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

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CHAPTER III OBJECTIVE JUSTIFICATION AND ARTICLE 102 TFEU[*]

1 INTRODUCTION

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

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

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

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

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

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

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

2 ARTICLE 102 TFEU

2.1 The background and objectives of Article 102 TFEU

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

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

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

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

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

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

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

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

[337] *Ibid*.

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

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

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

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

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

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

2.2 The sliding scale of market power

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 OBJECTIVE JUSTIFICATION UNDER EXAMINATION

3.1 Introduction

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

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

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

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

[360] *Ibid*, para 186.

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

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

3.2 'Objective justification' and Article 102 TFEU

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

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

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

[363] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4 Three types of objective justification

3.4.1 The various types of objective justification

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

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

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

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

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

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

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

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

<table>
<tr><td colspan="4">Objective justification</td></tr>
<tr><td colspan="2">Legitimate commercial conduct/business behaviour</td><td rowspan="2">Efficiency</td><td rowspan="2">Public interest</td></tr>
<tr><td>Commercial freedom</td><td>Objective necessity</td></tr>
<tr><td>Competition on the merits</td><td>Force majeure; State action</td><td>Positive welfare effect</td><td>Public interest gain</td></tr>
</table>

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

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

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

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

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

3.4.2 Legitimate business behaviour – commercial freedom

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[430] *Ibid*., at 36.

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

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

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

3.4.3 Legitimate business behaviour – objective necessity

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

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

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

The *Télémarketing* case was an early acknowledgment that technical and commercial reasons can offer an objective necessity for *prima facie* abusive conduct.[435] Such reasons could thus provide a reason for a dominant undertaking to reserve to itself an ancillary activity on a neighbouring market on which it holds a dominant position.[436] Technical and commercial constraints may be particularly relevant in the examination of a possible objective justification in a refusal to deal case.[437] There may, for example, be physical limitations. An example is the Commission decision in *Port of Rødby*.[438] The Commission observed that an undertaking that owns or manages an essential port facility from which it provides a maritime transport service may not, without objective justification, refuse to grant access to a competitor.[439] The Commission examined whether there were technical constraints, such as insufficient capacity, that prevented the competitor from entering the market.[440] On the facts, the Commission found no such constraints.

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

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

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

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

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

[439] *Ibid*., para 12.

[440] *Ibid*., para 15.

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

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

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

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

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

[444] *Ibid.,* para 205.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4.4 Legitimate business behaviour – The BP *judgment*

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

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

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

[469] *CIF*, *supra* note 447, para 54. Do note that *CIF* seemed to support the second approach, which depends on an infringement of Article 102 TFEU.

[470] *BP*, *supra* note 338.

reasons for this.[471] Disagreeing with the Commission, the AG's Opinion and the ECJ's judgment provide several reasons why there was no abuse, after all.[472]

First, the case involves an element of State intervention. AG Warner considered the intervention by a government agency – even though not compulsory – may have created doubts as to whether BP should honour its contractual obligations.[473] Furthermore, there was an element of *force majeure*. The wider context was the shortage of oil products,[474] forcing BP to choose how to allocate its supplies. The ECJ held that BP could indeed differentiate between 'traditional' and 'occasional' customers. If BP had reduced its supplies to ABG only to a limited amount, it would have had to considerably lower its deliveries to its traditional customers.[475] The ECJ also noted that ABG would not be greatly affected, as it had various alternative sources of supply through the intermediary of a government agency.[476] Finally, the differentiation also contained an element of commercial freedom. AG Warner suggested customers may indeed be given priority if they had been prepared to pay higher prices in normal times – with the aim to obtain an assured supply in times of scarcity.[477] The *BP* case thus shows how various perspectives can put the conduct under review in its proper context, and how a conclusion may follow that there has been no abuse.

3.4.5 Efficiency

An efficiency plea provides another type of objective justification.[478] The plea is based on the link between economic efficiency and consumer welfare, which some commentators argue should be the

[471] *Ibid*., para 19.

[472] *Ibid.*, para 43. See also the Opinion of AG Warner in the same Case.

[473] Opinion of AG Warner in *BP* (*ibid.*) *supra* note 338, at 1540

[474] As well as the 'regrouping of BP's operational activities following the nationalization of a large part of the company's production activities'. See *BP* (*ibid*.), para 28.

[475] *Ibid*., para 33.

[476] *Ibid*., para 39.

[477] Opinion of AG Warner in *BP* (*ibid*), at 1534.

[478] See Whish (2008, *supra* note 331, at 208), who argues that Article 101(3) TFEU serves as a useful template to consider an efficiency plea under Article 102 TFEU.

key objective of competition law.[479] In essence the efficiency criterion requires the dominant firm to show that the *prima facie* abuse has no net harm effect on consumer welfare.[480] The efficiency plea is likely to gain more ground following the Commission's 2009 guidance paper that pushes for a more economic approach vis-à-vis abuse cases.[481]

Several early ECJ judgments show the relevance of efficiency considerations within Article 102 TFEU. Examples include *Hoffmann-La Roche*,[482] *Michelin I*[483] and *Michelin II*.[484] A more formal acknowledgment of the efficiency plea came in *British Airways*. The case shows that Article 102 TFEU can accommodate an efficiency-based balancing act.[485] The ECJ held that, even where there is an 'exclusionary effect',[486]

[479] L. Lovdahl Gormsen, 'How well does the European Legal Test for Predation go with an Economic Approach to Article 102 TFEU?', (2010) 37 *Legal Issues of Economic Integration* 294 ('Gormsen 2010'). She notes that it is 'debatable' whether consumer welfare is reflected in the case law of Article 102 TFEU. See, further, L. Lovdahl Gormsen, *A Principled Approach to Abuse of Dominance in European Competition Law* (Cambridge University Press: Cambridge 2010).

[480] See Commission guidance on enforcement priorities, *supra* note 378, para 30. See also *Irish Sugar* (General Court), *supra* note 353, para 187-189. The General Court held that dominant undertakings are allow to take measures of a defensive nature if they are based on criteria of economic efficiency, provided it is consistent with the interests of consumers. More recent case law, as shall be examined below, seemingly expanded the possibilities for dominant firms to invoke efficiency benefits.

[481] In its guidance document, the Commission repeatedly emphasized the importance of an effects-based approach instead of a form-based approach. See the Commission guidance on enforcement priorities, *supra* note 378. For a view supporting the effects-based approach, see e.g. Competition Law Forum Article 82 Review Group, 'The Reform of Article 82: Recommendations on Key Policy Objectives', (2005) European Competition Journal 179, at 180-182.

[482] *Hoffmann-La Roche*, *supra* note 349, para 90.

[483] *Michelin I* (ECJ) *supra* note 334, para 85.

[484] *Michelin II* (General Court) *supra* note 422, para 59.

[485] *British Airways* (ECJ), *supra* note 341, para 69. Interestingly, in the *Atlantic Container* ruling the General Court held that efficiencies *cannot* constitute and objective justification under Article 102 TFEU. See Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II-3275, para 1112. Only months later, however, the General Court confirmed in *British Airways* that the efficiency plea exists after all. See *British Airways* (General Court), *supra* note 416, para 280. It seems there has been extensive debate between the judges, which has finally been settled in favour of the pro-efficiency side.

[486] In sum, there was thus a *prima facie* abuse.

such an effect 'may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.'[487] Conduct that meets this criterion should, *ex post facto*, be considered as competition on the merits.[488] It reflects the idea that competition law should not intervene if a dominant firm is able to outperform its competitors simply as a result of superior efficiency.

Building upon *British Airways*, the 2012 *Post Danmark* judgment offers a clear framework as how to perform such an efficiency-balancing test.[489] The ECJ held that:[490]

> 'it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition'.

The *Post Danmark* judgment thus calls for a weighing exercise of positive and negative effects that arise from the conduct; not only effects in terms of consumer welfare (that is often equated with an

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[487] *British Airways* (ECJ), *supra* note 341, para 69. Cf. Opinion of AG Kokott in *British Airways* (*ibid*), para 59. The General Court's ruling in *British Airways* (*supra* note 416, para 280) referred explicitly to 'economic efficiency'. An earlier relevant judgment was *Irish Sugar* (General Court), *supra* note 353, para 189. In *Irish Sugar*, the General Court held that protection of the commercial position of an undertaking must be based on criteria of economic efficiency and be consistent with the interests of consumers.

[488] *TeliaSonera*, *supra* note 347, paras 24 and 43. At para 88, the ECJ appeared to sketch a link between the dominant firm's 'reliance on its own merits' and 'the absence of any […] economic and objective justification'. See also *Post Danmark*, *supra* note 381, at paras 21 and 22. In the latter paragraph the ECJ held that 'not every exclusionary effect is necessarily detrimental to competition', explaining that competition on the merits may well lead to the exit of competitors from the market. Note that this is slightly different from the 'competition on the merits' discussed in section 3.4.2 above, which concerns conduct that takes place within the commercial freedom afforded to the dominant undertaking.

[489] *Post Danmark, supra* note 381, paras 41-42; *British Airways*, *supra* note 341, para 86, and *TeliaSonera, supra* note 347, para 76; Also note that some recent cases have remained relatively traditional; Case C-549/10 P *Tomra Systems ASA and Others v Commission* [2012] nyr.

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

efficiency standard), but in terms of competition, more broadly, as well. The test is strikingly similar to the conditions of Article 101(3) TFEU.[491] Some commentators have argued that such a transposition is inappropriate.[492] However, *Post Danmark* is not that surprising considering the widespread call for, and the ECJ's apparent wish to follow, a more effects-based approach.[493] The conditions of Article 101(3) TFEU simply provided a tried and tested framework that the ECJ is familiar with. The transposition also has the benefit of bringing more consistency in the application of Articles 101 and 102 TFEU.[494]

Efficiency is not a unitary concept, but can be viewed from different perspectives. These perspectives include allocative efficiency (output maximization), productive efficiency (cost minimization) and dynamic efficiency (innovation maximization). There is no sound basis to prefer, *in abstracto*, one type of efficiency to the other.[495] Only a balancing act of the various, and often opposing, effects can

[491] See *Post Danmark*, *supra* note 381, para 41-42. The dominant undertaking must show that the likely efficiency gains must 'counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition'. Article 101(3) TFEU, for its part, notes that a restrictive agreement will not be prohibited if it 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

[492] J. Temple Lang, 'Judicial review of competition decisions under the European Convention on Human Rights and the importance of the EFTA court: the Norway Post judgment', (2012) 38 European Law Review 464, at 487. For another criticism, see Friederiszick and Gratzà 2012, *supra* note 408, at 38. They note that 'copying the conditions from art. [101](3) of the Treaty to art. [102] may contribute to the illusionary character of efficiency defence'. Of course, this position assumes that Article 101(3) TFEU cannot adequately accommodate for an efficiency plea.

[493] D. Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom?', (2004) 41 *Common Market Law Review* 1527.

[494] See e.g. *Continental Can*, *supra* note 343, para 25. See also section 3.2.1 in chapter II.

[495] Allocative efficiency is strongly associated with the model of price equilibrium, which many commentators argue should be the basis for competition policy. At the same time, productive efficiencies could be preferred as it

determine whether conduct has a net beneficial effect on efficiency. In practice, a *prima facie* abuse will usually entail a net loss in allocative efficiency, raising the question whether the loss can be outweighed by productive or dynamic efficiencies. For example, the General Court examined productive efficiencies in *British Airways* (focusing on possible cost savings of the scheme under review)[496] and dynamic efficiencies in *Microsoft* (focusing on the incentives to innovate).[497] Another example is a refusal to license an IP right. Such a refusal may reduce allocative efficiency (as it likely to lower output and raise prices), but at the same time strengthens the incentive to invest, thus strengthening dynamic efficiency.[498]

Although an efficiency-balancing test is relatively straightforward in theory, in practice it is anything but.[499] It is, generally speaking, difficult to quantify the various effects in a precise and reliable way.[500] This is particularly the case for dynamic efficiencies, which usually entail highly uncertain benefits in the future. By comparison, productive efficiencies are often less difficult to quantify. A system that solely takes into account effects that can be quantified in a reliable manner is thus likely to have a bias in favour of productive efficiencies; even though dynamic efficiencies can have a much greater long-term influence on consumer welfare.[501]

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is often the easiest to accurately measure (Friederiszick and Gratzà 2012, *supra* note 408, at 36). Finally, dynamic efficiencies have the benefit of taking into account long-term benefits, but are particularly difficult to assess.

[496] *British Airways* (General Court), *supra* note 87, paras 267 and 284-285.

[497] *Microsoft*, *supra* note 395, para 709.

[498] See also Opinion of AG Jacobs in Case C-7/97 *Bronner* [1998] ECR I-7791, para 57. Jacobs holds that 'interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations', referring in particular to the opposing effects on short term and long term competition. See also Opinion of AG Poiares Maduro in *KPN v OPTA*, supra note 331, para 53: 'a duty under Article [102 TFEU] for a dominant undertaking to aid its competitors should not be assumed too lightly'. Poiares Maduro also notes that '[a] balance should be kept between the interest in preserving or creating free competition in a particular market and the interest in not deterring investment and innovation by demanding that the fruits of commercial success be shared with competitors'.

[499] See also the difficulties noted by K. Tosza, 'Efficiencies in Art. 82 EU: An illusionary defence?', (2009) Concurrences: Law & Economics 35, at 35-36.

[500] *Ibid*.

[501] Note also the criticism on the Commission's approach towards dynamic efficiencies, putting more faith in 'follow-on incremental innovation' rather than 'breakthrough competition for the market'. See Friederiszick and

In practice, the efficiency plea should attempt to approximate the effects of the conduct. There should be a balance between the *magnitude* of the effects and the *likelihood* with which they are to arise. Such an approach removes the bias towards any type of efficiency: although dynamic efficiencies are often much less certain, they may represent substantial efficiency gains. An approximation of effects, rather than an intricate quantification, may sound as a wobbly basis for an efficiency analysis. However, assessments whether conduct tends to be pro-competitive or not have been used within the framework of Article 101 TFEU for many years. Usually, once can find proxies to what extent conduct can be expected to be efficient. For example, if the conduct is simply a continuation of a practice that the firm already engaged in before attaining dominance, it is likely to be pro-competitive.

An efficiency examination should, in my view, also consider the degree of dominance to the extent that it has an impact on the effects of the conduct under review. In its Article 102 TFEU guidance paper, the Commission stated that exclusionary conduct of a super-dominant firm 'can normally not be justified' on efficiency grounds.[502] The Commission's cautious choice of words indicates that not even a super-dominant firm is barred *in toto* from invoking an efficiency plea.[503] Nevertheless, such an undertaking will find it more difficult to invoke an objective justification than a firm that barely meets the criteria for dominance. This seems a reasonable stance. As was argued in paragraph 2.2, the higher the degree of market power, the less likely *prima facie* abusive conduct will exhibit redeeming features that are

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Gratzà 2012, *supra* note 408, at 39. They refer e.g. to D. F. Spulber, 'Competition Policy and the Incentive to Innovate: The Dynamic Effects of Microsoft v. Commission', (2008) 25 Yale Journal on Regulation 300.

[502] Commission guidance on enforcement priorities, *supra* note 378, para 30.

[503] The Commission does not mention what I consider to be the other sources of objective justification, i.e. public interest considerations and legitimate business practice. There seems to be no reason why super-dominant firms should, as a matter of principle, not be allowed to invoke these sources. Whether they can be accepted is of course a different matter. See also DG Competition's discussion paper on the application of Article [102] of the Treaty to exclusionary abuses of December 2005, available at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf. At paras 90-91, the Commission holds that it is highly unlikely that a dominant undertaking can successfully invoke efficiencies if its conduct would lead to a monopoly. I think that this statement is too restrictive, as it would bar an efficiency plea in sectors where competition is *for* the market – sectors, in other words, that tend towards (temporary) monopolies even under perfectly legitimate competition.

sufficient to compensate for its anti-competitive features. The *TeliaSonera* judgment is somewhat ambivalent on this issue. Although it held that 'the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct', this is not the case 'to the question of whether the abuse as such exists'.[504] To my mind, the second quote is mistaken, as it suggests that an examination of the extent of effects is irrelevant for a finding of an abuse – contrary to the reliance on an effects-based approach in the same judgment.[505]

Admittedly, the difficulty with the quantification of effects may lead to challenges for legal certainty.[506] If the test can only produce results with hindsight, it may leave dominant undertakings with insufficient possibility to adapt their behaviour beforehand.[507] According to Temple Lang, '[t]here should be a test of exclusionary foreclosure that dominant companies can apply before they begin the conduct in question'.[508] A dominant undertaking can formulate *ex ante* what efficiency gains it considers applicable and, importantly, how they benefit consumers. Another useful examination is asking whether the conduct is truly necessary for the efficiencies to arise – this test will often prove to be the most formidable hurdle for an efficiency plea. However, there is no single *ex ante* test that can provide 100% reliability on an examination of effects – if only because the conduct may have unexpected consequences, either pro- or anti-competitive. It appears that an effects-based approach entails a degree of uncertainty that we will simply have to live with. At the end of the day, I believe it is preferable to opt for an effects-based approach that contains slightly more uncertain rules, instead of a form-based approach that is fully predictable but also bans many practices that are actually pro-competitive.

As a final comment, I should note the ambiguity as to the precise relation between the efficiency plea and objective justification. Rousseva has argued that the efficiency plea should not form part of objective justification.[509] Her point raises an important question: why would a dominant undertaking

[504] *TeliaSonera*, *supra* note 347, para 81.

[505] *Ibid.*, para 76

[506] According to the principle of legal certainty, dominant firms must be able to know whether conduct is prohibited or not. See *Deutsche Telekom*, *supra* note 336, para 202; *TeliaSonera*, *supra* note 347, para 44.

[507] Temple Lang 2012, *supra* note 492, at 469-470.

[508] *Ibid*.

[509] Rousseva 2010, *supra* note 332, at 380-387.

have to justify efficient behaviour? Why is such conduct not legitimate in and of itself? It is submitted that the answer lies in the opposing effects that conduct may have. The need to proffer a justification arises precisely because the conduct has *some* anti-competitive characteristic, such as an adverse impact on allocative efficiency.[510] The net effect can only be found by weighing the pro-competitive effects as well. The same approach applies to merger control. A merger filing may require an efficiency defence for a merger that – if the defence proves successful – transpires to have a net efficient effect.

3.4.6 Public interest

Public interest objectives may serve as another type of objective justification. It is submitted that a dominant undertaking should not be *a priori* precluded from taking public interest into account when determining its course of action. Sometimes public interest is equated with 'non-economic' values. In my view, a sharp distinction between 'economic' and 'non-economic' values can be deceptive. At least in theory, it is possible to valuate, in economic terms, values that we would otherwise think of as 'non-economic'.[511] An example is where the production of a certain good has negative effects on the environment. If perfect information were available, it would be possible to calculate all its negative externalities and compare it to the benefits of continuing production. If the benefits are greater than the costs, the polluter could theoretically negotiate full compensation for the harm it inflicts upon others.[512] In this way, public interest values can to a large extent be considered in terms of efficiencies, as they call for a weighing exercise of beneficial and harmful welfare effects.

Indeed, the issue is not that public interest values can never viewed in economic terms (because, theoretically, they often can), but that they are often exceedingly difficult to quantify in actual practice. For example, a comprehensive examination of harm to the environment should not only assess the current effects, but its impact in the future as well. But how do we valuate the burden that we put on

[510] An 'exclusionary effect', in the words of *British Airways* (ECJ), *supra* note 341, para 68-70.

[511] For several examples of how we can make difficult societal choices (such as the decision in which municipality to build a prison) through market mechanisms, see e.g. R.F. Frank, *The Darwin Economy: Liberty, Competition and the Common Good* (Princeton University Press: Princeton, New Jersey 2011). Of course, it is a different matter whether this is always desirable or practicable.

[512] Do note that this implies that those receiving compensation are representative for the full extent of the relevant harm. Alas, this does not seem likely. For example, people not yet born are unlikely to be compensated, even though they may well be affected (see Townley 2011, *infra* note 513).

future generations by, say, burning irreplaceable fossil fuels or by contributing to irreversible climate change?[513]

There is simply no sufficiently reliable and precise data available that provides a solid basis to make an all-inclusive balancing exercise. Indeed, there may be an undesirable bias in favour of present-day benefits as they are relatively easy to quantify, compared to future adverse effects that are more uncertain – even though those future adverse effects can be much greater than the current benefits. And even if we do succeed in quantifying all the relevant effects, there may still be a market failure. Coming back to the previous example, people not yet born can simply not claim compensation for the harm to them by previous generations – leaving current generations largely free to neglect the extensive harm that their conduct may inflict on future generations.

In addition to the point raised above, there may also be values that, from an ethical perspective, we do not *wish* to translate into economic terms. Welfare maximisation is not the only value we care about.[514] That is why competition law should not *a priori* bar a dominant undertaking from bringing its actions more in line with the interests of society at large. The mere fact that an interest is difficult to properly express in economic terms, does not mean that it should be neglected. Although competition law is obviously not the primary means to pursue public interest goals, it is submitted that Article 102 TFEU should not, by definition, reject such considerations as irrelevant.[515]

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[513] For a further analysis, see C. Townley, 'Inter-Generational Impacts in Competition Analysis: remembering those not yet born', (2011) 11 European Competition Law Review 580.

[514] See e.g. C. Townley, 'Is Anything more Important than Consumer Welfare (in Article 81 EC)?: reflections of a Community lawyer', (2007-2008) 10 Cambridge Yearbook of European Legal Studies 345. See also the discussion between Dworkin and Posner on whether 'wealth' itself can be considered a value: R.M. Dworking, 'Is Wealth A Value?', (1980) 9 J. Legal Stud. 191; R.A. Posner, 'The Value of Wealth: A Comment on Dworkin and Kronman', (1980) 9 J. Legal Stud. 243.

[515] Note that not all commentators seem to agree with this separate category of 'objective justification'. For example, Kingston seems to argue that environmental concerns should be subsumed under the heading of 'objective necessity'. See S. Kingston, *The Role of Environmental Protection in EC Competition Law and Policy* (dissertation Leiden 2009), at 211. I that Kingston's approach has the risk of focusing too much on the alleged impossibility for a dominant firm to act otherwise – even though the real crux is raised when a dominant firm has chosen environmentally-friendly behaviour out of free will, namely: do we accept a diminuation of the level of competition in favour of a more effective protection of the environment?

In my view, EU competition law provides ample room to accommodate public interest considerations. The ECJ has consistently held that the competition rules must be interpreted in light of the principles and objectives of the EU.[516] Indeed, the ECJ has noted that the competition rules are 'essential for the accomplishment of the tasks entrusted to the [EU]''.[517] These tasks clearly go beyond the economic well being of consumers,[518] and include many objectives that can easily be associated with the public interest. Article 9 TFEU provides that, in defining and implementing its policies and activities, the EU shall take into account requirements linked e.g. to the promotion of a high level of employment, the guarantee of adequate social protection, and a high level of protection of human health. Article 3(3) TEU provides that the EU shall work for, *inter alia*, 'sustainable development', 'social progress' and 'a high level of protection and improvement of the quality of the environment'. These objectives can have an ample influence on the application of the competition rules.[519] An example is *Preussen Elektra*, where the ECJ held that 'environmental protection requirements must be integrated into the definition and implementation of other [EU] policies'.[520] The *Kanal 5* judgment offers another confirmation of the relevance of public interests: the ECJ held that an objective justification within the meaning of Art. 102 TFEU 'may arise, in particular, from the task and method of financing public service undertakings'.[521]

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[516] See e.g. *Continental Can*, *supra* note 343, para 25. See also Kingston 2009 (*ibid*., at 209-210), who – in my view, rightly – concludes that environmental concerns could thus be relevant in the interpretation of Article 102 TFEU.

[517] See, on Article 101 TFEU but clearly transposable to Article 102 TFEU as well, *Courage*, *supra* note 467, para 20 and Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 36.

[518] Indeed, one could question to what extent a competition policy that is solely based on consumer welfare finds a basis in the Treaties. One basis that seems to get closest is Article 3(1) TEU, which provides that the EU aims to promote e.g. 'the well-being of its peoples'. The concept of 'well-being' is much broader than simply (monetary) 'welfare'.

[519] Note that Article 7 TFEU provides that the EU shall ensure consistency between its policies and activities, reflecting the link between various policy areas and objectives.

[520] Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para 76.

[521] Case C-52/07 *Kanal 5 and TV 4 v STIM* [2008] ECR I-9275, para 47. Unfortunately, the ECJ provided no further explanation. The funding of a public service obligation may, alternatively, be considered as 'objective necessity'. I prefer, however, to categorise it under public interest, because it is a deliberate *choice* to pursue a specific policy objective, rather than a situation akin to *force majeure*.

I agree with the consideration of wider public interest objectives laid down by the EU Treaties, as those objectives would become hollow statements if they cannot make a difference in EU policies. A public interest plea is particularly persuasive if the relevant conduct protects a vital public interest goal, and presents only a limited issue for competition. Such may be the case if a dominant firm expects its business partners from abiding by minimum Corporate Social Responsibility (CSR) criteria.[522] In my view, Article 102 TFEU should not *a priori* preclude a dominant firm refusing to buy from upstream suppliers that, say, make use of child labour,[523] or that supply wood from uncertified forests.[524]

Another reason in favour of considering public interest is the role they can play within Article 101 TFEU.[525] Townley has aptly shown why public interest goals should be taken into consideration while analysing an agreement under Article 101 TFEU.[526] Considering the parallelism that should be upheld while interpreting Articles 101 and 102 TFEU (see section 3.2.1 in chapter II above), there is ample reason to give due consideration to public interest in the framework of Article 102 TFEU as well.

Two well-known Article 102 TFEU cases where the litigating parties invoked public interest are *Hilti* and *Tetra Pak II*.[527] In *Hilti*, the Court examined a justification plea that an exclusionary practice was necessary for the protection of public health and safety. Hilti argued that it disallowed the compatibility of its own products with products made by other companies for public health reasons. The General Court rejected this claim because public health in this area was already protected by a government body and by various regulations. The General Court observed that, under such circumstances, it is not the task of the dominant undertaking to 'take steps on its own initiative to eliminate products which, rightly or

[522] On the connection between CSR and competition law, see e.g. T.R. Ottervanger, *Maatschappelijk verantwoord concurreren: mededingingsrecht in een veranderende wereld* ['socially reponsible competition: competition law in a changing world'] (inaugural address 19 March 2010, Leiden University).

[523] Article 3(3) and (5) TEU provide that the EU shall promote the protection of the rights of the child.

[524] Article 3(3) TEU provides that the EU aims for a high level of environmental protection, while Article 3(5) TEU provides that the EU shall contribute to the sustainable development of the Earth.

[525] Case C-309/99 *Wouters* [2002] ECR I-1577. See also Commission decision in Case COMP.F.1/37.894 *CECED* [2000] OJ L 187/47.

[526] C. Townley, *Article 81 EC and Public Policy* (Hart Publishing: Oxford and Portland, Oregon 2009). See, differently, O. Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP: Oxford 2006).

[527] *Hilti* (General Court), *supra* note 400; *Tetra Pak II* (General Court), *supra* note 357.

wrongly, it regards as dangerous or at least as inferior in quality to its own products.'[528] Similarly, in *Tetra Pak II* the General Court did not agree with the dominant firm's submission that allowing interoperability would entail health and safety risks and would therefore be contrary to the public interest.[529]

Crucially, *Hilti* and *Tetra Pak II* rejected the public interest on the facts, but *not* as a matter of law.[530] The facts of the cases do not indicate any particular weakness in the applicable legal framework protecting health and safety, and accordingly no reason why the dominant undertaking should have gone beyond its formal legal requirements. The facts also showed little sign that the safety concerns were genuine. For example, in *Hilti*, the dominant undertaking did not pro-actively approach the competent authorities for a ruling that the use of non-Hilti nails was, in fact, dangerous.[531] There was clearly an alternative that Hilti should have taken up.

I doubt whether it follows from *Hilti* and *Tetra Pak II* the mere existence of government rules and institutions should, by definition, preclude dominant firms from ever going beyond the health and safety requirements formally required by law. This issue becomes particularly relevant in a situation where the relevant rules are, for whatever reason, ineffective to ensure health and safety standards – such a situation would not be covered by the reasoning in *Hilti* and *Tetra Pak II*, as that reasoning depends on the assumption that the relevant objective is already sufficiently protected. The most important hurdle for a dominant undertaking will be to show why its conduct is necessary to achieve the desired goal. For example, in *RTT v GB-Inno-BM*, the dominant undertaking relied in its approval of telephone equipment on 'the safety of users, the safety of those operating the network and the protection of public telecommunications networks against damage of any kind'. [532] The ECJ did not hold that these

[528] *Hilti* (*ibid*.), para 118. For the ECJ appeal, see Case C-53/92 P *Hilti v Commission* [1994] ECR I-667. The ECJ appeal focused on the nature of the evidence that needs to be submitted to the EU courts.

[529] *Tetra Pak II* (General Court), *supra* note 357.

[530] See, similarly, Case T-151/01 *DSD v Commission* [2007] ECR II-1607.

[531] *Hilti* (General Court), *supra* note 400, para 115.

[532] *RTT v GB-Inno-BM, supra* note 436, para 22.

considerations are irrelevant for the purposes of Article 102 TFEU, but rejected the plea as the dominant undertaking could have resorted to less anti-competitive alternatives.[533]

The objective justification pleas seem to have been unsuccessful because the conduct went beyond what is necessary to protect the stated public interest. I agree that there is no basis to accept a public interest plea if less anti-competitive measures would have been able to achieve the objective as well. The rulings therefore merely show that the ECJ does not accept hollow references to public interest – and rightfully so. I believe that the case law still allows dominant firms to uphold a public interest goal; as long as they can show why that goal is relevant in the EU legal context; and how their conduct meets the proportionality test (as examined below in Section 4).

Apart from the ECJ, the Commission has also dealt with public interest concerns in various cases. In the decisions discussed below, the Commission showed that it is conceptually possible to consider public interest issues in the abuse analysis. The *Port of Genoa* case concerned the differentiation of tariffs for piloting in the Port of Genoa.[534] The Commission found that pilots cannot favour certain shipping companies to the detriment of others – unless there is an objective reason to do so. The Commission noted that such objective reasons may include the 'protection of the sea bed' – confirming that environmental reasons may justify a *prima facie* abuse.[535] In *Spanish Airports*, the Commission objected to a system of discounts on landing fees in use at Spanish airports.[536] It again held that there may be 'objective reasons' for such behaviour, such as the 'aim of reducing air traffic noise or air congestion'.[537]

The finding of an abuse in both in *Port of Genoa* and *Spanish Airports* implies that no 'objective reasons' were applicable.[538] The Commission could – and should – have been more explicit as to why the relevant public interests at play were unable to justify the *prima facie* abuse. It is unclear how the differentiation

[533] *Ibid*. The ECJ notes that it could have been sufficient to lay down specifications and to establish a procedure for type-approval to examine whether those specifications have been met.

[534] Commission decision in Case 97/745/EF *Port of Genoa* [1997] OJ L 301/27.

[535] *Ibid*., para 21. The Commission also referred to economies of scale.

[536] Commission decision in Case 2000/521/EF *Spanish Airports* [2000] OJ L 208/36.

[537] *Ibid*., para 52. As in *Port of Genoa*, the Commission referred to economies of scale as well.

[538] Even though, in *Spanish Airports,* the Commission does note why the conduct does not lead to any economies of scale.

under review truly contributed to the relevant public interest aims. For example, a justification would have been much more persuasive in *Spanish Aiports* if the discounts had actually been linked to the level of noise that a particular aircraft would create by landing there.

In *GVG/FS*, the Commission examined a complaint from GVG, a German railway company. Ferrovie dello Stato, the Italian national railway carrier, allegedly made it impossible for GVG to enter the Italian market, for example by refusing to provide traction.[539] One of the arguments raised was that traction could not be provided based on safety concerns. Although the Commission did not denounce the importance of such safety reasons as a matter of law, it did reject the argument on the facts. The Commission observed that GVG, before being able to offer passenger transport services, would first have to obtain a safety certificate. As this is the responsibility by the infrastructure manager, 'it is not the responsibility of [Ferrovie dello Stato] to judge whether GVG fulfils the necessary safety requirements'[540] – echoing the approach taken in *Hilti*. It seems reasonable that a general reference to safety concerns is unlikely to be persuasive – especially if there specific regulations are in place dealing with that specific concern.[541]

A number of arguments can be raised against considering public interest within the framework of Article 102 TFEU.[542] Some commentators have suggested that competition law should only consider efficiencies and the effect of conduct on consumer welfare,[543] which seemingly takes public interest out of the equation. To my mind, this position creates a false dichotomy. As said before, public interests have an

[539] Commission decision in Case COMP/37.685 *GVG/FS* [2004] OJ L 11/17.

[540] *Ibid*., para 136.

[541] Provided that there are no strong reasons to assume that the regulations are inadequate.

[542] V. Brisimi, 'Abuse of a Dominant Position and Public Policy Justifications: A Question of Attribution', (2013) 24 EBLR 261. He argues, *inter alia*, that the right of undertakings to lobby is 'the flip side of the cases that reject public policy justifications under Article 102 TFEU' (at 267). Although insightful, I believe that there can be situations in which Brisimi's birfucation is inadequate. For example, how would this system work in terms of a particularly successful lobby, namely where the legislator gives the dominant firm leeway to achieve certain public interest goals?

[543] See e.g. Odudu 2006, *supra* note 526.

impact on (consumer) welfare just like more easily quantifiable interests. There is no solid foundation to discard interests just because they are difficult to gauge.[544]

Another argument is that the State, instead of private firms, should resolve issues related to public interest.[545] The case law, such as *Hilti* and *Tetra Pak II*, seems to support this position.[546] In another case, *Sot. Lélos*, the ECJ rejected a claim that restrictions to parallel imports were necessary to prevent shortage of medicines on a given national market – according to the ECJ, it should be for the national authorities to resolve the situation.[547] Although it makes sense that it is normally the role of States to ensure the public interest, I consider it too simplistic to hold that State action always provides the answer. As said earlier, State legislation may be ineffective to reach the desired goal or, alternatively, may still be in the making. Another possibility is that the legislator has provided leeway for a dominant undertaking to take public interests into account.[548] For instance, such a 'delegation' of public interest responsibilities may exist within the framework of a public service obligation, or may arise within the activities of a public-private partnership.[549] Another issue is that a national authority – or court – does not necessarily protect EU interests at large, but may have a statutory duty to focus on certain domestic interests. As a result, one cannot conclude that, by definition, national authorities sufficiently protect the interests defined by the EU Treaties. Dominant undertakings may thus be confronted with public interest issues, even though it does not seem their prerogative at first sight. In short, the distinction between 'public' and 'private' is often not easy to make. Indeed, the *Bosman* judgment, an internal

[544] Also consider that efficiency balancing tests themselves are often based on an approximation of effects, rather than a precise quantification.

[545] See e.g. Brisimi 2013, *supra* note 542.

[546] *Hilti* (General Court), *supra* note 400; *Tetra Pak II* (General Court), *supra* note 357. See also the General Court rulings in *Irish Sugar*, *supra* note 353 and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389.

[547] *Sot. Lélos*, *supra* note 375, para 75. The authorities should do so 'by taking appropriate and proportionate steps'.

[548] Providing such leeway may improve the flexibility of legislation. A State may attach more relevance as to the principles that are upheld, rather than the actual implementation of those principles. This may particularly be the case for markets where technological developments make it difficult for the legislator to keep up.

[549] See Article 106(2) TFEU. Cf, in the context of Article 101 TFEU, the *Wouters* case, *supra* note 525. Dutch law gave the Bar Council ample leeway to work towards objectives such as the independence of lawyers.

market case, confirmed that private actors may rely on the public interest contained in Article 36 TFEU: '[t]here is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health'.[550] Of course, this does not mean *carte blanche* for any type of behaviour that would otherwise be prohibited. It simply means that we should not, by definition, turn a blind eye to the relevance of public interest concerns for the purposes of Article 102 TFEU.

Yet another criticism may be that NCAs and courts are considered ill-equipped to deal with the balancing of competition and public interests.[551] The idea is that it would require them to weigh interests of a completely different nature, also known as *incommensurabilia*. I doubt whether this argument is sufficiently potent, as EU law often requires NCAs and courts to make such decisions. For example, how to deal with agreements that appear pro-competitive overall, but at the same time segment national markets (and could thus harm the functioning of the internal market)?[552] Indeed, balancing various interests that are difficult to compare is often at the core of what judges do – not just those applying EU law.[553]

A final critique is that introducing public interest concerns in competition matters lacks a democratic basis;[554] such issues should more properly be examined in the political field.[555] Such criticism appears to overlook that, because of the hierarchy of norms, the national and EU legislator[556] are incapable of

[550] Case C-415/93 *Bosman* [1995] ECR I-4921, para 86.

[551] See e.g. Brisimi (*supra* note 542, at 270), who warns for a potential 'distorted application of competition law'.

[552] Joined Cases C-403/08 and C-429/08 *FAPL* ('*Karen Murphy*') [2011] ECR I-9083.

[553] It is interesting that commentators who argue in favour of an efficiency-based approach appear to assume that competition authorities and courts are perfectly capable of doing so – even though judging the soundness of an economic effects analysis is *not* what courts normally do.

[554] This point is often raised by commentators who also argue that competition law should only involve an efficiency analysis – a position that is itself questionable from a democratic legitimacy point of view. I doubt whether the people representing the contracting parties, at the time of the adoption of the text of Article 102 TFEU, were Chicago School adepts *avant la lettre* (the text has remained substantively unchanged from the very beginning of the European Economic Community). See, differently, P. Akman, 'Searching for the Long-Lost Soul of Article 82 EC', (2009) 29 Oxford Journal of Legal Studies 267.

[555] Brisimi argues that public interest isses should be resolved, *inter alia*, through appropriate legislation. See Brisimi 2013, *supra* note 542, at 264.

[556] I am referring to the EU institutions that make secondary EU legislation.

introducing rules that set aside a Treaty provision such as Article 102 TFEU (see also section 3.4.3). So, in fact, allowing such considerations to influence the interpretation of Article 102 TFEU may actually *enhance* the impact of democratically agreed-upon public interest values. In this vein, one should remember that the democratic legitimacy of Article 102 TFEU is not greater – or smaller – than that of the provisions in the EU Treaties that show concern for non-competition interests.

4 THE LEGAL ASSESSMENT OF OBJECTIVE JUSTIFICATION

4.1 Introduction

It is useful to examine the requirements that any objective justification must meet. I shall examine the use of the proportionality test; a key legal framework for many parts of EU law. It is frequently used by the ECJ to examine whether a justification applies vis-à-vis conduct that would otherwise be considered contrary to the Treaty, and is clearly relevant for EU competition law as well.[557]

The proportionality test embodies a number of elements.[558] It first ascertains whether the aim relied upon is legitimate and whether the conduct is suitable to achieve that aim. The necessity test then requires an examination of whether the means were necessary to achieve the desired aim, i.e. whether less anti-competitive means could have obtained the stated objectives just as well. The necessity often provides the crux of the legal analysis, as it is usually the most difficult condition to meet. Finally, there may also be a proportionality test *stricto sensu*, which assesses whether the conduct under review does not disproportionality advance the dominant firm's interests in comparison to the interests of other market participants.

[557] Opinion of AG Cosmas in *Masterfoods, supra* note 331, para 101: 'the question of whether conduct is justified or not is assessed on the basis of the principle of proportionality'. See also the Opinion of AG Kirschner in *Tetra Pak II* (General Court), *supra* note 357, paras 68-71, showing the relevance of the proportionality principle in several important cases on Article 102 TFEU. See, more recently, R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 211): 'All defences in the Article 102 TFEU context must meet a proportionality test'.

[558] The European Commission's discussion paper (*supra* note 503, para 81) notes the importance of a proportionality test when assessing a 'meeting competition defense'.

After the examination of the proportionality test, I shall also deal with the relevance of anti-competitive intent and effects. All these elements provide insight into the main issues that are relevant in the legal analysis of an objective justification. A red thread in my analysis is that the type of justification at play largely determines what legal conditions can and should play a role.[559] The following paragraphs also contain several references to the *Post Danmark* legal test that applies to an efficiency plea, as discussed in Section 3.4.5.

4.2 Legitimate aim & suitability[560]

It is unclear what kind of legitimate aims a dominant undertaking may invoke. An aim should in any case be considered legitimate if it seeks to achieve a goal that is consistent with one of the objectives of EU competition law – this will be an attractive route for a public interest plea, for example if the conduct benefits environmental protection.[561] More generally, a legitimate aim should refer to benefits that accrue wider than simply to the dominant firm itself. This is particularly the case in terms of the justifications that call for a balancing test, namely the efficiency plea and the public interest plea. As the finding of a *prima facie* abuse connotes that the conduct under review has the potential to harm competition; a justification then requires a wider benefit to the market.[562]

[559] See, differently, R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 215). They suggest that objective justification *always* requires a full examination of suitability, necessity and proportionality.

[560] For a discussion of the relevance of 'legitimate aim', reasonableness and proportionality, see Loewenthal 2005, *supra* note 332,at 465.

[561] See e.g the objectives mentioned in *supra* note 523 and 524. See also Kingston (2009, supra note 516, at 210), who argues that a dominant firm that relies on environmental benefits of its conduct should be able to meet the suitability test.

[562] Case T-66/01 *ICI v Commission* [2010] ECR II-2631, para 306: 'the desire to maintain or increase production capacity is not an objective justification to allow an undertaking to act independently of Article [102 TFEU]'. I believe that the General Court could not have made such a sweeping statement if the dominant firm would have relied more heavily on the wider efficiency benefits of its conduct.

In my opinion, the condition of a legitimate aim should not be strictly enforced vis-à-vis legitimate business conduct. Such a justification implies that the dominant undertaking is simply making use of its commercial freedom. Within the boundaries of 'legitimate business conduct', the dominant firm may indeed be led by a wish to pursue its own interests,[563] rather than a more 'objective' benefit to the market at large. At the same time, such a plea is more likely to be persuasive if the dominant firm succeeds in showing the wider benefits of its conduct: would markets be functioning better if all market participants exhibit the same conduct? For example, consider a dominant undertaking that refuses to deal with a purchaser that refuses to pay its bills. Although such a refusal obviously seeks to protect the financial interests of the dominant undertaking, its beneficial ramifications are wider than that. If all companies would pay their bills, the economy would be better off as a whole.

As to a plea based on objective necessity, the circumstances will dictate to what extent it can be subsumed under a legitimate aim. Compliance with legislative standards is clearly a legitimate aim. It should then be examined whether the conduct is capable of meeting those standards. However, the 'legitimate aim' criterion cannot be easily laid down on a situation of *force majeure*, as such a plea connotes that the dominant undertaking acts out of necessity (which is considered justified *ex post facto*), rather than a legitimate aim.

Finally, an assessment of legitimate aim should also include a check whether the conduct is *suitable* to achieve the professed legitimate aim. If the conduct is incapable of reaching the desired objective, there is no reason to condone the behaviour on the basis of a legitimate aim. In effect, the suitability test calls for a 'first glance' examination, and is accordingly a lighter version of the more important necessity test. The necessity test shall be examined below.

4.3 Necessity test

Under the necessity test, sometimes referred to as the 'indispensability' test, a dominant firm must use the least anti-competitive means to reach its professed goal. Various authors, such as Loewenthal and Eilmansberger, appear to attach much weight to the necessity test.[564] The value of the necessity test for

[563] Even though such conduct may have wider benefits.

[564] Loewenthal 2005, *supra* note 332, at 466. See also Eilmansberger 2005, *supra* note 339, at 172-173.

objective justification is not apparent from early case law such as *United Brands*. The ECJ held that, in principle, the dominant firm is at liberty to decide what type of action it carries out as part of a commercial 'counter-attack' vis-à-vis its competitors.[565] The judgment does not include a requirement to choose the least anti-competitive means. In addition, the ECJ seemed to create a link between the principle of proportionality and 'the economic strength of the undertakings confronting each other'.[566] This does not seem to refer to a necessity test, but rather a requirement to abstain from certain conduct depending on the *degree* of dominance. Such a test is compatible with a concept of dominance that is not black and white but more akin to a sliding scale (as suggested in section 2.2).

However, the case law seems to have made a gradual shift with an increased focus on the necessity test.[567] *Tetra Pak II* can be interpreted as an early indication that a necessity test should be performed. In that case, the General Court was unconvinced that the protection of public health – the professed goal of the *prima facie* abuse – could not be guaranteed by other means.[568] Later, in *British Airways*, the ECJ established the necessity criterion more firmly: 'If the exclusionary effect of [a rebate] system […] goes beyond what is necessary in order to attain [efficiency] advantages, that system must be regarded as an abuse.'[569] The same emphasis on the necessity test is apparent from the Commission decision in *Microsoft*.[570] For its part, the ECJ firmly established the necessity test as one of the legal conditions in *Post Danmark*.[571]

A way to reconcile *British Airways*, *Microsoft* and *Post Danmark* on the one hand; and *United Brands* on the other hand is by considering the different types of objective justification that were at play. In the former cases, the dominant firm invoked an efficiency plea. In such a balancing exercise it is

[565] *United Brands*, *supra* note 417, para 189.

[566] *Ibid*., para 190.

[567] It should be noted that the ECJ has never overruled *United Brands,* but keeps referring to it.

[568] *Tetra Pak II* (General Court)*, supra* note 357, paras 84 and 140.

[569] *British Airways* (ECJ), *supra* note 341, para 86.

[570] Commission decision in Case COMP/C-3/37.792 *Microsoft* (24 March 2004), recital 970.

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

understandable that the conduct should be necessary for the professed pro-competitive outcome.[572] In terms of a public interest plea, there is – likewise – no need to condone *prima facie* abusive conduct if the dominant undertaking had less anti-competitive means available to work towards the relevant public interest objective.[573]

However, a necessity test makes less sense when the objective justification plea is based on legitimate business behaviour. In such a case it is more difficult – and less desirable – for competition authorities and courts to second-guess the appropriate route for the dominant firm to take. A dominant firm may therefore still have ample liberty to choose its preferred conduct, as was decided in *United Brands*.

But how can one differentiate in the application of the necessity test, considering that it appears to entail such a straightforward examination? The necessity test can indeed become more stringent, or more lenient, depending on the context. Case law on the internal market[574] and Article 101 TFEU[575] confirms this approach. For example, the *Wouters* case shows that a restrictive measure by the Dutch Bar Council could be justified, even though the Bar Councils in several other Member States did not have such restrictive measures. Transposed to Article 102 TFEU, it means that a dominant firm may still pas

[572] The analysis should be less stringent when it concerns dynamic efficiencies. Considering the uncertain nature of such efficiencies, it will usually be impossible to determine whether the conduct is truly necessary for those efficiencies to materialize.

[573] See *Tetra Pak II* (General Court), *supra* note 357, para 115-119. See also *RTT v GB-Inno-BM*, *supra* note 436, paras 21-22. The ECJ referred specifically to an alternative: 'In order to ensure that the equipment meets the essential requirements of, in particular, the safety of users, the safety of those operating the network and the protection of public telecommunications networks against damage of any kind, *it is sufficient to lay down specifications which the said equipment must meet and to establish a procedure for type-approval to check whether those specifications are met* [italics added by author].' The dependence on other market participants may also be relevant in a follow-on private action based on Article 101 TFEU, see *Courage*, *supra* note 467, paras 32-33. See also Kingston (2009, supra note 516, at 210), who argues that a dominant firm that relies on environmental benefits of its conduct should be able to meet the necessity test. See, similarly attaching weight to the necessity test, T. Graf & D.R. Little, 'Tying and Bundling', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331) at 553.

[574] See e.g. Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, para 63; Case C-36/02 *Omega* [2004] ECR I-9609, paras 37; Case C-333/08 *Commission v France* [2010] I-757, para 105.

[575] See e.g. *Wouters*, *supra* note 525, paras 109-110.

the necessity test even if a comparable actor (for instance a dominant firm in the same product market, but in a different geographic area) has achieved the same goals by 'less' anti-competitive conduct.

4.4 Proportionality *stricto sensu*

The proportionality test, *stricto sensu*,[576] essentially assesses whether there is an equitable balance between the means to achieve a professed objective, and the (potential) impact on the market.[577] To my mind, proportionality *stricto sensu* can be an important element in the context of 'objective justification' depending on the type of objective justification at play.[578]

The role of proportionality *stricto sensu* is ambiguous as regards an efficiency plea.[579] Such an examination should primarily delve into the question whether or not the pro-competitive effects *outweigh* the anti-competitive effects; the extent to which it does so appears to be less relevant. This approach is confirmed by the *Post Danmark* judgment, which comprises no proportionality test *stricto sensu*. On the other hand, proportionality *stricto sensu* is not irrelevant here either; because even efficient conduct may fail the *Post Danmark* test if it leads to the elimination of all competition.

Similarly, the importance of the proportionality test *stricto sensu* may vary vis-à-vis an objective necessity plea. The test has little use if it was truly impossible for the dominant undertaking to act otherwise. However, to the extent that such a firm relies on a 'lighter' version of objective necessity, based on commercial or technical, there is more room for a balancing test of various interests.

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[576] Proportionality in the wider sense entails an examination of (i) legitimate aim and suitability; (ii) necessity and (iii) proportionality *stricto sensu*. See also section 4.1 above.

[577] See, differently, Østerud 2010, *supra* note 332, at 279. He argues that the proportionality test 'requires a determination of whether a conduct's net effect for consumers is positive or negative'. In my view, this test should be subsumed under the efficiency category rather than the proportionality criterion.

[578] This may not be surprising if one considers EU law more broadly. In the words of Albors-Llorens (2007, *supra* note 332, at 1729), '[o]bjective justification and proportionality have conditioned the development of key areas of [EU] law'.

[579] Even though the idea of balancing various interests is of course similar to that in the examination of an efficiency plea.

Proportionality *stricto sensu* has a particularly prominent role when examining pleas based on public interest and legitimate business behaviour.[580] In terms of public interest, the key examination is whether a fair balance has been struck between competition and non-competition interests – an assessment clearly in tune with proportionality *stricto sensu*. As regards legitimate business behaviour, the ECJ held in the *United Brands* ruling:

> 'Even if the possibility of a counter-attack [by the dominant firm] is acceptable *that attack must still be proportionate to the threat* taking into account the economic strength of the undertakings confronting each other. [italics added, TvdV]' [581]

On the facts, the ECJ held that the refusal to supply by United Brands was a disproportionate response to the actions by the purchaser.[582] Apart from proportionality *stricto sensu*, the *United Brands* judgment also noted that a dominant firm may take steps insofar they are 'reasonable'.[583] It appears that conduct is considered reasonable if it conforms to a proportionality *stricto sensu* test.

A dominant undertaking is free to act as it wishes, which may even entail a certain degree of harm to other market participants, *until* that harm is no longer proportionate to the objective sought by the conduct. In *Syfait*, AG Jacobs opined that GlaxoSmithKline's limitations on parallel exports were justified, as they were 'reasonable' within the specific context of the pharmaceutical sector.[584] The *United Brands* judgment and the Opinion in *Syfait* aptly show that one cannot draw this boundary in the abstract, and will always depend on an in-depth examination of the relevant context.

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[580] For an example, see e.g. *Atlantic Container*, *supra* note 485, para 1120.

[581] *United Brands*, *supra* note 417, para 190.

[582] *Ibid.,* para 191.

[583] *United Brands*, *supra* note 417, para 189-190.

[584] Opinion of AG Jacobs in *Syfait*, *supra* note 389, para 100 (stating that the conduct under review must be 'reasonable' and 'proportionate'). See, for a critical analysis of the Opinion (targeting in particular AG Jacob's reasoning on the internal market), C. Koenig and C. Englemann, 'Parallel trade restrictions in the pharmaceuticals sector on the test stand of Article 82 EC: Commentary on the Opinion of Advocate General Jacobs in the case Syfait/GlaxoSmithKline', (2006) 26 ECLR 338. Do note that, on the facts, the ECJ finally took a different approach is *Sot. Lélos*, *supra* note 375.

4.5 Intent

Loewenthal has argued that single firm conduct cannot be justified if its 'primary aim' is to eliminate competitors, portraying a widely held view that the dominant firm's intent is an important consideration.[585] I see two main – and distinct – ways to use intent.[586] The first possibility is that documents showing anti-competitive intent may provide context, and can support the finding of an abuse.[587] Such evidence is clearly relevant in cases involving selective price-cutting[588] as well as refusal to supply.[589] In addition, establishing an anti-competitive purpose is a necessary condition before one can label prices between Average Variable Costs and Average Total Costs as an abuse.[590]

The second possibility is that anti-competitive intent is, *ex post facto*, inferred from the finding of an abuse. This may be because the conduct under review has an anti-competitive effect,[591] or is considered to have no other *rationale* other than an anti-competitive purpose – such as the case for prices below

[585] *Ibid*. Similarly, Østerud (2010, *supra* note 332, at 249) emphasizes the importance of the 'legitimate aim' by the dominant firm. See also Eilmansberger 2005, *supra* note 339, at 146 *et seq.*

[586] Note also that the *lack* of anti-competitive intent may be relevant. Negligence, which entails a lack of such intent, may be a mitigating factor in determining the level of the fine, see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C 210/2, para 29.

[587] See e.g. the UK *Aberdeen Journals* case, where the OFT found overwhelming evidence of a carefully established plan by the dominant firm to get rid of its main competitor. See also Commission guidance on enforcement priorities, *supra* note 378, para 66 (on predation): '[i]n some cases it will be possible to rely upon direct evidence consisting of documents from the dominant undertaking which clearly show a predatory strategy'. See also *United Brands*, *supra* note 417, para 189. This paragraph refers to the 'purpose' of the conduct in question. For a clear example of where the finding of abuse hinged on the motivation of the dominant undertaking, see *BPB* (General Court), *supra* note 409.

[588] A. Jones & B. Sufrin, *EC Competition Law* (OUP: Oxford 2008), at 325. See e.g. the following cases: Case C-497/99 P *Irish Sugar v Commission* [2001] ECR I-5333; *Compagnie maritime belge*, *supra* note 348. See also R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 214): 'the defence [of prices below AVC/AAC] contains a strong intent element'.

[589] See e.g. the Opinion of Advocate-General Jacobs in *Syfait*, *supra* note 389, at para 72.

[590] Indeed, according to *AKZO* (*supra* note 351, para 72), prices between Average Total Costs and Average Variable Costs are abusive if they are part of a plan to eliminate a competitor.

[591] *Michelin II*, *supra* note 334, para 241.

Average Variable Costs.[592] The application of unrebuttable presumptions can be highly problematic, as they disregard the overall context – leaving no room for objective justification – and may well lead to mistaken inferences (as shall be examined more closely in paragraph 5.2).

Most cases with considerations on intent somehow use it as an element in line with a finding of abuse. Indeed, it appears far from easy to convince the courts that *prima facie* abusive conduct actually had a 'benign' purpose. The courts may simply regard the justification plea as an *ex post facto* explanation of conduct that 'had never really occurred to anyone in the decision-making process'.[593] Still, the *General Motors* judgment shows that a dominant firm will be able to stave off a finding of an abuse if it changes its behaviour in accordance with Article 102 TFEU in a timely fashion (i.e. before any intervention by the Commission).[594] The *General Motors* case seems to confirm that the circumstances may indeed show benign intent, which may – in turn – set aside a finding of an abuse.

Although intent can thus play an important role, its relevance should not be overstated either. First, the abuse of dominance is an objective concept.[595] This suggests that the subjective intent of a dominant firm is normally not a necessary condition to establish a breach of Article 102 TFEU.[596] I take from this that the *lack* of intent will usually not be sufficient to establish an objective justification.

[592] See e.g. the seemingly unrebuttable presumption in *AKZO* (*supra* note 351, para 71) that prices below Average Variable Costs reveal anti-competitive intent: '[a] dominant undertaking has no interest in applying such prices except that of eliminating competitors'. As discussed in section 5.2 below, this presumption may not always be warranted.

[593] Mann J in *Purple Parking and Meteor Parking v Heathrow Airport* [2011] EWHC 987 (Ch), at 204.

[594] *General Motors v Commission*, *supra* note 447, paras 20, 22.

[595] See e.g. Eilmansberger 2005, *supra* note 339, at 146. In the *Deutsche Telekom* ruling (*supra* note 336, para 124), the ECJ observed that intent and negligence is in any case irrelevant if the firm 'cannot be unaware of the anti-competitive nature of its conduct'.

[596] In addition, there is no 'fault' criterion. See e.g. *BPB*, *supra* note 409, para 70. This reasoning is derived from the fact that the concept of abuse is an objective one, see *Hoffmann-La Roche*, *supra* note 349, para 91.

Second, there is a risk of false positives: which firm would *not* want to eliminate its rivals?[597] As it is difficult to know with certainty what a company's 'primary aim' is,[598] shaky legal presumptions need to be introduced. It will also prove tricky to attach a unitary aim to a firm, especially if it is a large multinational corporation. And what happens if there is a managerial struggle over the primary aim of the firm, or if it shifts over time? Is the firm only in violation for the months during which bullish strategy notes were created philosophizing about the elimination of rivals; and could it possibly end if the tone of these documents turns more dovish?

Third, anti-competitive intent, even by a dominant firm, does not necessarily result in a restriction of competition. This may depend in particular (i) on the type of practice engaged in and (ii) on the degree of dominance. Firms that barely meet the dominance threshold may not be sufficiently potent to alter the competitive landscape at will. In the *Microsoft* and *British Airways* rulings, the EU courts suggested that conduct is only considered abusive if it is *capable* of restricting competition.[599] If a dominant undertaking has an anti-competitive intent, but engages in conduct that is incapable of restricting competition, it is difficult to see how that criterion has been met.[600] In addition, the more Article 102 TFEU is considered to focus on effects, the less value one can attach to the dominant undertaking's intent.

A fourth argument that cautions against attaching too much relevance on intent, is discernable from case law on Article 101 TFEU. The *Matra Hachette* ruling made clear that even an agreement that restricts competition *by object* (the very concept that presupposes anti-competitive intent) may be exempted from the prohibition on the basis of Article 101(3) TFEU.[601] Surely, such restrictions are

[597] See *AKZO* (*supra* note 351, para 71), which laid down a seemingly unrebuttable presumption. By contrast, more recent case law seems to have put forward a rebuttable presumption. See *Wanadoo* (ECJ), *supra* note 597, para 110. See also Gormsen 2010, *supra* note 479, at 297.

[598] This is the reason I have difficulty with the weight Albors-Llorens attaches to the dominant firm's 'genuine motivation' (2007, *supra* note 332, 1746).

[599] *Microsoft*, *supra* note 395, para 867. Østerud (2010, *supra* note 332, at 266 *et seq*.), however, seems to regard this criterion as part of the proportionality test. See also the ECJ ruling in *British Airways*, *supra* note 341, para 86.

[600] On the other hand, see *Commercial Solvents*, *supra* note 494, where the conduct was thought to entail a risk that competition would be eliminated. In practice this comes close to a prohibition of an attempted abuse.

[601] Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595.

usually harmful to competition and therefore necessitate considerable countervailing benefits. Nevertheless, the possibility remains open.[602] There is no good reason why such a possibility would exist for restrictions by object under Article 101 TFEU, and not for similar restrictions that suggest anti-competitive 'intent' under Article 102 TFEU.[603] This point is all the more relevant, as the legal test mentioned by the ECJ in *Post Danmark* for the purposes of Article 102 TFEU is close to the examination under Article 101(3) TFEU.[604]

For the reasons set out above, I believe that intent is usually important for the overall context of a case, but is not necessarily decisive.[605] I also think that the importance of intent should depend on the type of objective justification that the dominant firm wishes to invoke. In the context of an efficiency plea, the aim of the dominant firm does not seem to be particularly important. Such a plea should fail or succeed based on the effect of the conduct, rather than the intent that the firm wishes to pursue.[606]

As to legitimate commercial conduct, the case law has been slightly confusing. In *United Brands*, the ECJ noted that a dominant undertaking is barred from protecting its commercial interests 'if its actual purpose is to strengthen this dominant position and abuse it'.[607] The General Court's *British Airways* judgment inserted one – seemingly crucial – word, making the final limb read 'and *thereby* abuse it'.[608] The insertion of 'thereby' appears to be a considerable expansion of the scope of Article 102 TFEU. It

[602] It is to be noted that scholars who argue in favour of a *per se* abuse in the context of Article 102 TFEU often seem to believe that Article 101 TFEU also deploys *per se* illegality, much like the US approach to issues like price fixing or market sharing. However, to my mind the *Matra Hachette* ruling (*ibid*.) has shown that this position is incorrect.

[603] Also note that a finding of a restriction by object does not require evidence of the subjective intentions of the parties. Rather, the aims of the agreement 'as such' should be examined. Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, para 26; Case C-209/07 *BIDS and Barry Brothers* [2008] ECR I-8637, para 21. See, further, Guidelines on the application of Article [101](3) of the Treaty, OJ [2004] C 101/97, para 22.

[604] *Post Danmark*, *supra* note 381, para 42. In essence, both Article 101(3) and the *Post Danmark* test seek to assess whether the conduct has a net pro-competitive effect – even though their wording may be slightly different.

[605] Cf *T-Mobile*, *supra* note 426, para 27. Do note that this case is about Article 101 TFEU.

[606] Even though, admittedly, documents showing intent may be instructive to understand the effects that the conduct has.

[607] *United Brands*, *supra* note 417, para 189-190.

[608] *British Airways* (General Court), *supra* note 416, para 243. Emphasis added by author.

suggests that a finding of an abuse will automatically follow where the dominant undertaking's actual purpose has been to strengthen its position. I disagree with this reading, as practically *any* conduct of the dominant undertaking can be considered to affect the competitive structure of the market.[609] My preferred reading is to look at what the case law seeks to prohibit: namely the exclusion of *equally efficient* competitors by using means other than competition on the merits.[610] As long as the dominant firm does not have such intent, it should not affect its ability to rely on an objective justification.

Finally, the Court has appeared hesitant to accept a plea based on legitimate commercial conduct plea if the practice at play is a marked change from historic conduct.[611] In cases ranging from *Commercial Solvents* to *Microsoft*, the refusal to supply another firm was preceded by a (long) period of business relations. The smoking gun is particularly apparent if the refusal to supply only came about after the firm's dominance was firmly established (see e.g. *Microsoft*) or after the dominant firm introduced an entrant of its own on the downstream market (see e.g. *Commercial Solvents*).[612] I agree that such a change can be an indicator for anti-competitive intent, even though the relevant context may show a wholly different (and indeed: benign) reason for the shift.[613]

[609] Albors-Llorens 2007, *supra* note 332, p. 1746-1747.

[610] *AKZO*, *supra* note 351, para 72. See also e.g. *Deutsche Telekom*, *supra* note 336, para 177.

[611] See, similarly, Commission decision in *British Midland v Aer Lingus*, *supra* note 415, para 26. The Commission held that a refusal to continue an interlining agreement with an airline that starts competing with the dominant undertaking on an important route.

[612] For a perspective from U.S. Antitrust Law, see e.g. U.S. Supreme Court, *Aspen Skiing Co. v Aspen Highlands Skiing Corp*., 472 U.S. 585, 601 (1985). In this case the U.S. Supreme Court took into account the fact that the conduct under review was different from what it had been in the past.

[613] See e.g. *BP*, *supra* note 338, para 28. One of the reasons for the change was the nationalization of a part of BP's production capacity.

4.6 Effect

Before discussing the importance of effects, the first question is what kind of effects we are talking about in the first place.[614] Early cases, such as *Michelin I*, often considered how the conduct under review affected competitors or other market participants.[615] Many commentators have argued that this approach is mistaken, stating that the ECJ should solely focus on the effects on consumer welfare.[616]

Even though the ECJ has indeed put more emphasis on consumer welfare in recent case law,[617] it clearly has regard to the broader interests of 'competition as such' as well.[618] The efficiency-focused *Post Danmark* ruling referred to the effects on consumer welfare *and* the effects on competition.[619] It appears that the broad term 'effect on competition' is appropriate to reflect the case law by the ECJ, including – but not limited to – the effects on consumer welfare.

A practice will only be abusive if it has – at least – a potential effect on competition. However, no actual effect needs to be shown.[620] So '[i]f it is shown that the object pursued by the conduct […] is to limit

[614] Although Article 102 TFEU requires an effect, actual or potential, on trade between EU Member States, I do not examine it in this study. I consider this requirement to be a jurisdictional issue, rather than provide a possibility for objective justification.

[615] *Michelin I*, *supra* note 334, para 85. The ECJ noted that discounts, such as the one under review, are liable to restrict a customer's freedom of choice and independence.

[616] See e.g. Odudu 2006, *supra* note 526.

[617] See e.g. *Post Danmark*, *supra* note 381, paras 41-42. One could interpret *TeliaSonera* (*supra* note 347, para 24) *a contrario* as holding that Article 102 TFEU only prohibits practices that cause damage to consumers, either directly or indirectly.

[618] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services v Commission* [2009] ECR I-9291, para 63: the Treaty's competition rules aim 'to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, *competition as such* [italics added by author]'. This means that, according to the Court, it is *not* necessary for final consumers to be deprived the advantages of effective competition in terms of supply or price. For a recent confirmation of this line of reasoning, see *Slovenská*, supra note 388, para 18.

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

[620] See e.g. *British Airways* (ECJ), *supra* note 341, para 30; *British Airways* (General Court), *supra* note 416, para 293; *Michelin II*, *supra* note 422, paras 238 and 239. These cases make clear that it is sufficient to show that the

competition, that conduct will also be liable to have such an effect'.[621] As establishing the effect of conduct under review is normally not a constituent part of the condition of a dominance abuse, its absence will normally be insufficient to offer an objective justification.

Nevertheless, Article 102 TFEU may require an analysis of effect. First, the relevant *prima facie* abuse may hinge on its effects. For example, in *Deutsche Telekom*, the ECJ held that 'in the absence of any effect on the competitive situation of competitors', the alleged margin squeeze 'cannot be classified as exclusionary if it does not make their market penetration any more difficult'.[622] Another example is an exclusive purchasing practice by a dominant firm. The higher the degree of dominance, the more likely the practice will have a significant impact on competition.

Second, certain types of objective justification require an examination of effect. This is particularly clear if a dominant firm raises an efficiency plea. Such a plea will only be accepted when the exclusionary effect is counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.[623] Indeed, the *Post Danmark* judgment has made clear that one must examine the efficiency gains that 'have been, or are likely to be, brought about as a result of [the] conduct [under review]'.[624]

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conduct under review 'tends to restrict competition or, in other words, that the conduct is capable of having that effect'.

[621] See e.g. *Michelin II* (General Court), *supra* note 422, para 241. The General Court held that 'for the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing', referring to *Irish Sugar* (General Court), *supra* note 353, para 170. The case law on exclusionary rebates provides further guidance. The ECJ has held on various occasions that rebates that e.g. '*tend to* remove or restrict the buyer's freedom to choose his sources of supply [italics added, TvdV]' may be found abusive. The use of the word 'tend' connotes that a potential effect could also be sufficient. See also *Hoffmann-La Roche*, *supra* note 349, para 90; *Michelin I*, *supra* note 334, para 73 and *Irish Sugar* (General Court), *supra* note 353, para 114. In the context of a margin squeeze case, see *Deutsche Telekom*, *supra* note 336, para 250.

[622] *Deutsche Telekom* (*ibid*), para 254. Note the clear parallel with internal market case law that focuses on market access, as discussed in Section 2.4 of chapter II.

[623] See *British Airways* (ECJ), *supra* note 341, para 86; *Telia Sonera*, *supra* note 347, para 76; *Post Danmark*, *supra* note 381, para 42.

[624] *Post Danmark* (*ibid*.).

Effect on competition may be less relevant if a party invokes a public interest plea. In such a case it is the benefit to another goal that justifies the restriction of competition. However, the practice must be *capable* of achieving the professed goal.[625] There is no reason why a court should accept a hollow reference to public interest. Similarly, a plea based on legitimate business conduct does not call for an analysis of effects, even though it usually concerns conduct that can be associated with pro-competitive effects. For example, charging higher interest rates to a customer that poses a substantial credit risk makes perfect economic sense. Finally, there is little need to examine effects while assessing an objective necessity plea. If such a plea is successful, and no less anti-competitive alternatives were available, the dominant firm could not have avoided the effects anyway.

The observations above also have an impact on the question of causation. Eilmansberger raised the question whether the lack of causation between the conduct and the effect can be an objective justification.[626] I believe that this idea is not in line with the ECJ's overall position on effect. Causation is needed to establish a link between conduct and an end result that (potentially) violates a norm. But if the end result (here: the effect on the market) is usually irrelevant in determining whether the norm has been violated or not, it is not clear why the link between behaviour and effect should necessarily be analysed. The exception to that observation may – yet again – be an efficiency plea. If there is no causal link between the conduct and the efficiency that is being observed, the conduct is unlikely to be justified as it does not meet the necessity test.

As a final comment, an effects analysis may not only focus on the direct effects on competition, but equally on the wider effects on residual competition.[627] The latter test examines whether the conduct under review is liable to eliminate all effect competition on the market. The ECJ has referred to residual competition in cases such as *IMS Health* and *Post Danmark*,[628] but their position in the analysis seems to have been quite distinct. In *IMS Health*, the residual competition test was one of the separate

[625] See e.g. Albors-Llorens 2007, *supra* note 332, p. 1758. She refers to it as the 'suitability' test.

[626] Eilmansberger 2005, *supra* note 339, at 140.

[627] A possible interpretation would be that no conduct should be allowed if it leads to a (quasi-)monopoly. I disagree, as this still leaves open the possibility for competition for the market – especially in sectors that depend on competitors leap-frogging over each other with disruptive innovations. Any other approach would take away the possibility of competition *for* the market.

[628] *IMS Health*, *supra* note 394, and *Post Danmark*, *supra* note 381.

conditions, *apart* from objective justification, to determine whether the dominant undertaking had a duty to license its IP rights.[629] By contrast, in *Post Danmark*, the residual competition test was part of the examination of whether pro-competitive effects outweigh the anti-competitive effects, and therefore seemed to be part of the objective justification analysis itself.[630] I prefer the latter view, as it allows for a more holistic examination of objective justification. Note that this test should not be equated with the protection of competitors. Competition may thrive even if individual competitors are forced to exit the market. Indeed, it may be a hallmark sign of healthy competition where the competitive process roots out the ones least apt to survive. It is submitted that the test should be taken to mean that the conduct under review may not eliminate the effective competitive constraints upon a dominant undertaking – and that inefficient firms are unlikely to represent a notably competitive constraint in the first place.

5 JUSTIFICATIONS VIS-À-VIS SPECIFIC TYPES OF ABUSE

5.1 Introduction

The previous sections have noted on multiple occasions the importance of context. This obviously includes the type of *prima facie* abuse that is under review. The following section examines how objective justification relates to selected types of abuse.[631] The section deals with exclusionary abuses,

[629] *IMS Health* (*ibid*.), para 52: 'the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market'.

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

[631] Opinion of AG Colomer in *Sot. Lélos*, *supra* note 375, para 70. Colomer notes that 'the option of accommodating certain types of abuse under Article [102 TFEU] by means of objective justification should remain open'. The following chapter does not discuss tying and bundling practices, even though such practices may also involve objective justification: T. Graf & D.R. Little, 'Tying and Bundling', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331) at 547. They note that 'combining the sale of several products may generate a number of procompetitive effects, creating economies of scope, and generating efficiencies in distribution or production'.

even though exploitative abuses (such as excessive prices) may be subject to a justification plea as well.[632]

5.2 Predation

In its landmark *AKZO* judgment, the ECJ took a very strict line as regards below-cost pricing, also known as 'predation'. The Court suggested that such conduct is abusive *per se* if the prices are lower than average variable costs (AVC),[633] as a dominant undertaking could have no interest in such pricing behaviour other than to seek the elimination of competitors.[634]

I disagree that an unrebuttable presumption for pricing below AVC is the right approach. A blanket prohibition has a notable problem of attaching too little weight to the surrounding context. There are several circumstances in which such conduct should be justified nonetheless. The sale below AVC may simply be a cost-minimizing strategy, for example if the relevant goods lose their value (such as perishable goods, news-related content or obsolete products) or if they cause substantial running expenses (such as storage costs). In addition, in two-sided markets companies routinely sell one service at a loss to make another service (more) attractive. The Google search engine is a case in point: it offers a free and attractive service at no charge (so by definition below AVC), attracting advertisers to earn money.

There is no clear reason why competition law should *a priori* ban business models that are likely to be pro-competitive and enhance welfare. So even though the wording of *AKZO* suggests a *per se* prohibition, it is preferable to allow the dominant firm to rebut the presumption of illegality if the prices are not anti-competitive after all; for instance because such prices do not have any exclusionary effect, or because a justification applies. Although the EU Courts have regularly confirmed the precedent in

[632] See e.g. Case 40/70 *Sirena v Eda* [1971] ECR 69, para 17. Particularly high prices can, under certain circumstances, be justified by 'objective criteria'.

[633] See, similarly, the approach by AG Colomer in *Tetra Pak II* (ECJ), *supra* note 353.

[634] *AKZO*, *supra* note 351, para 71. Kingston (2009, supra note 516, at 214) notes that below-cost pricing may also follow from environmental concerns, for example if the dominant firm wishes to provide a price incentive for customers to adopt a new and environmentally friendlier product.

AKZO,[635] more recent cases do suggest a shift in the ECJ's approach.[636] In *Wanadoo*, the ECJ held that prices below AVC are 'prima facie abusive'.[637] In *Post Danmark*, it observed that such prices should '*in principle*, be regarded as abusive [italics added by author]'.[638]

The *Wanadoo* and *Post Danmark* cases thus show that a dominant firm is indeed allowed to rebut the presumption of illegality. The main challenge will be to show that the pricing policy had an economic objective *other than* the elimination of competitors.[639] The *Wanadoo* judgment appears to leave open the possibility of a justification if pricing below AVC is normal business practice in a sector (e.g. to minimize losses), connoting that it is unlikely to exclude competitors.[640] The *Post Danmark* case appears to add another possibility, namely where the practice has a net efficient effect that also benefits consumers.[641]

The paragraphs above have discussed to what extent a dominant firm can justify below-cost pricing in order to meet competition. Indeed, several cases have made clear that a dominant firm has some

[635] *Tetra Pak II* (ECJ), *supra* note 353, para 41.

[636] R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 210), state that '[i]t is now generally accepted that even prices below AVC/AAC can have an objective justification'.

[637] *Wanadoo* (ECJ), *supra* note 597, para 109.

[638] *Post Danmark*, *supra* note 381, para 27 (italics added by author). The underlying rationale seems to be that only pricing practices with an exclusionary effect are prohibited (*ibid*., para 25). The conduct can be condoned if no such effect exists. Note that the ECJ thus seemed to depart from its bright-line rule set in *AKZO* (*supra* note 351), but did refer to that case at para 27.

[639] *Wanadoo* (ECJ), *supra* note 597, para 107-109. R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 215) note that the 'meeting competition' plea also requires that the 'price cuts must be defensive in nature', referring e.g. to *United Brands*. At 216 *et seq*, they specify why 'the dominant company must act in good faith'.

[640] Of course, one could also argue that, in such a case, there is no *prima facie* abuse. However, such an approach is difficult to reconcile with the *AKZO* judgment, *supra* note 351. In a 2004 submission to the OECD, the Commission observed that prices should be justified if it could have no exclusionary effect. See OECD Policy Roundtable document 2004, *Predatory Foreclosure*, available at http://www.oecd.org/competition/abuse/34646189.pdf, at 237.

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

leeway to protect its commercial interests.[642] I do not think that this conclusion should be altered based on the *Wanadoo* case, in which the ECJ held that there is no 'absolute' or 'unconditional' right to align prices with those of competitors.[643] I am hard pressed to think of *any* defense in competition law that is absolute or unconditional – *Wanadoo* simply shows that such a plea will not be automatically accepted if the dominant undertaking is able to show that it has aligned its prices.[644]

As a final remark, it is clear that EU competition law does not require proof of recoupment in a predation case.[645] As a consequence, the dominant undertaking will find little benefit in arguing that it will *not* be able to recoup its losses. However, if the EU courts continue on their path to afford more weight to efficiency, a dominant firm can perhaps couch the substance of that same plea in a different framework. This would mean that the dominant undertaking shows that the below-cost pricing is beneficial to current consumer welfare, and is incapable of reducing future consumer welfare, as it has no exclusionary effect.

5.3 Rebates

Rebates by a dominant undertaking based on the volume of purchases, also known as 'volume' or 'quantity' rebates,[646] will normally be consistent with Article 102 TFEU. Such rebates are normally

[642] *Irish Sugar* (General Court), *supra* note 353, paragraph 189: 'the protection of the commercial position of an undertaking in a dominant position with the characteristics of that of the applicant at the time in question must, at the very least, in order to be lawful, be based on criteria of economic efficiency and consistent with the interests of consumers'. Note that this paragraph suggests that 'commercial freedom' should only be seen in terms of efficiencies. See also *United Brands*, *supra* note 417, para 189-190. See also Commission guidance on enforcement priorities, *supra* note 378, paras. 237-238. The Commission noted that it would be justified to meet the prices of one's competitor in order to minimize short-run losses.

[643] *Wanadoo* (ECJ), *supra* note 597; confirmation of Case T-340/03 *France Télécom v Commission* ('*Wanadoo*') [2007] ECR II-107, para 187. See, differently, Commission decision in Case IV/31.900 *BPB Industries* [1989] L 10/50, para 131-134, in which it did accept a meeting competition defense.

[644] See also *Wanadoo* (General Court) (*ibid*.), para 187; see also the Opinion of AG Mazák in *Wanadoo* (ECJ) (*ibid*.), paras 47 and 95. See, similarly, R. Snelders, A. Leyden & A. Lofaro, 'Predatory Conduct', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 213),

[645] *Wanadoo* (ECJ), *supra* note 597, para 110.

[646] For possible pro-competitive effects of rebates, see e.g. *Hoffmann-La Roche*, *supra* note 349, para 90.

deemed to reflect gains in efficiency and economies of scale made by the dominant firm.[647] However, the scheme will not be accepted if the 'criteria and rules for granting the rebate reveal that the system is not based on an economically justified countervailing advantage but tends […] to prevent customers from obtaining their supplies from competitors'.[648] In order to make the distinction between competitive and abusive rebates, there should be an examination of 'all the circumstances'.[649]

Rebates can thus be condoned if they can be subsumed under an 'objective economic justification'.[650] In *Irish Sugar*, the General Court enunciated the broad nature of such a justification: it can apply based on the 'quantities purchased by the customer, marketing and transport costs or any promotional, warehousing, servicing or other functions which the relevant customer might have performed'.[651] It is only proper that a dominant undertaking is allowed to pass on cost benefits to its customers through volume rebates.[652]

The facts of *Irish Sugar* revealed that the rebates were solely based on the retailer's place of business, which the Court considered an insufficiently valid reason to provide a rebate. The Court's approach appears too straightforward, as it should have paid more attention as to whether the relevant customers were indeed exposed to a higher level of competition compared to customers that did *not* receive a rebate.[653] It would substantially hamstring dominant undertakings if they cannot adjust their rebates to alternative offers or the price sensitivity of customers. The latter possibility is particularly relevant: if a dominant firm cannot satisfy the needs of those customers, they may be priced out of the market leading to a reduction of output. In sum, although one should obviously consider whether such rebates simply are exclusionary, their potential pro-competitive effect should also be examined.

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[647] *ICI*, *supra* note 562, para 298.

[648] *ICI* (*ibid*.), para 299. See also *Hoffmann-La Roche* (*supra* note 349), para 90, and Case T-203/01 *Michelin v Commission* ('*Michelin II*') [2003] ECR II-4071, para 59.

[649] *ICI* (*ibid.*), para 300. See also *Hoffmann-La Roche* (*ibid*.), para 90; *Michelin II* (*ibid*.), para 60.

[650] *Irish Sugar* (General Court), *supra* note 353, para 173.

[651] *Ibid.* The General Court held, on the facts, that '[t]he border rebate was unrelated to objective economic factors like the sales volume of the customers'.

[652] See also *BPB* (Commission Decision), *supra* note 643, para 131. The Commission found that certain discounts were justified, as they reflected cost differences.

[653] *Irish Sugar* (General Court), *supra* note 353, para 188.

5.4 Discrimination

Many of the observations in the previous paragraph on rebates can also be transposed to the issue of price discrimination.[654] It is clear that price differentiation, even if found *prima facie* abusive,[655] is 'not inherently harmful'.[656] Such conduct may be justified based on a number of reasons. For example, the conduct may be subsumed under legitimate business conduct.[657] Such may be the case if a customer continues to receives a favourable price as a reward for being an early adapter of a new technology by the company that later turns out to be dominant.[658] Either way, the degree of differentiation should be commensurate with the interest that it seeks to support.[659]

Differentiation may also be justified in a situation of objective necessity. In *BPB*, the General Court acknowledged that a shortage of resources should enable a dominant undertaking to 'lay down criteria

[654] Note that I do use 'discrimination' in a legally and morally neutral way.

[655] P. Akman, 'To abuse, or not to abuse: discrimination between consumers', (2007) 32 ELRev 492, at 495. Akman seems to argue that 'mere differential' pricing may already be *prima facie* abusive price discrimination. However, it is submitted that it must also be established that the conduct may have an exclusionary effect. See, *mutatis mutandis*, *British Airways* (ECJ), supra note 341, paras 58-60.

[656] Odudu 2007, *supra* note 399, at 1810. See also A. Layne-Farrar, A. Setari & P. Stuart, 'Abusive Discrimination', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331), at 570. They specify: 'while conceptually separate from the determination of equivalence between two transactions, in practice, this assessment is generally carried out in the context of the assessment of the equivalence between transactions and by reference to the same parameters'. Their view confirms that there is less room for a justification if there has already been an in-depth examination when determining whether there has been a *prima facie* abuse.

[657] AG Kokott referred to the possibility to justify otherwise abusive price discrimination based on 'legitimate business considerations'. See also Opinion of AG Kokott in *British Airways*, *supra* note 341, para 114. See also *Michelin I*, *supra* note 334, para 90, referring to differences in treatment between different dealers that were, on the facts, not based on 'legitimate commercial reasons'.

[658] See e.g. the initial decision of 28 April 2003 as well as the administrative appeal decision of 29 June 2005 of the Dutch NCA, currently named ACM, in Case 2978/*Superunie v Interpay*. The ACM considered price differentiation to be justified as an appropriate reward for risks taken. See, further, section 3.2.3 in chapter V.

[659] *Irish Sugar* (General Court), *supra* note 353, para 142-143. The Court rejected the justification plea, holding that the 'justification does not match the scope of the discrimination impugned in the contested decision'.

for according priority in meeting orders' as 'a matter of normal commercial policy'.[660] Such criteria are justified if they are objective and non-discriminatory.[661]

Differentiation can also be based on efficiencies. The same reasoning that applies to rebates should be applied, providing room for differentiation that is based, *inter alia*, on cost benefits that arise from economies of scale. This may be particularly relevant in network sectors, where variable costs are relatively low. In addition, differentiated prices can improve welfare if price sensitive customers receive lower prices, ensuring that they do not exit the market altogether.

Finally, it appears to me that a dominant undertaking should have some leeway to differentiate prices on non-economic grounds. Just think of a dominant publisher that provides its content at lower prices to not-for-profit customers. Even if some of these parties would have been willing and able to pay the 'normal' price (i.e. there is no direct economic *rationale* to differentiate),[662] the dominant firm may still agree to a lower price for these customers to reflect its corporate social responsibility policy.[663]

Akman has argued that discrimination between consumers, instead of intermediate customers, can also be contrary to Article 102 TFEU.[664] Although I acknowledge that this possibility cannot be rejected as such, I do think decision makers should be reluctant in condemning such practices – especially if one (like Akman) believes that one of the objectives of Article 102 TFEU is to strive towards consumer welfare.[665] Think of the example where the domestic train incumbent has lower prices for the young and

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[660] *BPB* (General Court), *supra* note 409, para 94.

[661] *Ibid*.

[662] There may be an overlap with an efficiency analysis, are not-for-profit customers are likely to be more price sensitive than 'regular' corporate clients.

[663] See e.g. Oxford Journal's policy of granting free content access to organisations located in countries ranging from Afghanistan to Zimbabwe, see a full list at http://www.oxfordjournals.org/access_purchase/developing_countries_list.html. See, in terms of environmental protection, Kingston 2009, supra note 516, at 213. Kingston argues that 'a dominant undertaking might legitimately distinguish between prices granted to environmentally-damaging undertakings and environmentally-friendlier undertakings, as long as this was done on an objective and proportionate basis'.

[664] Akman 2007, *supra* note 655.

[665] *Ibid*., at 503.

the elderly. Such a pricing practice is likely to benefit consumer welfare in terms of allocative efficiency, as output can be expanded to groups that can generally be described as price sensitive. The train company may also differentiate in another way, offering lower prices for travel during the off-peak hours. Such differentiation may not only be beneficial to allocative efficiency,[666] but also to productive efficiency as it encourages a more spread-out use of capacity that is both scarce and costly.

5.5 Refusal to deal

Under EU law, a dominant undertaking is, in principle, free to deal with whom it wishes. However, there may be 'exceptional circumstances' under which a refusal to deal may be contrary to Article 102 TFEU. These types of cases should consider the *degree* of market power. In his Opinion in the *IMS Health* case, AG Jacobs noted that the relevant facility must provide the dominant firm with a 'genuine stranglehold' on the market, rather than give it a 'competitive advantage'.[667] The *Magill* judgment, a case on IP rights, stipulated the conditions for an abusive refusal to deal: the input must be indispensable, the refusal prevents the emergence of a new product for which there was potential consumer demand and it is likely to exclude all competition in the downstream market.[668] Importantly, the dominant undertaking may also invoke that the refusal 'was not justified by objective considerations'.[669] From *Bronner* it appears that the same conditions apply to access issues to property rights other than IP rights, apart from the 'new product' criterion.[670]

[666] Again, price sensitive consumers are able to benefit from lower prices, especially if their trip is not time critical.

[667] Opinion of AG Jacobs in *Bronner*, *supra* note 498, para 65.

[668] *Magill*, *supra* note 394, paras 53-56. See also the ECJ judgment in *Bronner* (*ibid*.), para 40.

[669] *Magill* (*ibid*.), para 55. See also *IMS Health*, *supra* note 394, para 52.

[670] See e.g. the ECJ judgment in *Bronner*, *supra* note 498, para 41. See also D. Geradin, 'Limiting the Scope of Article 82 EC: What Can the EU Learn From the U.S. Supreme Court's Judgment in Trinko in the Wake of Microsoft, IMS and Deutsche Telekom?', (2004) 41 *Common Market Law Review* 1527. Geradin argues that there is no clear reason for imposing the 'new product' criterion. See also D. Ridyard, 'Compulsory Access under EC Competition Law – A New Doctrine of "Convenient Facilities" and the Case for Price Regulation', (2004) 11 ECLR 669.

Although *IMS Health* suggests that the justification criterion requires a fact-specific inquiry,[671] there are – yet again – few indications in the case law of what may constitute justification. Documents by the Commission provide some additional guidance, even though its views may not necessarily be shared by the ECJ. In its notice related to the telecom sector, the Commission provided the following examples where a refusal to provide access may be condoned:[672]

> '[r]elevant justifications in this context could include an overriding difficulty of providing access to the requesting company, or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market'.

The Commission further notes that the competent authorities must examine whether the difficulties associated with providing supply can outweigh the anti-competitive effect,[673] showing the need for a balancing test. Finally, the Commission notes that technical feasibility may also provide an objective justification for a refusal to supply, for example if the technical standards are not compatible.[674]

Although I agree with the examples given by the Commission, their inclusion in a document written specifically for the telecom sector raises questions about their applicability in other situations. The Commission should strive for a more holistic treatment of this topic in future guidance. A useful exercise is to consider whether the dominant undertaking is likely to have refused supply if it would have lacked market power. Such a thought experiment is likely to filter out cases where there is no link between the

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[671] *IMS Health*, *supra* note 394, para 51: 'it is for the national court to examine, if appropriate, in light of the facts before it, whether the refusal of the request for a licence is justified by objective considerations'.

[672] Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ [1998] C 265/2, para 86. At para 85, the Notice refers to the possibility that a company requesting supply represents a potential credit risk.

[673] *Ibid*., para 93.

[674] *Ibid*., para 96. The Commission also notes the possibility of capacity constraints. However, such constraints may not prove to be a justification if the firm had reasonable alternatives to overcome those constraints. See, even more strongly, M. Dolmans & M. Bennett, 'Refusal to Deal', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 506). They hold that '[t]here are indications that a refusal to supply cannot be justified by lack of capacity if a non-dominant or non-vertically-integrated firm in the circumstances would have invested in expansion or capacity'.

dominant position and the refusal, such as the case where a dominant firm refuses supply because of credit risks, or because of genuine environmental concerns.[675] As said before, one should be very hesitant to prohibit practices that have nothing to do with market power. Such a stance would defeat the very *raison d'être* of Article 102 TFEU, that seeks precisely to ban certain practices that only make sense, and are harmful, because of the dominant position enjoyed by one undertaking.

As a final observation, the essential facilities doctrine may increasingly considered be as an efficiency-balancing test, as suggested by Geradin.[676] Basically, mandatory access is likely to enhance current allocative efficiency, as it introduces more competition on the downstream level. At the same time, such access is likely to harm dynamic efficiency, as it reduces the financial rewards of investments.[677] Geradin is critical on whether NCAs and courts are able to actually make such a balancing test, arguing that the risk of mistaken decisions is particularly high.[678] I consider the issue to be less grave than Geradin suggests. Remember that even a dominant firm is able to deal with whom it wants, save for *exceptional* circumstances. To the extent that mandatory supply is truly reserved in a limited number of cases, EU competition law could be said to have a bias in favour of non-intervention and towards protecting investments. The law only risks becoming too interventionist if a *prima facie* abuse is found relatively easily and if dynamic efficiencies are awarded too little weight.

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[675] See e.g. Kingston 2009, supra note 516, at 213. Kingston argues that 'a dominant undertaking might legitimately refuse to supply, or to grant access to an essential facility, to an undertaking whose practices are objectively extremely environmentally dangerous. Alternatively, a dominant undertaking might refuse to grant access to an essential facility, if a natural resource, or might cease supply of this resource to an existing customer, because it would risk unsustainably exhausting or overusing this resource'. According to Kingston, such an interpretation is consistent with *Commercial Solvents* and *Bronner*.

[676] Geradin 2004, *supra* note 670, at 1539 *et seq*. Geradin refers to the Opinion of AG Jacobs in *Bronner* (*supra* note 667) as one of the few significant references to such a balancing exercise.

[677] The effects on productive efficiency will often be more difficult to gauge. If the facility is already used efficiently and at full production capacity, allowing access is likely to raise costs and thus reduce productive efficiency. However, if the facility runs (far) below full capacity, providing access is likely to enhance the utilisation rate, thereby lowering costs and improving productive efficiency.

[678] Geradin 2004, *supra* note 670, at 1542. Although I sympathize with his remark as such a balancing test is undoubtedly difficult, I do think it is interesting that commentators who argue in favour of an effects-based approach often seem to be mistrustful of the capacity of courts or NCAs to properly exercise such a balancing act. These two views seem difficult to reconcile.

5.6 Margin squeeze

A so-called margin squeeze can occur if a vertically integrated dominant undertaking provides an indispensable input at the wholesale level and also competes at the retail level.[679] The price difference between the wholesale and retail price may leave insufficient margin for an equally efficient competitor to viably compete, for example if the wholesale price is kept artificially high.[680]

The EU Courts have accepted that a margin squeeze can have an exclusionary effect on equally efficient competitors.[681] As a result, a margin squeeze is a separate abuse under Article 102 TFEU,[682] but only in the absence of a justification.[683] The case law is unclear about what such justifications could entail. The

[679] For the recognition that margin squeeze can be a separate abuse under Article 102 TFEU, see *Deutsche Telekom*, *supra* note 336, para 183 and *TeliaSonera*, *supra* note 347, para 31. By contrast, U.S. Federal Antitrust law does not accept that margin squeeze is a separate type of conduct that should be prohibited under Section 2 of the Sherman Act, see *Pacific Bell Telephone v. linkLine Communications*, 555 U.S. 438 (2009). According to the U.S. Supreme Court, such conduct is only prohibited under the Sherman Act either if there is predation downstream (under the standard of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 (1993); or if there is an illegal refusal to deal upstream (under the standard of *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In its view, a margin squeeze would be an attempt to 'amalgate' two complaints that would otherwise fail. See also G.A. Hay & K. McMahon, 'The Diverging Approach to Price Squeezes in the United States and Europe', (2012) 8 Journal of Competition Law & Economics 259.

[680] See e.g. Case T-336/07 *Telefónica v Commission* [2012] nyr, para 187 (an appeal case is pending before the ECJ, Case C-295/12 P). Note that this does *not* require the wholesale price to be excessive, see *Deutsche Telekom*, *supra* note 336.

[681] *TeliaSonera*, *supra* note 347, para 31 and *Deutsche Telekom*, *supra* note 336, para 177. In the latter case, the ECJ added that such practices 'are capable of making market entry very difficult or impossible' for equally efficient competitors. In order to test for equal efficiency, the costs and strategy of the dominant undertaking are used as a benchmark (*Deutsche Telekom* (*ibid.*), para 198).

[682] See e.g. *Telefónica* (General Court), *supra* note 680, para 187; Deutsche Telekom (*ibid*), para 177-178.

[683] *TeliaSonera*, *supra* note 347, paras. 31 and 88. *Telefónica* (General Court), *supra* note 680, para 187 (just mentioning 'objective justification'). See also F.E. Gonzáles & J. Padilla, 'Margin Squeeze', in: F.E. Gonzáles & R. Snelders 2014 (*supra* note 331, at 292): 'There are indeed several reasons why a dominant firm might, at least temporarily, price in a manner consistent with a margin squeeze', referring to para 89 of the Commission's

TeliaSonera case suggests that a dominant undertaking may be able to show that the relevant conduct was not anti-competitive.[684] For example, the margin squeeze may have been a single occurrence only lasting a short period of time: such an event is unlikely to exclude equally efficient competitors.

To my mind, an objective justification should also exist if the margin squeeze is caused by factors external to the dominant undertaking. An obvious example would be a situation where the State dictates the relevant wholesale and retail prices. However, to the extent that the regulatory framework still allows the dominant undertaking a degree of discretion to lower its wholesale prices, raise its retail prices (or both), the dominant undertaking is expected to make use of that leeway if that would avoid a margin squeeze.[685]

6 CONCLUSION

This chapter has shown that objective justification is an important topic within the framework of Article 102 TFEU. There is only an abuse absent an objective justification. As a consequence, the scope of abuse depends to a large extent on the scope of objective justification. Notwithstanding its importance, however, the concept of objective justification has not received the attention that it deserves. This chapter has sought to examine the most important feature of objective justification, and assess its potential. To my mind, the potential of the concept lies, in particular, in its ability to consider a *prima facie* abuse in its proper context. As a consequence, the concept is also able to draw Article 102 TFEU away from a *per se* approach, and thus avoid the risk of mistaken inferences of anti-competitive behaviour.

This chapter has distinguished between various types of objective justification. The first source of objective justification is legitimate business behaviour. This category reflects that dominant undertakings still have a degree of commercial freedom (for instance if they compete on the merits), or that they could not have been expected to act differently (in the case of objective necessity). The

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guidance paper (*supra* note 18). They hold that efficiencies and preserving the incentive to innovate should in any case be accepted as a possible justification.

[684] *TeliaSonera*, *supra* note 347, para 88.

[685] *Deutsche Telekom* (*supra* note 336).

efficiency plea embodies a second type of objective justification. The plea succeeds if the conduct leads to a net gain in welfare. This plea is likely to receive more attention in a more effects-based approach of competition law; I would, however, counsel against considering this to be the only relevant justification plea. A third source of objective justification is public interest, where the attainment of a non-efficiency objective trumps the application of Article 102 TFEU. This type of justification is likely to be controversial in the competition community, even though it seems clear from EU law that wider public interest objectives may influence the interpretation of any policy areas, including competition law.

Admittedly, it may be difficult to distinguish between these types in actual practice, as they may have considerable overlaps. For instance, conduct may at the same time be subsumed under legitimate business behaviour as well as under an efficiency heading. Hence, the subdivision should not be seen as a watertight compartmentalisation, but rather as an analytical tool to help determine the proper scope of objective justification and the applicable legal conditions.