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

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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.