer to this concept in strikingly similar ways: 'valid business reason' or 'legitimate business justification' (US);[1267] 'legitimate commercial interests' (Singapore);[1268] a '(pro-competitive) business justification' (Canada),[1269] 'legitimate business considerations' (Australia)[1270] or a 'legitimate business justification' (South Africa).[1271] These expressions reflect a similar concept, namely that unilateral conduct is not illegal if the company under review does not transcend the boundaries of legitimate business behaviour (even though, admittedly, the precise boundary between this plea and efficiencies is not always easy to draw).

[1263] Section 51 of the Australian Competition and Consumer Act; Section 2(2) of Schedule 1 of the Hong Kong Competition Ordinance; Third Schedule of the Singapore Competition Act.

[1264] See e.g. the cases cited at *supra* note 1172.

[1265] See *B-Filer*, *supra* note 1095; and *Telkom*, *supra* note 1167. See also the UK Competition Appeal Tribunal judgments in *Floe*, *supra* note 1168.

[1266] In my view, this exemption should even be expanded to *any* unilateral conduct where the firm with market power did not choose its course of action. However, due to the lack of legislation or cases on this issue in the jurisdictions under review, it shall not be discussed here.

[1267] See the case law cited at *supra* note 1177.

[1268] CCS guidelines, *supra* note 1117, at 4.4. Singapore also refers to 'objective justification', the standard term also used by the European Court of Justice in its case law.

[1269] See e.g. *Nielsen*, *supra* note 1059.

[1270] See e.g. *BBM*, *supra* note 1049, at 70.

[1271] *Bulb Man*, *supra* note 1164, at 57 and 60.

An obvious follow-up question is how far such commercial freedom extends. In my view, it is instructive to consider whether there is any nexus between a firm's market power and the conduct under review. Such an examination may reveal if the firm would have acted in the same way absent its market power. As a result, it can be an important indicator to show whether certain conduct is competitive or rather an expression of the lack of competition.[1272]

Such an assessment relies on the assumption that firms with market power may usually act in the same way as firms that lack market power. Under Australian and US law, such companies are clearly allowed to compete just as vigorously compared to other companies.[1273] This approach suggests that companies with market power do not have to show that their actions benefit a greater good – their competitive conduct, as long as it stays within the sphere of their commercial freedom, can already considered to benefit the economy at large.

It is thus no surprise that the scope for a justification plea is narrower to the extent that a jurisdiction affords less commercial leeway to companies with market power. For example, the Canadian Competition Tribunal has taken into account whether the invoked justification is 'in the public interest' or 'socially beneficial',[1274] rather than solely in the 'self-interest' of the firm invoking the justification.[1275] It is understandable that a justification plea will fail if the alleged benefits accrue only to the firm with market power.

[1272] See *Queensland Wire*, *supra* note 1020.

[1273] For Australian law, see e.g. *Queensland Wire* (*ibid.*), at 191. For US law, see *Olympia Leasing*, *supra* note 22. See, similarly, the Judicial Committee of the Privy Council in *Telecom Corp of New Zealand v Clear Communications (New Zealand)*, [1994] UKPC 36, at 20: 'A monopolist is entitled, like everybody else, to compete with its competitors: if it is not permitted to do so it "would be holding an umbrella over inefficient competitors"'.

[1274] *Tele-Direct*, *supra* note 1063, at 215 and 248-249. At 216, the Tribunal reiterated its doubts on whether 'the unrestricted pursuit of completeness, while it may be in Tele-Direct's interest, is wholly in the public interest or "socially optimal"'.

[1275] *Ibid*., at 67-68. Note that certain US judgments, such as *Otter Tail* (*supra* note 1195), have rejected a justification plea as it was solely based on the monopolist's self-interest. It could be questioned, however, if this is still good law considering more recent case law such as *Trinko*, *supra* note 1189.

At the same time, such requirements may go too far. In Singapore, one of the arguments to reject a justification plea was that one of the 'stakeholders' did not benefit from the conduct under review, even though it is unclear why benefits should accrue to each and every market participant.[1276] Equally puzzling is the stance by the Canadian Federal Court of Appeal that the law should take due account of the impact upon competitors;[1277] a stance that risks a serious competition-chilling effect. I think that the law should make clear *who* must benefit from the alleged gains of the conduct (apart from the dominant firm), and *how* a balance should be struck between the various interests. For example, in *BATSA*, the South African Competition Tribunal accepted that a dominant firm's category management was a legitimate form of competition and left sufficient alternatives for competitors to augment their market share – even though the practice undoubtedly had *some* adverse effect on third parties. [1278]

The scope of commercial freedom appears to be particularly important in refusal to deal cases. Australia,[1279] Canada,[1280] Singapore,[1281] and the US[1282] have confirmed that a refusal to supply may be justified if the company requesting supply does not abide by 'normal' business practice. Of course several factors may indicate what, in the particular circumstances of the case. Again, a helpful analytical tool is to consider whether a firm without market power would, in the same situation, also have discontinued supply.

In terms of the applicable legal conditions, the FCA's judgment in *Canada Pipe* provides a useful enumeration. A business justification requires a credible pro-competitive rationale that is not only attributable to the respondent, but also relates to and counterbalances the anti-competitive elements of the conduct.[1283] Although these conditions relate specifically to the assessment of paragraph 79(1)(b) CA, I think they can and should be considered by courts in other countries. A strong cross-border dialogue is, in my opinion, a good way to identify promising practices. And even if it does not bring

---

[1276] *SISTIC, supra* note 1131, at 8.3.6.

[1277] *Canada Pipe*, *supra* note 1075.

[1278] *BATSA*, *supra* note 1158, at 273-282.

[1279] See the dissenting opinion by Kirby J in *Melway*, *supra* note 1036, at 104, and the case law cited.

[1280] *Tele-Direct*, *supra* note 1063.

[1281] CCS guidelines, *supra* note 1117, at 4.4. It gives the example of a customer's poor creditworthiness.

[1282] See the case law cited at *supra* note 1204 – 1209.

[1283] *Canada Pipe*, *supra* note 1075, at 73.

competition law regimes closer together, it can at least show where competition law regimes differ and where they resemble. This outcome would, in itself, be valuable for firms that operate globally and have to take into account a growing number of competition law regimes.

8.5 Lessons for EU law

Before concluding this chapter, it is apt to consider what lessons can be drawn for the purposes of EU law. For a start, all the jurisdictions under review have acknowledged the importance of efficiencies *as well as* a category of legitimate business conduct. In essence, the latter type of justification reflects the notion that the firm with market power still has a degree of commercial freedom left – a position that the ECJ would do well to articulate more clearly in its future case law.

The experience of the non-EU jurisdictions under review shows that the quantification of efficiencies is highly complex. It explains why many cases show the use of proxies to establish why certain conduct should be deemed efficient or not. The ECJ should be aware of such difficulties, and make clear to what extent it allows the use of proxies to establish whether or not the conduct has a net pro-competitive effect. To the extent that the ECJ does require a quantification of effects, it should make clear how a bias in favour of easily quantifiable effects can be avoided. The ECJ should also allow for efficiencies that are difficult to gauge, but may have a vast welfare effect. A key assessment should be the causal link between the *prima facie* anti-competitive conduct and the efficiencies.

In terms of justifications other than efficiencies, it is submitted that the ECJ should enunciate more clearly that a dominant undertaking is still allowed to enter into 'normal' competitive behaviour – reflecting the commercial freedom that it still has. In essence, it calls for a contextual analysis of the conduct, showing whether or not the conduct was truly anti-competitive or not. Notwithstanding the 'special responsibility' incumbent upon dominant firms, the ECJ should be very cautious to consider conduct as an abuse if it is simply a normal business practice in that particular sector – otherwise such firms may be unduly constrained, to the detriment of the public at large. A useful test is to examine what the firm would have done absent its market power. Conduct should, in principle, not be an abuse if there is no causal link between the conduct under review and the dominance of the undertaking.

As a final remark, there are little signs of a separate ‘public interest’ plea similar to the one identified in the two previous chapters. It appears that such a plea can often be subsumed under a different heading. In jurisdictions such as Hong Kong and Singapore, competition law provides ample room for public interest related measures by executive bodies – although this still leaves the question to what extent dominant firms can act in the public interest aside from government compulsion. Instead, jurisdictions such as Australia and the US may subsume such a plea under the heading of commercial freedom. In terms of Australian law, such conduct would not have the requisite causal link with the prevalent market power.

9 CONCLUSION

The prohibition of anti-competitive unilateral conduct by companies with market power is clearly not absolute. Jurisdictions across the globe have accepted that such conduct is only prohibited in the absence of a justification. But despite its apparent importance, there seems to be little cross-border dialogue on this topic. In order to obtain a better understanding of how such justifications are interpreted across the globe, this chapter has examined a number of jurisdictions: Australia, Canada, Hong Kong, South Africa, Singapore and the United States.

For all the differences between these jurisdictions, there are many similarities as well. Overall, the jurisdictions under review ascribe a comparable role to justifications in their legal assessment of unilateral conduct. Basically such a justification can provide an alternative explanation of the conduct under review, setting aside a finding of an anti-competitive purpose or effect. It is submitted that dominant firms should not *a priori* be precluded from invoking any particular type of justification, as only an in-depth examination of the relevant context can reveal whether a justification should be accepted.

When a dominant company manages to show that its conduct has a net pro-competitive effect, such evidence should constitute a valid justification. Such a justification does not necessarily require a weighing exercise of quantified effects, but rather an examination of whether the practice *tends* to be pro-competitive or not. Jurisdictions that are particularly effects-focused, such as Australia and the US, are likely to require the plaintiff to firmly base its case in economic price theory.

In addition, conduct may also be justified on grounds other than efficiency. Often such behaviour is simply considered 'reasonable' within its specific context. This may be because the dominant company seeks to comply with a legal requirement. It also includes conduct that can be subsumed under 'commercial freedom', reflecting the idea that companies with market power still have a degree of leeway to freely decide their business behaviour (also referred to as 'competition on the merits'). An instructive, although not determinative, assessment to explore the boundaries of commercial freedom is by examining whether the company would also have engaged in the practice under review absent its market power.

It is submitted that the comparative analysis has revealed ample common ground for further contemplation on the issue of justifications of *prima facie* anti-competitive unilateral conduct, which would benefit cross-border legal certainty and consistency. The concept of justifications of *prima facie* anti-competitive unilateral conduct is simply too important to be left ignored.

CHAPTER VII CONCLUSION

1 JUSTIFICATIONS AND UNILATERAL CONDUCT LAW: THE GROUNDWORK

This Chapter brings together the main observations from my PhD research. The thesis examines the concept of justifications in EU law (the focal point of the research) as well as the laws of several EU Member States and non-EU jurisdictions. The study shows that all these jurisdictions have accepted the availability of a justification plea for unilateral conduct that their competition laws would otherwise prohibit.

Even though the justification concept is obviously relevant to indicate the boundaries of prohibited unilateral conduct, many questions remain as to its precise scope and to the applicable legal conditions. In addition, there seems to be little international dialogue on this topic. The lack of such a debate entails risks for the quality and the consistency of the application of the justification concept across the globe.

In this PhD thesis I explore how various jurisdictions have dealt with such justifications, and offer suggestions as to how they should be dealt with. The examination seeks to encourage NCAs and courts to draw from experiences in other jurisdictions, in order to achieve more cross-border convergence of the law on unilateral conduct. Perhaps the gap we need to bridge is narrower than we think. Indeed, even though there seems to be little international debate on the topic at the moment, there are striking similarities in the way that jurisdictions deal with justifications.

The issue of justifications vis-à-vis *prima facie* anti-competitive unilateral conduct does not stand in isolation, but is inextricably linked with broader debates in competition law. A key element is how much commercial freedom a jurisdiction wishes to afford to dominant companies. A jurisdiction may have ample faith in market forces and less faith in the ability of regulators and courts to improve market outcomes. Such a jurisdiction is likely to accept a relatively wide range of unilateral practices, in order to avoid the competition-chilling risk that over-enforcement may entail. By contrast, a jurisdiction is likely to opt for a stricter regime if it has a relatively small and closed-off economy, in which self-correcting market mechanisms are less likely to adjust for any anti-competitive practices. For example, companies may dominate an economy not because of their superior efficiency, but because the government has

shielded them from competitive forces for a prolonged period of time. Such imbalances can persist for many years, even after the government has withdrawn its former protection.

The discussion on justifications may also be broadened to include lessons from moral philosophy. Consequentialism assumes that we should focus on effects to establish whether certain conduct has moral worth. Consequentialism can provide a theoretical basis for considering an efficiency plea and a public interest plea, to the extent that these pleas connote that the beneficial effects outweigh the detrimental effects. By contrast, deontology suggests that we should only ascribe moral worth depending on the nature or the intention of the conduct under review. Kantian ethics, more specifically, can provide a dogmatic foundation for legitimate commercial conduct (to the extent that such conduct conforms to the universal law), and public interest (to the extent that such conduct protects human dignity). Furthermore, a deontological perspective that focuses on an actor's intent may provide a theoretical underpinning for a justification based on objective necessity, which implies that there is no anti-competitive intention.

A distinction can be made between reasons on the basis of which unilateral conduct escapes the prohibition altogether, and reasons that function as a genuine justification. This thesis deals with both categories and does not propose any strict delineation between them. In most cases, similar arguments can relate to both stages of the analysis. A discrimination case offers perhaps the best example: the (alleged) explanation for differentiated treatment could be used when determining whether there has been a *prima facie* abuse, or when determining whether a justification applies. A formalistic regime is more likely to consider differentiation as a *prima facie* abuse. In such a regime, the arguments that may have otherwise been treated during the first analytical step, can only be dealt with during the second analytical step – i.e. the examination of a justification. With these comments in mind, the following paragraphs provide an overview of the main findings of the PhD thesis.

2 LESSONS FROM OTHER AREAS OF EU LAW

Chapter II puts the topic of the thesis in a broader EU law perspective. The Chapter examines what lessons can be drawn from other areas of EU law for the understanding of justifications vis-à-vis Article 102 TFEU. It examines the law on the free movement of goods, Article 101 TFEU and merger control.

* Free movement of goods

Article 34 TFEU prohibits State measures that impede the free movement of goods between EU Member States. Domestic measures may, however, escape the prohibition on the basis of several grounds. The first ground is the explicit derogation provided for by Article 36 TFEU. The provision contains mostly 'non-economic' interests that are normally associated with action by the State. However, the case law has clearly shown that non-State actors may also invoke the provision.[1284] It shows that, within EU law, there is no conceptual impossibility for non-State entities to rely on public interest type arguments.

A second ground for removing State measures from the ambit of Article 34 TFEU applies if the conduct under review falls under one of the unwritten 'mandatory requirements'. The ECJ has been willing to consider a wide array of unwritten justifications to compensate for an otherwise overly restrictive prohibition. This suggests that 'objective justification' may have a wide scope, even though Article 102 TFEU does not explicitly mention the concept. Finally, the mandatory requirements test attaches great importance to the surrounding context and is particularly cogent if the measure under review conforms to values protected by the general principles of EU law.

A third ground on the basis of which State measures may escape the application of Article 34 TFEU exists, in short, if the measure does not *truly* impede inter-State trade. The gist is that the Treaty should not prohibit measures that do not materially hamper market access by operators from other Member States. A lesson for Article 102 TFEU is that there must be a sufficiently strong nexus between the relevant conduct and the interest that the Treaty provision seeks to protect (i.e. competition undistorted by unilateral conduct).

* Article 101 TFEU

Article 101(1) TFEU prohibits anti-competitive agreements which may affect trade between Member States. Acknowledging that there may still be reasons to condone such agreements, Article 101(3) TFEU provides a number of conditions for an exemption. I have argued in favour of conceptual consistency

[1284] See para 86 of the *Bosman* judgment, as quoted by *supra* note 142.

between Article 101 TFEU and Article 102 TFEU, and tried to show that Article 101 TFEU contains various lessons for the concept of justifications under Article 102 TFEU.

Article 101(3) TFEU acknowledges that seemingly restrictive conduct by undertakings may have diverging effects. Basically, the examination under Article 101(3) TFEU seeks to examine whether the benefits arising from the agreement can outweigh the harm identified under Article 101(1) TFEU. It is submitted that Article 101(3) TFEU may not only encapsulate efficiencies, but can accommodate non-efficiency considerations as well. An example is the internal market. This is clearly an important objective that can put much weight in the scale of Article 101 TFEU, even though it is not a standard directly based on efficiencies.[1285]

As to the conditions of Article 101(3) TFEU, it is clear that benefits must have a wider remit than simply accruing to the undertakings themselves. As regards the condition that the restriction may not eliminate residual competition, it is worthy of note that the Commission proposes a sliding scale approach that takes into account to what extent competition is 'already weakened' by the restrictive agreement – clearly in synch with Article 102 TFEU where the degree of residual competition should also be relevant.

Apart from the justification in Article 101(3) TFEU, agreements may also escape the application of Article 101(1) TFEU altogether – even those that have *some* restrictive effect on competition. In some cases the restriction under review was, in its context, simply not grave enough to merit application of Article 101(1) TFEU. In other cases the restriction was considered 'ancillary' to otherwise efficient business conduct or legitimate aims pursued by bodies with a distinct regulatory competence. The ECJ thus seems to acknowledge that undertakings should have a certain degree of commercial freedom, taking in the realities of business practice and the relevant context.

* Merger control

[1285] It is true that the internal market objective can often be *associated* with efficiencies, as a well-functioning internal market is likely to lower costs for businesses (productive efficiency) and widen choice and lower prices for consumers (allocative efficiency). However, the internal market goal should primarily be seen as a political objective, which may even take precedence if this would *lower* efficiency – consider a situation of price discrimination between Member States, that may be prohibited even though it could be beneficial from an efficiency perspective.

Merger control has various features that may be transposed to Article 102 TFEU. First, it is clear that efficiencies can be highly relevant when determining whether a merger is anti-competitive or not. The efficiencies should be merger-specific. There is no reason to uphold an efficiency plea in the absence of a clear causal link between the merger and the stated efficiencies. In addition, the efficiencies shall only be accepted if they cannot be achieved through other, less anti-competitive, means.

Second, merger control allows a 'failing firm' defence. The plea acknowledges that there must be a connection between the merger and the alleged impediment to competition. The plea can be compared to a situation of objective necessity, as there is no viable alternative that is less anti-competitive.

Third, the Merger Regulation allows Member States to examine public interest concerns that may follow from a merger with a EU dimension. Although such a domestic examination cannot alter the outcome of the Commission's competition assessment, it does provide an acknowledgment that non-competition interests may be legitimate as well, and can be affected by the outcome of a competition assessment.

3 THE SUBSTANCE OF OBJECTIVE JUSTIFICATION AND ARTICLE 102 TFEU

Chapter III turns to the core of the PhD research, discussing the substance of objective justification within the framework of Article 102 TFEU. According to established ECJ case law, an undertaking does not abuse its dominant position insofar it can rely on an objective justification. The ECJ's approach makes sense: the negative connotation of 'abuse' implies that no justification applies. The absence of an explicit derogation possibility, as found in Article 101 TFEU, does not make this any different. For example, the ECJ's introduction of unwritten 'mandatory requirements' in internal market law show that unwritten derogations may be used in order to narrow the scope of a prohibition that would otherwise have an overly wide scope. The Chapter argues that the concept of objective justification can and should have a key role in the Article 102 TFEU analysis. The concept can draw the provision away from a formalistic application and can infuse competition enforcement with a more context-based approach.

Notwithstanding the relevance of objective justification, however, there are still many uncertainties as to its scope and applicable legal conditions. To provide more clarity in the justification analysis, the Chapter argues in favour of distinguishing between several 'categories' of objective justification. The

first category is legitimate business behaviour. Legitimate business behaviour provides a justification for conduct that has an insufficiently strong nexus with the company's dominant position. This category should encompass competition on the merits, as there is no reason why competition law should prohibit pro-competitive conduct.[1286] A dominant undertaking still has a degree of commercial freedom, notwithstanding its 'special responsibility' not to impair effective competition. In addition, legitimate business behavior should include objective necessity, where a dominant undertaking cannot reasonably be expected to act differently. Only autonomous actions by an undertaking should lead to the possibility of a competition law infringement. This criterion is clearly not met in the case of *force majeure* or State compulsion, where factual or legal circumstances require the dominant firm to act in a specific way. A situation of objective necessity may also exist in the case of pressing technical or commercial requirements – even though the dominant firm must then be able to show why it could not have resorted to potentially less anti-competitive alternatives.

Efficiency considerations are a second source of objective justification. If the conduct leads to a positive net welfare effect, it may be objectively justified. The category fits in a context where the Commission is pushing towards a more effects-based approach of competition law. Recent ECJ case law confirms the relevance of efficiencies within Article 102 TFEU. For this purpose, the ECJ has in effect transposed the conditions of Article 101(3) TFEU to Article 102 TFEU. Although perhaps not a perfect fit,[1287] the

[1286] Of course it may be possible that competition on the merits does not arrive at the objective justification stage if it is no *prima facie* abuse in the first place. To my mind, acknowledging that competition on the merits may also be subsumed under an objective justification can function as a 'safety valve' to ensure that such conduct is not prohibited – in particular when the finding of a *prima facie* abuse can be made on relatively formal (i.e. non-context related) grounds. This is not to say that I support a formalistic approach towards abuse: it simply means that, in EU law, a finding of a *prima facie* abuse has often been based on relatively formal grounds with little regard to the surrounding context.

[1287] For example, the examination of less anti-competitive alternatives may be relatively straightforward in terms of Article 101 TFEU: the undertakings concerned can simply refrain from entering into, or prolonging the effect of, the one agreement found to be anti-competitive. By contrast, if unilateral conduct is found to be contrary to Article 102 TFEU, it is often much less clear what the undertaking concerned is still allowed to do. For example, rebates may be abusive if certain conditions have been met – but that does not mean that the dominant firm is completely barred from providing *any* rebates.

transposition does have the advantage of strengthening consistency between the two provisions, and of providing Article 102 TFEU with a tried and tested analytical framework.

The framework may be of use for the many challenges that lie ahead. Although an efficiency-balancing test appears to be straightforward in theory, in practice it is anything but. It is highly complex to establish a reliable and precise quantification of all the relevant effects. Furthermore, there is a risk of a bias in favour of the types of efficiencies that are easier to quantify than others. The Commission and the ECJ should make clear what types of efficiencies they deem relevant and how they decide on a balancing test within the specific circumstances of that case. In my view, there should be a clear balance between the *magnitude* of the effects and the *likelihood* with which they are thought to arise. The context will be important, which also means that efficiencies should not be rejected *a priori* simply because they are invoked by a super-dominant firm.[1288] A separate issue is that a legal test where the result can only be known *ex post* is difficult to reconcile with legal certainty. A more effects-based approach inherently leads to fewer clear-cut rules than a formalistic approach, but this is arguably a price worth paying if it leads to better rules. In addition, the legitimate business behaviour category may be of use in situations where quantification appears difficult, as that category is less demanding in terms of its effects analysis.

A third source encompasses public interest considerations, where a public policy goal can trump the application of Article 102 TFEU. This does not mean that competition law should be the primary means through which public interest is achieved, but rather that Article 102 TFEU should not, *a priori*, reject such considerations as irrelevant. Taking into account public interest objectives is in line with ECJ case law holding that EU law should be interpreted in light of the Union's wider principles and objectives. I think that a public interest plea is particularly persuasive if the relevant conduct protects a vital public interest goal that is clearly protected by the Treaty, and presents only a limited issue for competition. Although the ECJ has rejected the public interest plea in several cases on the facts, I still think that the plea is available as a matter of law.

[1288] Even though, in this PhD, I have argued that the degree of market power should indeed be taken into consideration as relevant context.

Of course, there are no clear-cut lines between the types of objective justification described above. Indeed, they may have considerable overlaps. For example, competition on the merits is likely to be strongly related with conduct that has a net efficient effect. Nevertheless, I believe that the categorisation helps bringing more structure into the analysis of objective justification. The categorisation shows its worth, *inter alia*, when one considers what legal test to apply. For example, an efficiency plea should consider the necessity test, as there is no reason to condone *prima facie* abusive conduct if those efficiencies could have been achieved through different means as well. At the same time, a necessity test is much less useful when examining *force majeure*, as such a plea connotes that the dominant undertaking could not have acted differently in any event. Finally, the chapter also shows that objective justification should be interpreted in line with the type of *prima facie* abuse that is at play. In sum, objective justification can – and should – function as a structured plea that can provide additional context into an abuse of dominance analysis.

4 THE PROCEDURE OF OBJECTIVE JUSTIFICATION AND ARTICLE 102 TFEU

Chapter IV examines various procedural aspects of objective justification within the framework of Article 102 TFEU. The focus is, in particular, on the applicable burden of proof, the evidentiary burden and the standard of proof.

The Commission and NCAs clearly bear the burden to prove an infringement of Article 102 TFEU. However, this does not mean that they bear the evidentiary burden to prove the absence of objective justification. The ECJ has determined that the latter burden will initially be borne by the dominant firm. The evidentiary burden is then able to shift back and forth depending on what type of evidence is being considered. To my mind, this approach makes sense: even though the absence of an objective justification could be seen as a constituent part of the abuse prohibition, it would go too far to require the Commission to examine, *a priori*, every single justification that could hypothetically apply. When contemplating the evidentiary burden, one should look closely at the *legal consequences* of that fact being proven. If the dominant firm has discharged its initial burden of invoking (and showing) an objective justification, it is up to the Commission to provide evidence why the invoked justification should not apply. If the Commission is unable to do so, there is no abuse.

It is submitted that the difficulty in meeting the standard of proof will vary according to the circumstances of the case. The lower the impact of the firm's conduct, the easier it will be to meet the requisite standard for an objective justification plea. In my view, the difficulty in meeting that standard should to a large extent depend on the type of objective justification that the dominant firm wishes to invoke.

It appears that, from the dominant firm's perspective, the standard of proof may be relatively difficult to meet in a plea based on efficiency or public interest. These types of justification require a difficult balancing test that cannot be taken lightly – the loss in competition should be compensated either by clear efficiency gains or benefits to a public interest goal. The standard of proof is perhaps easier to meet if it concerns a plea based on legitimate business conduct. For example, there may be clear evidence that the conduct arises from objective necessity, in the sense that the dominant firm had no alternative way to act. In addition, dominant firms should have the possibility to show that their conduct is legitimate competition on the merits. Such a plea will be particularly persuasive if the dominant company manages to show that the conduct under review was unrelated to its dominance.

Matters become more complex in a private law context. In a stand-alone action, the regular domestic rules on burden and standard of proof apply. The most important demand that currently arises from EU law is that these national rules may not be interpreted in such a way that would disable the *effet utile* of the private enforcement of EU competition law. In a follow-on action, a dominant firm will in principle no longer be able to invoke an objective justification. Its best chance to escape civil liability is by invoking domestic legal conditions that are not part of the objective justification plea, such as lack of foreseeability. However, an objective justification may possibly be invoked if the domestic context is different from the context in which the Commission took its decision; for example if the efficiency analysis would render a different outcome at the domestic level than at the EU level.

5 OBJECTIVE JUSTIFICATION AT THE LEVEL OF EU MEMBER STATES

Chapter V examines how EU Member States have interpreted the concept of 'objective justification' for the purposes of their domestic competition law, focusing in particular on its scope and the applicable legal conditions. The examination discusses cases from France, Germany, Ireland, Luxembourg, the

Netherlands, Spain and the UK. The Chapter uses the same categories of objective justification as were introduced by Chapter III: legitimate business behaviour, efficiency benefits and public interest gains.

Cases at the EU Member State level provide several examples of these types of justifications. The examination of UK competition practice, in particular, has revealed several cases where justifications have played an important role. The UK NCAs and courts should be commended for their efforts to apply the objective justification concept in a structured and well-conceived manner – even though such deliberations may undoubtedly lead to findings that could be at odds with each other. If there are to be inconsistencies, it is better to have them out in the open.

As to the available types of justifications, NCAs and domestic courts have often relied on a notion of legitimate business conduct. Several Member States clearly attach much weight to commercial freedom. The Chapter argues that an analysis of such a justification should pay heed to the relevant nexus between the dominant position and the conduct under review. The more likely it will be that the dominant firm would also have engaged in that conduct *without* being in a dominant position, the easier a justification can be applied. The proportionality test, *stricto sensu*, should provide the key method of legal assessment. By contrast, an indispensability test (that examines whether the objective could have been reached through alternative, less anti-competitive, means) will be less relevant.

Some domestic cases also show the relevance of objective necessity, implying that the dominant company could not have been expected to act differently. The *Aberdeen Journals* case has shown that *force majeure* may be accepted if the *prima facie* abuse follows completely from reasons external to the dominant company. Furthermore, the UK Competition Appeal Tribunal took the position in *Floe* that competition law cannot force undertakings to act against the law.[1289] It is true that such a position is perhaps easier to uphold in a purely domestic setting compared to a situation where national law and the EU competition rules are at odds (considering the differences in the hierarchy of norms).[1290] However, the CAT's approach does have benefits over the position seemingly taken by those ECJ

[1289] *Floe Telecom v Ofcom* [2004] CAT 18; *Floe Telecom v Ofcom* [2006] CAT 17.

[1290] In a purely domestic setting, the generalist rules of competition law can be set aside by more specific rules according to the *lex specialis* adage. However, this reasoning does not apply to the EU competition rules. These rules are enacted in the Treaty and enjoy primacy over EU regulatory measures (enacted in secondary legislation such as Regulations and Directives) and domestic measures.

judgments that suggest that there may still be an infringement even in the presence of clear State compulsion.[1291]

Another type of justification is the efficiency plea. NCAs and domestic courts should make clear what type of efficiencies they deem relevant, and how they weigh the various pro- and anti-competitive effects. Moreover, the dominant firm must show that the conduct under review is indispensable to achieve the pro-competitive effects. Many domestic cases that have accepted efficiencies, however, simply state in general terms that the conduct will lead to efficiencies, but fail to make an explicit balancing test. There is much room for improvement here.

Finally, surprisingly many domestic cases have relied on public interest – especially if one considers the lack of guidance given by EU law (and, for that matter, the scepticism expressed by many commentators about the viability of such a plea). Such cases confirm that public interest may indeed provide a justification for a *prima facie* abuse. Several domestic cases show the importance to uphold safety and security standards. A public interest plea should make clear what objective the conduct seeks to attain and why it should prevail over competition concerns – so, in other words, why the dominant firm is right to go beyond its legal requirements vis-à-vis a particular public interest. In addition, if the dominant firm engages in conduct that differentiates between its own (downstream) operations and third parties, it should clarify why working towards the public interest should have an adverse impact upon other market participants, while leaving its own downstream activities unaffected.

6 JUSTIFICATIONS IN NON-EU JURISDICTIONS

Chapter VI discusses a number of jurisdictions outside the EU: Australia, Canada, Hong Kong, Singapore, South Africa and the US. All these jurisdictions have accepted that a firm may invoke a justification plea to justify otherwise prohibited unilateral conduct. A justification usually functions as an alternative explanation for the dominant company's allegedly anti-competitive purpose.

[1291] See e.g. the case law cited at *supra* note 459.

The countries under review often couch their treatment of justifications in terms of efficiencies. However, this has rarely led courts to engage in a quantification and subsequent balancing of effects. Instead, courts usually assess whether the conduct under review *tends* to distort competition or not. Although it will often prove cumbersome to have a precise and reliable quantification of effects, NCAs and courts should – at the very least – make clear what they consider to be the relevant effects, and what types of efficiencies they deem relevant.

The examination has also shown how several cases in the jurisdictions under review have accepted justifications other than efficiencies. A justification may be applicable if the conduct seeks to comply with a legal requirement. Another possible justification exists if a company operates within the boundaries of its commercial freedom. In such cases the link between a firm's market power and its conduct may simply be sufficiently weak, providing a strong indication that a firm is acting in a way that it would also do absent its market power. The examination has not revealed cases that relied on 'public interest'.

7 KEY LESSONS

The analysis in this PhD has shed light on the central research question, namely what it means to justify unilateral conduct that would otherwise be contrary to the competition rules, and what it should mean. The key lessons that I deduce from this research are as follows:

- Many jurisdictions have acknowledged the importance of justifications of otherwise prohibited unilateral conduct. And rightfully so: justifications are an indispensable part of the analysis whether competition law should condone unilateral conduct or not. The comparative analysis has shown that competition cases around the world have relied on the concept of justifications, primarily as a means to put the conduct under review in its proper context.
- At the same time, the topic remains highly under-theorized. There are relatively few academic studies on the subject – especially comparative work is scarce. In addition, there is relatively little NCA guidance on the topic, which may negatively affect legal certainty and consistency. NCAs should spend more effort on providing guidance, preferably in international forums such as the International Competition Network. I encourage a more widespread reception of case law

and decisional practice from other countries. Hopefully this research can contribute to such a development.

- NCAs and domestic courts should attempt to differentiate between (i) a *prima facie* finding of unilateral conduct that would otherwise be prohibited – and (ii) a justification plea. Admittedly, there is no watertight barrier between these two steps, as arguments that could support a justification plea may already be relevant in the determination whether there has been a *prima facie* violation. For example, in a case on (price) discrimination, should the (alleged) explanation for differentiation be subsumed under a justification, or rather as an element to consider why there was no *prima facie* abuse in the first place? To my mind, jurisdictions that have a more formalistic approach are more likely to consider such explanations as a justification (as the stage of a *prima facie* abuse will be easily met).
- The way in which justifications operate should vary according to the circumstances, such as the degree of dominance, the type of *prima facie* abuse and the type of justification at play. In my view, competition law should not prohibit unilateral conduct in the following circumstances:
    - If the dominant company engages in legitimate commercial conduct. Typically such cases display an insufficiently strong nexus between the practice under review and the company's market power. Legitimate commercial conduct could follow from the following situations:
        - If the practice under review falls within the scope of the dominant firm's commercial freedom; i.e. conduct that can be considered as 'competition on the merits'. Note that this category is particularly relevant in a formalistic abuse regime, as one could wonder whether such conduct should be considered *prima facie* abusive in the first place.
        - If the dominant company is confronted with a situation of 'objective necessity', typically in a situation of *force majeure*. Objective necessity implies that the dominant company has no possibility to act in an alternative way that could have averted the abuse. In other words: there is no autonomous conduct that could be considered an abuse.
    - If the conduct under review produces efficiencies that lead, on balance, to a positive welfare effect. Benefits must be able to compensate consumers for the anti-competitive aspects of the conduct. Although this category is likely to have a substantial overlap with 'competition on the merits', there is a difference in methodology. Competition on the

merits concerns conduct that should be considered legitimate in its specific context, often because there is no relevant nexus with the dominant firm's market power. However, that category does not require an intricate analysis of effects. Efficiency, on the other hand, does require an examination of effects. If that examination shows a positive outcome, the conduct may (with hindsight) be considered justified.

  - If the conduct seeks to support a public interest that, in the specific context of the case, ought to override the competition issues. In the EU context, a plea based on public interest should refer to an objective that the EU legal order clearly strives for.

- This leads to the following overview on the concept of objective justification in EU law:

Objective justification			
Legitimate commercial conduct/business behaviour		Efficiency	Public interest
Commercial freedom	Objective necessity		
Competition on the merits	*Force majeure; State action*	*Positive welfare effect*	*Public interest gain*

- Apart from the *legal* reasons to make the categorisation described above, *moral philosophy* contains useful perspectives as to the theoretical basis for these justifications.
  - Consequentialism provides a basis for the acceptance of an efficiency and public interest plea. Using an inclusive interpretation (which I favour), consequentialism can also provide a basis for a plea based on commercial freedom and objective necessity. The justifications examined in this thesis thus have a basis in consequentialism.
  - By contrast, it is more difficult to transpose lessons from deontology. In particular, if one establishes moral worth simply based on the inherent character of particular conduct, there is little room left for a context-driven approach. However, to the extent that one does consider such a transposition to be useful, Kantian ethics can provide a basis for legitimate business behaviour (that conforms to the universal law) and public interest (to the extent that the conduct protects human dignity). Finally, a deontological perspective that focuses on intent can provide a foundation for the plea based on objective necessity.
- An analysis of a justification plea should afford ample weight to the specific context of that case. The legal analysis should normally include the following elements.
  - The conduct should be suitable to attain the prescribed goal.

- The conduct should normally be indispensable to attain the prescribed goal. This is particularly relevant as regards a plea based on efficiency and public interest.
  - The conduct should not have a disproportionate anti-competitive effect. This is especially relevant while examining a plea based on commercial freedom and public interest.
  - Evidence on intent may be relevant for the overall interpretation of evidence, but will normally not be decisive. Evidence on effects can be decisive in specific circumstances, in particular when the dominant undertaking has raised an efficiency plea.
- The evidentiary burden regarding objective justification lies initially with the dominant company, and can shift as soon as it has discharged this burden. The standard of proof should be no different compared to the standard for establishing a *prima facie* abuse.

ANNEX A. ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACM	*Autoriteit Consument en Markt* (NCA, the Netherlands)
AG	Advocate-General (EU)
ATC	Average Total Costs
AVC	Average Variable Costs
BHG	*Bundesgerichtshof* (Federal Court of Appeal, Germany)
BKartA	*Bundeskartellamt* (NCA, Germany)
CA (1)	Competition Act 1998 (UK)
CA (2) (in Chapter VI)	Competition Act 1986 (Canada)
CAC	Competition Appeal Court (South Africa)
CAT	Competition Appeal Tribunal (UK)
CCA	Competition and Consumer Act 2010 (Australia)
CCS	Competition Commission of Singapore
CdC	*Code de Commerce* (Commercial Code, France)
Cir.	Circuit (US)
CJ	Chief Justice (e.g. in Australia)
CNC	*Comisión Nacional de la Competencia* (NCA, Spain)
CSR	Corporate Social Responsibility
CT	Competition Tribunal (Canada). For South African Competition Tribunal, see SACT
Cf	*Confer* (compare)
D.C.	District of Columbia
DoJ	Department of Justice (US)
EC (1)	European Communities
EC (2) (preceded by number)	Treaty establishing the European Community
ECJ	European Court of Justice
ECN	European Competition Network
ECR	European Court Reports

E.g.	*Exempli gratia* (for example)
EU	European Union
EWCA	Court of Appeal of England & Wales
EWHC	High Court of England & Wales
FCA	Federal Court of Appeal (Canada)
FFC	Full Federal Court (Australia)
FTC	Federal Trade Commission (US)
GC	General Court of the European Union
GEMA	Gas and Electricity Markets Authority (UK)
HC	High Court
HCA	High Court of Australia
ICA	The Irish Competition Authority
ICN	International Competition Network
Ibid.	*Ibidem* (the same)
I.e.	*Id est* (that is)
J	Justice (e.g. in England & Wales and Australia)
LDC	*Ley de Defensa de la Competencia* (Spain)
MEQR	Measure having an equivalent effect as a quantitative restriction
NCA	National Competition Authority
NMa	*Nederlandse Mededingingsautoriteit* (NCA, the Netherlands) (as of 1 April 2013: ACM)
nyr	Not yet reported (in European Court Reports)
OECD	Organisation of Economic Cooperation and Development
Ofcom	Office of Communications (UK)
Ofgem	Office of Gas and Electricity Markets
OFT	Office of Fair Trading (UK) (as of 1 April 2014: Competition and Markets Authority)
ORR	Office of Rail Regulation
OJ	Official Journal of the European Union
P.	Page
Para	Paragraph
SACA	South African Competition Act

SACT	South African Competition Tribunal
SCA	Singaporean Competition Act
TCA	The Competition Authority (Ireland), see ICA
TEU	Treaty on European Union, as amended by the Treaty of Lisbon
TFEU	Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon
UK	United Kingdom
US	United States
v (or v.)	Versus

ANNEX B. LIST OF CASES

EUROPEAN UNION

European Court of Justice

- Case 7/61 *Commission v Italy* [1961] ECR 317
- Case 6/64 *Costa v ENEL* [1964] ECR 585
- Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299
- Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235
- Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125
- Case 40/70 *Sirena v Eda* [1971] ECR 69
- Case 78/70 *Metro* [1971] ECR 487
- Case 6/72 *Europemballage and Continental Can v Commission*, [1973] ECR 215
- Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie v Commission* [1975] ECR 1663
- Case 127/73 *BRT v SABAM and Fonior* [1974] ECR 313
- Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* 1974 [ECR] 837
- Case 36/74 *Walrave and Koch* [1974] ECR 1405
- Case 41/74 *Van Duyn* [1974] ECR 1337
- Case 26/75 *General Motors v Commission* [1975] ECR 1367
- Case 36/75 *Rutili v Minister for the Interior* [1975] 1219
- Case 26/76 *Metro v Commission* [1977] ECR 1875
- Case 27/76 *United Brands v Commission* [1978] ECR 207
- Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461
- Case 5/77 *Tedeschi v Denkavit Commerciale* [1977] ECR 1555
- Case 13/77 *Inno v Atab* [1977] ECR 2115
- Case 30/77 *Bouchereau* [1977] ECR 1999
- Case 77/77 *BP v Commission* [1978] ECR 1513
- Case 7/78 *R v Thompson* [1978] ECR 2247
- Case 22/78 *Hugin v Commission* [1979] ECR 1869

- Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (‘*Cassis de Dijon*’), [1979] ECR 649
- Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck v Commission* [1980] ECR 3125
- Case 34/79 *R v. Henn and Darby* [1979] ECR 3795
- Case 31/80 *L’Oréal* [1980] ECR 3775
- Case 322/81 *Michelin v Commission* (‘*Michelin I*’) [1983] ECR 3461
- Case 66/82 *Fromançais v Forma* [1983] ECR 395
- Joined Cases 96 to 102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and Others v Commission* [1983] ECR 3369
- Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151
- Case 174/82 *Sandoz* [1983] 2445
- Case 177 and 178/82 *Officier van Justitie v Van de Haar* [1984] ECR 1797
- Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831
- Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679
- Case 41/83 *Italy v Commission* [1985] ECR 873
- Case 72/83 *Campus Oil* [1984] ECR 2727
- Case 123/83 *BNIC v Clair* [1985] ECR 391
- Case 177/83 *Kohl v Ringelhan & Rennet* [1984] ECR 3651
- Case 240/83 *Procureur de la République v Association de défense des brûleurs d' huiles usagées* [1985] ECR 531
- Case 42/84 *Remia and Others v Commission* [1985] ECR 2545
- Case 161/84 *Pronuptia* [1986] ECR 353
- Case 178/84 *Commission v Germany* [1987] ECR 1227
- Case 311/84 *CBEM v CLT and IPB* (‘*Télémarketing’)* [1985] ECR 3261
- Case C-89/85 *Ahlström v Commission* (‘*Woodpulp II*’) [1993] ECR I-1307
- Case 121/85 *Conegate* [1986] ECR 1007
- Case C-62/86 *AKZO v Commission* [1991] ECR I-3359
- Case 66/86 *Ahmed Saeed* [1989] ECR 803
- Case 267/86 *Van Eycke v ASPA* [1988] ECR 4769
- Case 302/86 *Commission v Denmark* [1988] ECR 4607

- Case 27/87 *Erauw-Jacquery v La Hesbignonne* [1988] ECR 1919
- Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521
- Case 18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941
- Case C-69/88 *Krantz v Ontvanger der Directe Belastingen* [1990] ECR I-583
- Case C-145/88 *Torfaen v B&Q* [1989] ECR 3851
- Case C-202/88 *France v Commission* [1991] ECR I-1223
- Case C-331/88 *Fedesa* [1990] ECR I-4023
- Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417
- Case C-154/89 *Commission v France* [1991] ECR I-659
- Case C-180/89 *Commission v Italy* [1991] I-709
- Case C-260/89 *ERT* [1991] ECR I-2925
- Case C-2/90 *Commission v Belgium* [1992] ECR I-4431
- Case C-42/90 *Bellon* [1990] ECR I-4863
- Joined Cases C-271, 281 and 289/90 *Spain, Belgium and Italy v Commission* [1992] ECR I-5833
- Case C-169/91 *Stoke-on-Trent* [1992] ECR I-6635
- Case C-185/91 *Reiff* [1993] ECR I-5801
- Case C-228/91 *Commission v Italy* [1993] ECR I-2701
- Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Keck and Mithouard* [1993] ECR I-6097
- Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* (‘*Magill*’) [1995] ECR I-743
- Case C-320/91 *Corbeau* [1993] ECR I-2533
- Case C-53/92 P *Hilti v Commission* [1994] ECR I-667
- Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287
- Case C-275/92 *Schindler* [1994] ECR I-1039
- Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539
- Case C-393/92 *Gemeente Almelo and Others v Energiebedrijf IJsselmij* [1994] ECR I-1477
- Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517
- Case C-412/93 *Leclerc-Siplec v TF1 and M6* [1995] ECR I-179
- Case C-415/93 *Bosman* [1995] ECR I-4921
- Case C-418/93 *Semeraro Casa Uno* [1996] I-2975
- Case C-55/94 *Gebhard* [1995] ECR I-4165

- Joined Cases C-68/94 and C-30/95 *France v Commission* [1998] ECR I-1375
- Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883
- Case C-333/94 P *Tetra Pak v Commission* (‘*Tetra Pak II*’) [1996] ECR I-5951
- Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen v De Agostini and TV-Shop* [1997] ECR I-3843
- Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8471
- Case C-299/95 *Kremzow* [1997] ECR I-2629
- Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* [1997] ECR I-6265
- Case C-368/95 *Familiapress v Bauer Verlag* [1997] ECR I-3689
- Case C-398/95 *Ypourgos Ergasias* [1997] ECR I-3091
- Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211
- Case C-158/96 *Kohll v Union des caisses de maladie* [1998] ECR I-1931
- Case C-348/96 *Criminal Proceedings Against Donatella Calfa* [1999] ECR I-11
- Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge and Dafra-Lines v Commission* [2000] ECR I-1365
- Case C-7/97 *Bronner* [1998] ECR I-7791
- Case C-126/97 *Eco Swiss* [1999] ECR I-3055
- Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139
- Case C-344/98 *Masterfoods and HB Ice Cream* [2000] ECR I-11369
- Case C-379/98 *PreussenElektra v Schleswag* [2001] ECR I-2099
- Case C-398/98 *Commission v Greece* [2001] I-7915
- Case C-405/98 *Konsumentombudsmannen v Gourmet International* [2001] ECR I-1795
- Case C-35/99 *Arduino* [2002] ECR I-1529
- Case C-54/99 *Église de Scientologie* [2000] ECR I-1335
- Case C-163/99 *Portugal v Commission* [2001] ECR I-2613
- Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375
- Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577
- Case C-453/99 *Courage and Crehan* [2001] ECR I-6297

- Case C-497/99 P *Irish Sugar v Commission* [2001] ECR I-5333
- Case C-24/00 *Commission v France* [2004] I-1277
- Case C-112/00 *Schmidberger v Austria* [2003] I-5659
- Case C-172/00 *Ferring* [2002] ECR I-6891
- Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P & 219/00 P *Aalborg Portland v Commission* [2004] ECR I-123
- Case C-15/01 *Paranova Läkemedel and Others* [2003] ECR I-4175
- Case C-82/01 P *Aéroports de Paris v Commission* [2002] ECR I-9297
- Case C-113/01 *Paranova* [2003] ECR I-4243
- Case C-192/01 *Commission v Denmark* [2003] ECR I-9693
- Case C-198/01 *Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato* (‘*CIF*’) [2003] I-8055
- Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105
- Case C-243/01 *Gambelli and Others* [2003] ECR I-13031
- Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887
- Case C-388/01 *Commission v Italy* [2003] ECR I-721
- Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039
- Case C-36/02 *Omega* [2004] ECR I-9609
- Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375
- Case 270/02 *Commission v Italy* [2004] I-1559
- Case C-286/02 *Bellio Fratelli Srl v Prefettura di Treviso* [2004] ECR I-3465
- Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987
- Case C-53/03 *Syfait v GlaxoSmithKline* [2005] ECR I-4609
- Case C-109/03 *KPN v OPTA* [2004] ECR I-11273
- Case C-514/03 *Commission v Spain* [2006] ECR I-963
- Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173
- Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331
- Case C-105/04 P *FEG v Commission* [2006] ECR I-8725
- Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619
- Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991
- Case C-110/05 *Commission v Italy* (‘*Motorcycle Trailers*’) [2009] ECR I-519

– Case C-171/05 P *Laurent Piau v Commission* [2006] ECR I-37
– Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125
– Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others v GlaxoSmithKline* [2008] ECR I-7139
– Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission* [2009] ECR I-9291
– Case C-49/07 *MOTOE* [2008] ECR I-4863
– Case C-52/07 *Kanal 5 and TV 4 v STIM* [2008] ECR I-9275.
– Case C-202/07 P *France Télécom v Commission* (‘*Wanadoo*’) [2009] ECR I-2369
– Case C-209/07 *Beef Industry Development Society and Barry Brothers (‘BIDS’)* [2008] ECR I- 8637
– Case C-8/08 *T-Mobile and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529
– Case C-153/08 *Commission v Spain* [2009] ECR I-9735
– Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555
– Case C-333/08 *Commission v France* [2010] ECR I-757
– Joined Cases C-403/08 and C-429/08 *FAPL* [2011] ECR I-9083
– Case C-413/08 P *Lafarge v Commission* [2010] ECR I-5361
– Case C-52/09 *TeliaSonera* [2011] ECR I-527
– Case C-108/09 *Ker-Optika* [2010] ECR I-12213
– Case C-272/09 P *KME Germany AG v European Commission* [2011] ECR nyr
– Case C-291/09 *Francesco Guarnieri & Cie v Vandevelde Eddy* [2011] ECR I-2685
– Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161
– Case C-375/09 *Tele2 Polska* [2011] ECR I-3055
– Case C-421/09 *Humanplasma v Austria* [2010] ECR I-12869
– Case C-439/09 *Pierre Fabre Dermo-Cosmétique* [2011] ECR I-9419
– Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] nyr
– Case C-386/10 P *Chalkor v Commission* [2011] nyr
– Case C-457/10 P *AstraZeneca v Commission* [2012] nyr
– Case C-549/10 P *Tomra Systems ASA and Others v Commission* [2012] nyr
– Case C-226/11 *Expedia v Autorité de la concurrence* [2012] nyr

- Case C-1/12 *Ordem dos Técnicos Oficias de Contas ('OTOC') v Autoridade da Concorrência* [2013] nyr
- Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa* ('*Slovenská*') [2013] nyr
- Case C-136/12 *Consiglio nazionale dei geologi v AGCM* [2013] nyr.

General Court

- Case T-30/89 *Hilti v Commission* [1990] ECR II-163
- Case T-51/89 *Tetra Pak Rausing v Commission* ('*Tetra Pak I*') [1990] ECR II-309
- Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389
- Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro and Others v Commission* [1992] ECR II-1403
- Case T-117/89 *Sens v Commission* [1990] ECR II-198
- Case T-83/91 *Tetra Pak International v Commission* ('*Tetra Pak II*') [1994] ECR II-755
- Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595
- Case T-513/93 *Consiglio nazionale degli spedizionieri doganali v Commission* ECR II-1810
- Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole television and Others v Commission* [1996] ECR II-649
- Case T-156/94 *Aristain v Commission* [1999] ECR II-645
- Case T-305/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931
- Case T-348/94 *Enso Española v Commission* [1998] ECR II-1875J
- Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141
- Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011
- Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937
- Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93
- Case T-5/97 *Industrie des Poudres Sphériques* [2000] ECR II-3759
- Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969
- Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707
- Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929

- Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* (‘*TACA’*) [2003] ECR II-3275
- Case T-219/99 *British Airways v Commission* [2003] ECR II-5917
- Case T-342/99 *Airtours v Commission* [2002] ECR II-2585
- Joined Cases T-67/00, T-68/00, T71/00 and T-78/00 *JFE Engineering and Others v Commission* [2004] ECR II-2501, paras 179
- Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and Others v Commission* [2002] ECR II-3805
- Case T-57/01 *Solvay v Commission* [2009] ECR II-4621
- Case T-66/01 *ICI v Commission* [2010] ECR II-2631
- Case T-151/01 *DSD v Commission* [2007] ECR II-1607
- Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969
- Case T-203/01 *Michelin v Commission* (‘*Michelin II*’) [2003] ECR II-4071
- Case T-210/01 *General Electric v Commission* [2005] ECR II- 5575
- Case T-314/01 *Avebe v Commission* [2006] ECR II-3085
- Joined Cases T-49 to 51/02 *Brasserie nationale and Others v Commission* [2005] ECR II-3033
- Case T-56/02 *Bayerische Hypo- und Vereinsbank v Commission* [2004] ECR II-3495
- Case T-114/02 *BaByliss v Commission* [2003] ECR II-1279
- Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209
- Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] II-3291
- Case T-53/03 *BPB v Commission* [2008] ECR II-1333
- Case T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477
- Case T-340/03 *France Télécom v Commission* (‘*Wanadoo*’) [2007] ECR II-10
- Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601
- Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805
- Case T-336/07 *Telefónica v Commission* [2012] ECR nyr

Commission decisions – Antitrust

- Case IV/31.900 *BPB Industries* [1989] L 10/50
- Case IV/33.544 *British Midland v Aer Lingus* [1992] OJ L 96/34
- Case IV/33.814 *Ford/Volkswagen* [1993] OJ L 20/14

- Case IV/34.600 *Night Services* [1994] OJ L 259/ 20
- Case 94/119/EC *Port of Rødby* [1994] OJ L 55/52
- Case 97/745/EF *Port of Genoa* [1997] OJ L 301/27
- Case COMP.F.1/37.894 *CECED* [2000] OJ L 187/47
- Case 2000/521/EF *Spanish Airports* [2000] OJ L 208/36
- Case COMP/38158 *Meca-Medina and Majcen/IOC* (1 August 2002)
- Case COMP/C-3/37.792 *Microsoft* (24 March 2004)
- Case COMP/37.685 *GVG/FS* [2004] OJ L 11/17
- Case COMP/C-3/37.990 *Intel* case (13 May 2009)

Commission decisions – Merger control

- Case IV/M.50, *AT&T/NCR* (18 January 1991)
- Case IV/M.53, *Aerospatiale-Alenia /DeHavilland* (2 October 1991)
- Case IV/M.308, *Kali+Salz/MDK/Treuhand* (14 December 1993)
- Case IV/M.1313, *Danish Crown/Vestjyske Slagterier* (9 March 1999)
- Case COMP/M.2333, *De Beers/LVMH*, (25 July 2001)
- Case COMP/M.2314 *BASF/Eurodiol/Pantochim* (11 July 2001)
- Case COMP/M.2502, *Cargill/Cerestar* (18 January 2002)
- Case COMP/M.3108, *Office Depot/Guilbert* (23 May 2003)
- Case COMP/M.3099, *Areva/Urenco/ETC* (6 October 2004)
- Case COMP/M.4000, *Inco/Falconbridge* (4 July 2006)
- Case COMP/M.4057, *Korsnäs/Assidomän Cartonboard* (12 May 2006)
- Case COMP/M.4439, *Ryanair/Aer Lingus*, (27 June 2007)
- Case COMP/M.4854, *TomTom/TeleAtlas* (14 May 2008)
- Case COMP/M.4942, *Nokia/Navteq* (2 July 2008)

EU MEMBER STATES

France

Case law

- Paris Court of Appeal judgment of 17 September 2008, Case 2007/14904

Autorité de la concurrence

- Autorité decision of 23 December 1999, *Bouygues/France Télécom*, Case 99-MC-12
- Autorité decision of 1 March 2000, *Armor Hélicoptère*, Case 00-D-13
- Autorité decision of 18 April 2003, *Coca-Cola*, Case 03-D-20
- Autorité decision of 18 March 2005, *Canal+*, Case 05-D-13
- Autorité decision of 28 July 2005, *Jaeger LeCoultre*, Case 05-D-46
- Autorité decision of 8 November 2005, *Saint-Honorat*, Case 05-D-60
- Autorité decision of 14 March 2007, *GlaxoSmithKline*, Case 07-D-09
- Autorité decision of 12 July 2007, *EPM/NMPP*, Case 07-D-23
- Autorité decision of 20 November 2008, *Total*, Case 08-D-27

Germany

Case law

- Bundesgerichtshof judgment of 7 October 1980, *Neue Osnabrücker Zeitung*, KZR 8/80
- Bundesgerichtshof judgment of 30 June 1981, *Adidas*, KZR 19/80
- Bundesgerichtshof judgment of 22 September 1981, *Original-VW Ersatzteile II*, KVR 8/80
- Bundesgerichtshof judgment of 9 November 1982, *Gemeinsamer Anzeigenteil*, WuW BGH 1965
- Bundesgerichtshof judgment of 25 October 1988, *Lüsterbehangsteine*, WuW/E 2540
- Bundesgerichtshof judgment of 12 March 1991, *Krankentransportunternehmen II*, WuW/E 2707
- Bundesgerichtshof judgment of 12 November 1991, *Aktionsbeiträge*, KZR 2/90
- Bundesgerichtshof judgment of 4 November 2003, *Strom und Telefon I*, KZR 16/02
- Bundesgerichtshof judgment of 4 November 2003, *Strom und Telefon II*, KZR 38/02

Bundeskartellamt

- Bundeskartellamt decision of 8 October 2003, *Mainova*, Case B11–12/03
- Bundeskartellamt decision of 27 January 2010, *Scandlines*, Case B9-188/05

Ireland

Case law

- Irish High Court, *Irish League of Credit Unions* [2004] IRLHC 330
- Irish Supreme Court, *Irish League of Credit Unions*, [2005] No. 077

Irish Competition Authority

- ICA decision of 7 December 2004, *Drogheda Independent Company*, Case COM/05/03

Luxembourg

Conseil de la concurrence

- Conseil decision of 3 August 2009, *Tanklux*, Case 2009-FO-02
- Conseil decision of 23 April 2007, *Rock Fernand Distributions*, Case 2007-FO-01

The Netherlands

Case law

- CBb judgment of 28 May 2004, LJN: AP 1336

Autoriteit Consument & Markt

- ACM initial decision of 28 March 2003 and administrative appeal decision of 11 October 2004, Case 1205/*FRHS v CR Delta*
- ACM initial decision of 28 April 2003 and administrative appeal decision of 29 June 2005, Case 2978/*Superunie v Interpay*
- ACM initial decision of 26 August 1999 and administrative appeal decision of 27 March 2000, Case 650/*Hydro Energy v SEP*

- ACM decision of 25 March 2009, Case 6424/*Ziekenhuis Walcheren/Oosterscheldeziekenhuizen*
- ACM initial decision of 26 June 2009 and administrative appeal decision of 28 April 2011, Case 5720/*Productschap Tuinbouw v GasTerra*

Spain

Case law

- Tribunal de Defensa de la Competencia judgment of 29 September 1999, *Eléctrica del Llémana*, Case 442/98
- Tribunal de Defensa de la Competencia judgment of 13 October 2004, *Spain Pharma/Glaxo*, Case R 611/2004

CNC

- CNC decision of 22 June 2009, *Facua/Ryanair*, Case S/0097/08

United Kingdom

Case law (Competition Appeal Tribunal)

- *Napp v Director General of Fair Trading* [2002] CAT 1
- *Aberdeen Journals v Director General of Fair Trading* [2002] CAT 4
- *Freeserve.com v Director General of Telecommunications* [2003] CAT 5
- *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11
- *Genzyme v Office of Fair Trading* [2004] CAT 4
- *JJB and Allsports v OFT* [2004] CAT 17
- *Floe Telecom v Ofcom* [2004] CAT 18
- *Burgess v OFT* [2005] CAT 25
- *The Racecourse Association v Office of Fair Trading* [2005] CAT 29
- *Floe Telecom v Ofcom* [2006] CAT 17
- *Albion Water v Water Services Regulation Authority* [2006] CAT 23
- *Albion Water v Water Services Regulation Authority* [2006] CAT 36
- *Merger Action Group v Secretary of State for BERR* [2008] CAT 36

- *National Grid v GEMA* [2009] CAT 14
- *Enron Coal Services (in liquidation) v EWS* [2009] CAT 36

Case law (other courts)

- *R v Dudley and Stephens [1884] 14 QBD 273 DC*
- *Leyland DAF v Automotive Products* [1993] WL 964480 (Ch)
- *Leyland DAF v Automotive Products* [1994] 1 BCLC 245
- *Getmapping v Ordnance Survey* [2002] UKCLR 410
- *Suretrack Rail Services v Infraco* [2002] EWHC 1316 (Ch)
- *Chester City Council v Arriva* [2007] UKCLR 1582
- *Dŵr Cymru v Albion Water* [2008] EWCA Civ 536
- *Ofcom v Floe Telecom* [2009] EWCA Civ 47
- *Enron Coal Services (in liquidation) v EWS* [2009] EWCA Civ 647
- *National Grid v GEMA* [2010] EWCA Civ 114
- *Purple Parking and Meteor Parking v Heathrow Airport* [2011] EWHC 987 (Ch)

OFT

- OFT decision of 16 July 2001, *Aberdeen Journals*
- OFT decision of 25 September 2002, *Aberdeen Journals (remitted case)*
- ORR non-infringement notice of 23 June 2004, *Suretrack Rail Services and P. Way Services*
- OFT decision of 8 August 2008, *Global Radio UK/GCap Media*
- OFT decision of 18 November 2008, *Cardiff Bus*
- OFT decision of 25 September 2002, *Aberdeen Journals (remitted case)*
- OFT decision of 11 December 2002, *The Association of British Travel Agents and British Airways*
- OFT decision (undated), *Flybe*

Other UK NCAs

- Ofcom decision of 3 November 2003, *Floe Telecom*
- Ofwat decision of 26 May 2004, *Dŵr Cymru*
- Ofcom decision of 28 June 2005, *Floe (re-investigation)*
- ORR decision of 12 August 2005, *NTM v Portec*

- ORR decision of December 2006, *EWS*
- GEMA decision of 21 February 2008, *National Grid*, Case CA98/STG/06
- ORR decision of 17 November 2009, *Association of Train Operating Companies* (‘*ATOC*’)

OTHER JURISDICTIONS

Australia

Case law

- *Top Performance Motors v Ira Berk (Queensland)* [1975] ATPR 40-004
- *Queensland Wire Industries v BHP* [1989] HCA 6
- *Melway Publishing v Robert Hicks* [1999] FCA 664
- *ACCC v BBM* [1999] FCA 1318
- *Melway Publishing v Robert Hicks* [2001] HCA 13
- *Rural Press v ACCC* [2002] FCA 213
- *BBM v ACCC* [2003] HCA 5
- *Rural Press v ACCC* [2003] HCA 75

Canada

Case law (Competition Tribunal)

- *Canada (Director of Investigation and Research) v The NutraSweet* [1990] CT-1989-002
- *Canada (Director of Investigation and Research) v Xerox (Canada)* [1990] CT-1989-004
- *Canada (Director of Investigation and Research) v D&B Companies of Canada* (*Nielsen*) [1995] CT-1994-001
- *Canada (Director of Investigation and Research) v Tele-Direct* [1997] CT-1994-003
- *Commissioner of Competition v Air Canada*, [2003] CT-2001-002
- *B-Filer Inc. et al. v. The Bank of Nova Scotia*, [2006] CT-2005-006

Case law (other)

- *R. v Consumers Glass Co. Ltd.* [1981] 57 C.P.R. (2d) 1 (Ont. H.C.J.).

- *Canada Pipe* (*Canada (Commissioner of Competition) v Canada Pipe* [2006] FCA 233

Singapore

Case law

- Competition Appeal Board decision of 28 May 2012, *SISTIC v CCS*

CCS

- CCS decision of June 2010, *SISTIC*

South Africa

Case law (Competition Tribunal)

- *Competition Commission v Patensie*, [2002] Case 37/CR/Jun01
- *Competition Commission v South African Airways* ('*SAA I*'), [2005] Case 18/CR/Mar01
- *The Bulb Man (SA) v Hadeco*, [2006] Case 81/IR/Apr06
- *Competition Commission & JTI v BATSA*, [2009] Case 05CRFeb05
- *Competition Commission v Senwes*, [2009] Case 110/CR/Dec06
- *Nationwide Airlines and Comair v South African Airways* ('*SAA II*'), [2010] Case 80/CR/SEPT06
- *Competition Commission v Telkom SA,* [2012] Case 11/CR/Feb04
- *Competition Commission v Senwes*, [2013] Case 110/CR/Dec06

Case law (other courts)

- *York Timbers v SA Forestry Company*, [2001] Case 09/CAC/May01
- *Patensie v Competition Commission*, [2003] Case 16/CAC/Apr02
- *Senwes v Competition Commission*, [2009] Case 87/CAC/FEB09
- *South African Airways v Comair and Nationwide Airlines*, [2011] Case 92/CAC/MAR10

United States

U.S. Supreme Court

- *Dr. Miles Medical Co. v John D. Park & Sons Co.*, 220 U.S. 373 (1911)

- *United States v Colgate & Co*, 250 U.S. 300 (1919)
- *Eastman Kodak Co. v Southern Photo Man. Co*., 273 U.S. 359 (1927)
- *United States v Columbia Steel Co*., 334 U.S. 495 (1948)
- *Standard Oil Co. of California v United States*, 337 U.S. 293 (1949)
- *Lorain Journal Co. v United States,* 342 U.S. 143 (1951)
- *Times-Picayune Publ. Co. v United States*, 345 U.S. 594 (1953)
- *FTC v Brown Shoe Co., Inc*., 384 U.S. 316 (1966)
- *United States v Arnold, Schwinn & Co*., 388 U.S. 365 (1967)
- *Utah Pie Co. v Continental Baking Co*., 386 U.S. 685 (1967)
- *U.S. v Topco Assocs*., 405 U.S. 596, 610 (1972)
- *Otter Tail Power Co. v United States*, 410 U.S. 366 (1973)
- *Gordon v New York Stock Exchange, Inc*., 422 U.S. 659 (1975)
- *United States v National Assn. of Securities Dealers, Inc*., 422 U.S. 694 (1975)
- *Cont'l T.V., Inc. v GTE Sylvania Inc.*, 433 U.S. 36 (1977)
- *Aspen Skiing Co. v Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985)
- *Matsushita Elec. Industrial Co. v Zenith Radio Corp*., 475 U. S. 574 (1986)
- *Eastman Kodak v Image Technical Services, Inc.,* 504 U.S. 451 (1992)
- *Brooke Group v Brown and Williamson Tobacco Corp*, 509 U.S. 209 (1993)
- *Verizon Communications v Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004)
- *Leegin Creative Leather Products, Inc. v PSKS, Inc*., 551 U.S. 877 (2007)
- *Pacific Bell Telephone v linkLine Communications*, 555 U.S. 438 (2009)

Other U.S. Federal Courts

- *United States v Alcoa*, 148 F.2d 416 (2d Cir. 1945)
- *Six Twenty-Nine Prods., Inc. v Rollins Telecasting*, *Inc*. 365 F.2d 478 (5th Cir. 1966)
- *America's Best Cinema Corp v Fort Wayne Newspapers, Inc.* 347 F Supp 328 (N.D. Ind. 1972)
- *Burdett Sound Inc v Altec Corporation*, 515 F.2d 1245 (5th Cir. 1975)
- *Intern'l Railways of Cent. America v United Brands*, 532 F.2d 231 (2nd Cir. 1976)
- *Byars v Bluff City News Co*, 609 F 2d 843 (6th Cir. 1979)
- *Homefinders of America Inc v Providence Journal Co*, 621 F 2d 441 (1st Cir. 1980)
- *Richter Concrete Corp. v Hilltop Concrete Corp*., 691 F 2d 818 (6th Cir. 1982)

- *Becker v Egypt News Co.*, 713 F.2d 363 (8th Cir. 1983)
- *Foremost Pro Color, Inc. v Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983)
- *General Foods Corporation*, 103 FTC 204 (1984)
- *Olympia Equipment Leasing Company v Western Union Telegraph Company*, 797 F.2d 370 (7th Cir. 1987)
- *Midwest Radio Co., Inc. v Forum Pub. Co.*, 942 F.2d 1294, 1297-1298 (8th Cir. 1991)
- *Oksanen v Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc)
- *High Tech. Careers v San Jose Mercury News*, 996 F.2d 987 (9th Cir. 1993)
- *Capital Imaging v Mohawk*, 996 F.2d 537 (2nd Cir. 1993)
- *Data Gen. Corp. v Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994)
- *Great Western Directories v Sw. Bell Tel. Co.*, 63 F.3d 1378 (5th Cir. 1995)
- *California Dental Association v FTC*, 128 F 3d 720 (9th Cir. 1997)
- *Brunswick*, 207 F.3d 1039 (8th Cir. 2000)
- *United States v Microsoft Corporation,* 253 F.3d 34 (DC Cir. 2001)
- *LePage's v 3M*, 324 F.3d 141 (3rd Cir. 2003)
- *California ex rel. Harris v Safeway*, *Inc.*, 651 F.3d 1118 (9th Cir. 2011)

MISCELLANEOUS

European Court of Human Rights

- ECtHR judgment of 21 February 1984, *Öztürk v Germany* (appl. no. 8544/79)
- ECtHR judgment of 13 February 2003, *Chevrol v France* (appl. no. 49636/99)
- ECtHR judgment of 23 November 2006, *Jussila v Finland* (appl. no. 73053/01)
- ECtHR judgment of 27 September 2011, *Menarini v Italy* (appl. no. 43509/08)

EFTA Court

- Case E-15/10 *Posten Norge v ESA* [2012] EFTA Ct. Rep 246

Judicial Committee of the Privy Council

- *Telecom Corp of New Zealand v Clear Communications (New Zealand)*, [1994] UKPC 36

ANNEX C. LIST OF LITERATURE

Books

- R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (The Free Press: New York 1978)
- M.-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialens, *L'application en France du droit des pratiques anticoncurrentielles* (L.G.D.J. : Paris 2008)
- P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials* (OUP: Oxford 2003)
- C.-D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing: Oxford and Portland, Oregon 2011).
- R.F. Frank, *The Darwin Economy: Liberty, Competition and the Common Good* (Princeton University Press: Princeton, New Jersey 2011)
- D.J. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (OUP: Oxford 1998)
- A. Gerbrandy, *Convergentie in het mededingingsrecht* [*Convergence in Competition Law*] (Boom Juridische Uitgevers: The Hague 2009)
- F.E. Gonzáles & R. Snelders (eds.), *EU Competition Law: Abuse of Dominance under Article 102 TFEU* (Claeys & Casteels: Deventer 2013)
- M. Horspool & M. Humphreys, *European Union Law* (OUP: Oxford 2008)
- A. Jones & B. Sufrin, *EC Competition Law* (OUP: Oxford 2008)
- S. Kingston, *The Role of Environmental Protection in EC Competition Law and Policy* (dissertation Leiden 2009)
- A. Komninos*, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing: Oxford and Portland, Oregon 2008)
- L. Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press: Cambridge 2010)
- J. Maitland-Walker (ed.), *Competition Laws of Europe* (LexisNexis UK: London 2003)
- NautaDutilh (ed.), *Dealing With Dominance: The Experience of National Competition Authorities* (Kluwer Law International: Alphen aan den Rijn 2004)

- R. Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP: Oxford 2011)
- R. O'Donoghue & A.J. Padilla, *The Law and Economics of Article 82 EC* (Hart Publishing: Oxford and Portland, Oregon 2006)
- O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP: Oxford 2006)
- E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Kluwer Law International: Alphen aan den Rijn 2010)
- R.A. Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press: Chicago and London 1976)
- R. Pitofsky (ed.), *How the Chicago School Overshot The Mark: the Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP: Oxford 2008)
- M. Reimann & R. Zimmermann (ed.), *The Oxford Handbook of Comparative Law* (OUP: Oxford 2006).
- E. Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing: Oxford and Portland, Oregon 2010)
- P.-J. Slot & A. Johnston, *An Introduction to Competition Law* (Hart Publishing: Oxford and Portland, Oregon 2006)
- A. Smith, *The Wealth of Nations* (Bantam Classic: New York 2003)
- C. Townley, *Article 81 EC and Public Policy* (Hart Publishing: Oxford 2009)
- Michael Trebilcock, Ralph A. Winter, Paul Collins & Edward M. Iacobucci, *The Law and Economics of Canadian Competition Policy* (University of Toronto Press: Toronto, Buffalo & London 2003)
- R.J. van den Bergh & P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Sweet & Maxwell: London 2006)
- R. Whish, *Competition Law* (OUP: Oxford 2009)

Articles and book chapters

- G. Addy, J. Bodrug & C. Tingley, 'Abuse of Dominance in Canada: Reflections on 25 Years of Section 79', (2012) 25 Canadian Competition Law Review 276
- P. Akman, 'Searching for the Long-Lost Soul of Article 82EC', (2007) CCP Working Paper 07-5; see also (2009) 29 Oxford Journal of Legal Studies 267

- P. Akman, ‘To abuse, or not to abuse: discrimination between consumers’, (2007) 32 ELRev 492
- A. Albors-Llorens, ‘The Role of Objective Justification and Efficiencies in the Application of Article 82 EC’, (2007) 44 CMLRev 1727
- V. Baccaro, ‘Failing Firm Defence and Lack of Causality: Doctrine in Europe of Two Closely Related Concepts’, (2004) 25 ECLR 11
- D. Bailey, 'Presumptions in EU Competition Law', (2010) 31 ECLR 362
- D. Bailey, ‘Restrictions of competition by object under Article 101 TFEU’, (2012) 49 CMLRev 559
- J.B. Baker, ‘Promoting innovation competition through the Aspen/Kodak rule’, (1998-1999) 7 George Mason Law Review 495
- G. Bermann, ‘Taking Subsidiarity Seriously’, (1994) 94 Columbia Law Rev 331
- W. Bishop, ‘Price discrimination under Article 86: Political economy in the European Court’, (1981) 44 MLR 282
- R.E. Bloch and others, ‘A Comparative Analysis of Article 82 and Section 2 of the Sherman Act’, (2006) 7 Bus. L. Int'l 137
- E. Blomme, ‘State Action as a Defence Against 81 and 82 EC’, (2007) 30 World Competition 243
- V. Brisimi, ‘Abuse of a Dominant Position and Public Policy Justifications: A Question of Attribution’, (2013) 24 EBLR 261
- M. Bronckers & A. Vallery, ‘Fair and effective competition policy in the EU: which role for authorities and which role for the courts after *Menarini*’, (2012) 8 European Competition Journal 283
- E.D. Cavanagh, ‘Trinko: A Kinder, Gentler Approach To Dominant Firms Under The Antitrust Laws’, (2007) 59 Maine Law Review 111
- A. Chiriţă, ‘The analysis of market dominance and restrictive practices under German antitrust law in light of EC antitrust law’, (2008) 4 European Competition Journal 415
- Competition Law Forum Article 82 Review Group, ‘The Reform of Article 82: Recommendations on Key Policy Objectives’, (2005) European Competition Journal 179
- K.J. Cseres, ‘The Controversies of the Consumer Welfare Standard’ (2007) 3 The Competition Law Review 121
- R.M. Dworkin, ‘Is Wealth A Value?’, (1980) 9 J. Legal Stud. 191
- T. Eilmansberger, ‘How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses’, (2005) 42 CMLRev 129

- E. Elhauge, ‘Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?’, (2007) 3(2) Competition Policy International 59
- S. Enchelmaier, ‘The Awkward Selling of a Good Idea, or a Traditionalist Interpretation of Keck’, (2003) 22 YEL 249
- B.A. Facey and D.H. Assaf, *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey*, (2002-2003) 70 Antitrust L.J. 513
- E.M. Fox, ‘Eastman Kodak Company v. Image Technical Services, Inc. – Information Failure As Soul or Hook?’, (1993-1994) 62 Antitrust Law Journal 759
- E.M. Fox, ‘We protect competition, you protect competitors’, (2003) 26 World Competition 149
- H.W. Friederiszick and L. Gratzà, ‘Dominant and Efficient – On the Relevance of Efficiencies in Abuse of Dominance Cases’, in: OECD Policy Roundtables, *The Role of Efficiency Claims in Antitrust Proceedings 2012* (DAF/COMP(2012)23)
- D. Geradin, ‘Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court’s Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom?’, (2004) 41 CMLRev 1527
- D. Geradin & N. Petit, ‘Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment’, TILEC Discussion Paper No. 2011-008
- C. Graham, ‘Judicial Review of the Decisions of the Competition Authorities and the Economic Regulators in the UK’, in: O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing: Groningen 2009)
- M. Gravengaard & N. Kjaersgaard, ‘The EU Commission guidance on exclusionary abuse of dominance - and its consequences in practice’, (2010) ECLR 285
- F. Hanks & P.L. Williams, ‘Implications of the Decision of the High Court in Queensland Wire’, (1990) 17 Melbourne University Law Review 437
- F. Hanks & P.L. Williams, ‘Queensland Wire Industries v BHP, Judgment of the High Court of Australia’, (1990) 27 CMLRev 151
- B. Hawk, ‘Attempts to Monopolize – Specific Intent as Antitrust's Ghost in the Machine’, (1973) 58 Cornell L. Rev. 1121
- B. Hawk, ‘System failure: Vertical Restraints and EC competition law’, (1995) 32 CMLRev 973
- G.A. Hay & K. McMahon, ‘The Diverging Approach to Price Squeezes in the United States and Europe’, (2012) 8 Journal of Competition Law & Economics 259

- T. Horsely, ‘Unearthing buried treasure: art.34 TFEU and the exclusionary rules’, (2012) 37 ELRev 734
- T.J. Horton, ‘The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses’, (2010-2011) 42 Loy. U. Chi. L.J. 469
- M. Jaeger, ‘The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?’, (2011) 2 Journal of European Competition Law & Practice 295
- A.Y. Kapen, ‘Duty to cooperate under Section 2 of the Sherman Act: Aspen Skiing’s slippery slope’, (1986-1987) 72 Cornell L. Rev. 1047
- J. Kavanagh, N. Marshall and G. Niels, 'Reform of Article 82 EC – Can the Law and Economics be Reconciled?', in: A. Ezrachi (ed.), *Article 82 EC: Reflections on its Recent Evolution* (Hart Publishing: Oxford and Portland, Oregon, 2009)
- C. Koenig and C. Engelmann, ‘Parallel trade restrictions in the pharmaceuticals sector on the test stand of Article 82 EC: Commentary on the Opinion of Advocate General Jacobs in the case Syfait/GlaxoSmithKline’, (2006) 26 ECLR 338
- V. Korah, ‘EEC Competition Policy – Legal Form or Economic Efficiency’, (1986) 39 CLP 85
- H. Legal, ‘Standards of Proof and Standards of Judicial Review in EU Competition Law’ in B. Hawk (ed), *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute 2005* (Juris Publishing: New York 2006)
- P.-J. Loewenthal, ‘The Defence of ‘objective justification’ in the application of Article 82 EC’, (2005) 28 World Competition 455
- L. Lovdahl Gormsen, ‘The conflict between economic freedom and consumer welfare in the modernization of Article 82 EC’, (2007) 3 European Competition Journal 329.
- L. Lovdahl Gormsen, ‘How well does the European Legal Test for Predation go with an Economic Approach to Article 102 TFEU?’, (2010) 37 Legal Issues of Economic Integration 294
- P. Lowe, ‘DG Competition’s Review of the Policy on Abuse of Dominance’, in: Hawk (ed.), *International Antitrust & Policy, Annual Proceedings of the Fordham Corporate Law Institute 2003* (Juris Publishing: New York 2004)
- P. Lugard & L. Hancher, ‘Honey, I Shrunk the Article! A Critical Assessment of the Commission's Notice on Article 81(3) of the EC Treaty’, (2004) 25 ECLR 410

- B. Marshall, ‘Refusals to Supply Under Section 46 of the Trade Practices Act: Misuse of Market Power or Legitimate Business Conduct?’, (1996) 8 Bond Law Review 182
- B. Marshall, ‘The Resolution of Access Disputes Under Section 46 of the Trade Practices Act’, (2003) 22 University of Tasmania Law Review 43
- M. Martyniszyn, ‘A Comparative Look at Foreign State Compulsion as a Defence in Antitrust Litigation’, (2012) 8 The Competition Law Review 143
- K. McMahon, ‘Refusals to supply by Corporations with Substantial Market Power’, (1994) 22 Australian Business Law Review 29
- L. Kelly & T. van der Vijver, ‘Less is more: *Senwes* and the concept of “margin squeeze” in South African competition law’, (2009) 126 South African Law Journal 246
- J.A. Keyte, ‘The Ripple Effects of Trinko: How It Is Affecting Section 2 Analysis’, (2005) 20 Antitrust 44
- A.T. Kronman, ‘Wealth maximization as a normative principle’, (1980) 9 J. Legal Stud. 227
- A. Meij, ‘Judicial Review in the EC Courts: *Tetra Laval* and Beyond’ in: O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing: Groningen 2009)
- G. Monti, ‘Article 81 EC and Public Policy’, (2002) 39 CMLRev 1057
- K. Mortelmans, ‘Towards convergence in the application of the rules on free movement and on competition’, (2001) 38 CMLRev 613.
- R. Nazzini, ‘The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases’, (2006) 31 ELRev 518
- A. Neil Campbell and J. William Rowley, ‘The Internationalization of Unilateral Conduct Laws – Conflict, Comity, Cooperation and/or Convergence?’, (2008-2009) 75 Antitrust L.J. 267
- O. Odudu, ‘Annotation of Case C-95/04 P, British Airways plc v. Commission, judgment of the Court of Justice (Third Chamber) of 15 March 2007’, (2007) 44 CML Rev 1781
- B.Y. Orbach, ‘The Antitrust Consumer Welfare Paradox’, (2010) 7 Journal of Competition Law & Economics 133
- E. Paulis, ‘The Burden of Proof in Article 82 Cases’ in: B. Hawk (ed.), *Fordham Competition Law Institute: International Antitrust Law and Policy 2006* (Juris Publishing: New York 2007)
- N. Petit & N. Neyrinck, ‘A Review of the Competition Law Implications of the Treaty on the Functioning of the European Union’, available via <https://www.competitionpolicyinternational.com/>

– T.A. Piraino, Jr., 'Identifying Monopolists' Illegal Conduct under the Sherman Act', (2000) 75 NYU L. Rev. 847
– R.A. Posner, 'Utilitarianism, economics and legal theory', (1979) 8 J. Legal Stud. 103
– R.A. Posner, 'The Value of Wealth: A Comment on Dworkin and Kronman', (1980) 9 J. Legal Stud. 243
– D. Ridyard, 'Compulsory Access under EC Competition Law – A New Doctrine of "Convenient Facilities" and the Case for Price Regulation', (2004) 11 ECLR 669
– E. Rousseva, 'The Concept of "Objective Justification" of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?', (2006) 2 The Competition Law Review 27
– S.C. Salop, 'Preserving Monopoly: Economic Analysis, Legal Standards and Microsoft', (1999) 7 George Mason Law Review 617
– H.A. Shelanski, 'The case for rebalancing antitrust and regulation', (2011) 109 Michigan Law Review 683
– N. Reich, 'The 'November Revolution' of the European Court of Justice: Keck, Meng and Audi Revisited', (1994) 31 CMLRev 459
– M. Schechter, 'The Rule of Reason in European Competition Law,' (1982) 2 LIEI 1
– H.A. Shelanski, 'The case for rebalancing Antitrust and Regulation', (2011) 109 Michigan Law Review 683
– E. Spaventa, 'The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of Keck, Remoteness and Deliège', in C. Barnard and O. Odudu (eds), *The Outer Limits of European Law* (Hart Publishing: Oxford 2009)
– F. Spulber, 'Competition Policy and the Incentive to Innovate: The Dynamic Effects of Microsoft v. Commission', (2008) 25 Yale Journal on Regulation 300
– M.E. Stucke, 'Should the government prosecute monopolies?', (2009) U. Ill. L. Rev. 497
– M.E. Stucke, 'Reconsidering Antitrust's goals', (2012) 53 B.C. L. Rev. 551
– C. Tay Swee Kian, 'New Developments in Competition Law in Singapore', (2006) 27 Business Law Review 120
– J. Temple Lang, 'Judicial review of competition decisions under the European Convention on Human Rights and the importance of the EFTA court: the Norway Post judgment', (2012) 38 European Law Review 464
– K. Tosza, 'Efficiencies in Art. 82 EU: An illusionary defence?' (2009) Concurrences: Law & Economics 35

- C. Townley, 'Is Anything more Important than Consumer Welfare (in Article 81 EC)?: reflections of a Community lawyer', (2007-2008) 10 Cambridge Yearbook of European Legal Studies 345
- C. Townley, 'Inter-Generational Impacts in Competition Analysis: remembering those not yet born', (2011) 11 European Competition Law Review 580
- T. van der Vijver, 'Objective Justification and Article 102 TFEU', (2012) 35 World Competition 55
- T. van der Vijver, 'Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?', (2012) 4 Journal of European Competition Law & Practice 121
- T. van der Vijver, 'Objectieve rechtvaardiging & misbruik economische machtspositie: analyse van een *known unknown*' [Objective justification & abuse of a dominant position: analysis of a known unknown], (2013) 16 Markt en Mededinging [Market and Competition] 3
- T. van der Vijver, 'Benighted we stand: justifications of prima facie dominance abuses in EU Member States', (2013) 9 European Competition Journal 465
- T. van der Vijver, 'Justifications and anti-competitive unilateral conduct: an international analysis', (2014) 37 World Competition 27
- B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts', (2005) 1 European Competition Journal 7
- B. Vesterdorf, 'Article 102 TFEU and sanctions: appropriate when?', (2011) 28 ECLR 573
- P. VerLoren van Themaat, 'Gaat de Luxemburgse rechtspraak over de vier vrijheden en die over het mededingingsbeleid uiteenlopen?', (1998) SEW 398
- S. Weatherill, 'After Keck: Some Thoughts on how the Clarify the Clarification', (1996) 33 CMLRev 885
- R. Whish and B. Sufrin, 'Article 85 and the Rule of Reason', (1987) 7 YBEL 12
- E. White, 'In search of the limits to Article 30 of the EEC Treaty', (1989) 26 CMLRev 235
- M.D. White, 'A Kantian Critique of Antitrust: On Morality and Microsoft', (2007) 22 Journal of Private Enterprise 161
- M. Williams, 'Section 46 of the Trade Practices Act 1974: Misuse of Market Power - A modern day catch 22?', (1992) 22 Queensland Law Society Journal 377
- J.D. Wright, 'Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust', (2009) George Mason Law & Economics Research Paper No. 09-23

ANNEX D. CURRICULUM VITAE

Tjarda van der Vijver (Haarlem, 1984) followed his pre-university eduction at the Sancta Maria Lyceum, Haarlem, between 1996-2002. In 2002-2003, he followed courses in French and Spanish language and culture at the Université Montpellier III in France and the Universidad del País Vasco in Bilbao, Spain. Afterwards, Tjarda went to Leiden University Law School, graduating *cum laude* in 2008 with master degrees in European law and company law. His master's thesis for the European law master, which analyzed exemptions to third party access in the EU gas sector, received awards from the Dutch Association of European Law, the Dutch Association of Energy Law and the Royal Dutch Gas Association. In 2009 Tjarda obtained, with merit, a specialist master degree in competition law & economics from King's College London. Subsequently, he worked at the network sectors & media unit of the Netherlands Competition Authority. His work focused mainly on competition law enforcement and merger control in the energy, telecom and media sectors. In 2010, Tjarda became an external PhD candidate at Leiden University, and worked on his PhD full-time between January and August 2013. As of September 2013, Tjarda works as an associate at Allen & Overy LLP in Amsterdam.