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

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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,

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[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

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[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]

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[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

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[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.

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[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

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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]

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[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

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[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:

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[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.

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[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?).