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

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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]

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[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.

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[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?

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[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

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[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.

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[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).

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[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]

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[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

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[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

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[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]

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[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

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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.

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[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]

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[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 *before* one can conclude whether or not a merger entails a significant impediment to effective competition.

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[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.

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[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.