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

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CHAPTER V JUSTIFICATIONS IN EU MEMBER STATES*

1 INTRODUCTION

The previous Chapter has focused mainly on Article 102 of the Treaty on the Functioning of the European Union ('TFEU'). However, EU Member States also prohibit the abuse of a dominant position in their domestic legislation. The EU and domestic prohibitions both seek to ban anti-competitive unilateral conduct.⁷⁸⁶ It is thus no surprise that National Competition Authorities ('NCAs') and domestic courts in EU Member States use the interpretation of Article 102 TFEU as a key focal point in the application of its national equivalent.

As noted in the previous Chapter, an abuse of a dominant position implies the existence of a *prima facie* abuse and the absence of an objective justification. But even though there is a wealth of literature on the concept of abuse, few publications examine justifications at the level of EU Member States.⁷⁸⁷ The absence of a cross-border debate leaves this crucial part of dominance law in a rather benighted condition. This obscurity may, in turn, entail risks for a consistent and high-quality application of the objective justification concept throughout the EU.

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

⁷⁸⁶ See Recital 9 of Regulation 1/2003. Of course there are lengthy debates on the prohibition's precise objective – and for that matter, the objectives of competition law as a whole.

⁷⁸⁷ There have been several high-quality publications on the concept of objective justification within the framework of the abuse of dominance, but they focus on EU law rather than the Member State level. See e.g. P.-J. Loewenthal, 'The Defence of "objective justification" in the application of Article 82 EC', (2005) 28 *World Competition* 455; A. Albors-Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC', (2007) 44 *CMLRev* 1727; E. Rousseva, 'The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?', (2006) 2 *The Competition Law Review* 27; E. Østerud, 'The Concept of Objective Justification' in: E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Kluwer Law International: Alphen aan den Rijn 2010), at 245.

In an effort to illuminate the concept of objective justification and its application at the Member State level, this chapter discusses competition law and practice in France, Germany, Ireland, Luxembourg, the Netherlands, Spain and the United Kingdom. The analysis explores legislation, case law, as well as guidance and decisional practice by NCAs. By discussing and comparing the available types of justification and the applicable legal reasoning, this chapter seeks to contribute to a better understanding of objective justification. A more thorough comprehension of the concept may provide valuable input for a debate that can hopefully improve the quality and consistency of competition practice on objective justification.

Having said what I plan to do, I should also note what this chapter does *not* aspire to. It does not provide a comprehensive overview of domestic competition practice on dominance abuses, but rather uses a selection of cases to illustrate key findings on objective justification. Most of the selected cases arise from public enforcement, as those proceedings are usually easier to find and compare than private enforcement actions. Furthermore, the chapter does not examine domestic prohibitions of unilateral conduct outside the scope of the prohibition of abuse within the meaning of Article 102 TFEU.⁷⁸⁸ Another caveat is that, in many of the cases under review, the issue of objective justification played a relatively small role. Due to considerations of length, however, this study shall not discuss all legal and factual intricacies. As a consequence, the Chapter does not display all the peculiarities found in the domestic cases. The author hopes that readers will agree that, even in their simplified form, these cases still have interesting lessons to offer.

A final concern, as with any comparative analysis, is whether the study compares like with like.⁷⁸⁹ Although there is a risk of taking competition law cases outside of their context, as they are often highly fact-specific, I do believe that it is possible to make a meaningful comparison. The chapter focuses on the available types of objective justification and the legal reasoning used, rather than the actual decisions on the facts. In addition, the domestic laws on abuse are not that dissimilar as they all have Article 102 TFEU (and its interpretation by the European Court of Justice, or ‘ECJ’) as a single point of reference. Indeed, Member State competition law is usually interpreted, as much as possible, in line

⁷⁸⁸ An example is the French prohibition of the abuse of so-called ‘economic dependence’, where a dominant firm may not take advantage of customers or suppliers dependent on it (see Article L. 420-2 *Code de Commerce*).

⁷⁸⁹ For a thorough analysis of the intricacies of comparative law, see M. Reimann & R. Zimmermann (ed), *The Oxford Handbook of Comparative Law* (OUP: Oxford 2006).

with EU competition law.⁷⁹⁰ Finally, not only do I believe that a comparative analysis *can* be made, I also think it *should* be made. Only a comparison can reveal strengths and weaknesses of how Member States interpret objective justification, and show to what extent there are inconsistencies that should be considered.

Section 2 discusses Member State legislation and NCA guidance relevant to the concept of objective justification. Section 3 provides the bulk of the chapter, examining domestic case law and decisional practice by NCAs that deal with objective justification. Section 4 analyses the legal conditions that domestic courts and NCAs have applied to the various types of objective justification. Building upon the findings in this chapter, Section 5 identifies a number of promising practices. Section 6 offers a conclusion.

2 LEGISLATION & NCA GUIDANCE

2.1 Legislation

All the countries under review prohibit the abuse of a dominant position in their domestic legislation.⁷⁹¹ Similar to Article 102 TFEU, the legislative texts usually provide little insight on the concept of objective justification. Even where domestic legislation does require the absence of objective justification vis-à-vis particular examples of abuses, such as in Spain, it reveals neither the scope of such justifications nor the applicable legal conditions.⁷⁹²

⁷⁹⁰ An example is Section 60(1) of the UK Competition Act 1998. This provision demands – so far as is possible, having regard to any relevant differences – interpretative consistency between EU and UK competition law.

⁷⁹¹ France: Article L. 420-2 of the *Code de Commerce*; Germany: Article 19(1) of the *Gesetz gegen Wettbewerbsbeschränkungen*; Ireland: Section 5(1) of the Competition Act 2002; Luxembourg: Article 5 of the *Loi du 23 octobre 2011 relative à la concurrence*; Spain: Article 6(1)(a) of the *Ley de Defensa de la Competencia* ('LDC'); the Netherlands: Article 24 of the *Mededingingswet*; UK: Section 18 of the Competition Act 1998 ('CA') (also known as the 'Chapter II' prohibition).

⁷⁹² See e.g. Spanish legislation, in particular subparagraphs 'b' and 'c' of Article 6(2) LDC. These provisions prohibit the limitation of production, distribution or technical development, to the *unjustified* prejudice of undertakings or consumers; and the *unjustifiable* refusal to meet the demands to purchase products or services.

Domestic legislation provides slightly more interpretative guidance insofar as it has codified elements of the objective justification plea in separate provisions. For example, Schedule 3 of the UK Competition Act 1998 provides a number of exclusions of the abuse prohibition. These exclusions apply, *inter alia*, if a legal requirement is applicable (paragraph 5(2) of Schedule 3), or if exceptional and compelling reasons of public policy are at stake (paragraph 7(4) of Schedule 3). Similarly, Section 7(2) of the Irish Competition Act permits conduct that seeks to comply with ‘a determination made or a direction given by a statutory body’. Although these provisions do provide some clarity, Section 3 will show that cases in the UK and Ireland have, in fact, acknowledged a much wider range of justifications.

France appears to have the most holistic legislative treatment of objective justification. Article L. 420-4(I) of the Code de Commerce (‘CdC’) provides two key exemptions. The first exemption applies to practices that result from the application of a statutory provision or an implementing administrative text. Resembling a State action defence, the provision is said to require restrictive interpretation.⁷⁹³ The second exemption applies if the dominant undertaking can show that its conduct ensured ‘economic progress’, while allowing customers a fair share of the resulting benefit. The exemption also requires that the conduct is indispensable to achieve the stated objective of economic progress and may not lead to the elimination of competition.

These conditions clearly mirror those of Article 101(3) TFEU, even though the latter provision does not directly apply to dominance abuses.⁷⁹⁴ The wide scope of the French codification reflects the notion that no justification should be rejected *a priori*.⁷⁹⁵ Landes suggests that the notion of ‘economic progress’ includes a wide range of elements such as the limitation of costs, the protection of the environment or

⁷⁹³ J. Maitland-Walker (ed), *Competition Laws of Europe* (LexisNexis UK: London 2003), p. 125.

⁷⁹⁴ However, see Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] ECR nyr, para 42. The ECJ transposed the conditions of Article 101(3) TFEU to Article 102 TFEU for the purposes of an efficiency balancing test.

⁷⁹⁵ Even though some commentators suggest that competition authorities are reluctant to take non-competition objectives into account for fear of ‘une perversion des règles de concurrence par des objectifs plus généraux’. See M.-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialens, *L’application en France du droit des pratiques anticoncurrentielles* (L.G.D.J. : Paris 2008), p. 286.

even the creation and retention of jobs.⁷⁹⁶ Although I support a wide notion of the potential scope of justifications, one should be cautious that the justification does have a relevant nexus with the conduct under review. A dominant firm should not be able to justify anti-competitive conduct simply on the basis of its bloated size, with the alleged benefits that this entails for the retention of jobs at that firm.

2.2 NCA guidance

Generally speaking, the NCAs have not published much guidance on objective justification. In the author's opinion, more guidance would be desirable.⁷⁹⁷ This could strengthen legal certainty and consistency of competition practice; especially if domestic courts consider the guidance to be persuasive. The UK Office of Fair Trading ('OFT') has referred to objective justification several times. An OFT guideline notes that a refusal to supply may be justified, *inter alia*, because of a customer's poor creditworthiness.⁷⁹⁸ An answer by the OFT to a questionnaire from the International Competition Network also mentions other examples of justifications, such as the possibility that an obligation to supply would negatively affect innovation.⁷⁹⁹ But even though the OFT guidelines are more elaborate than those in other Member States, they too leave many questions unanswered as to the type of justifications available as well as their scope and the applicable legal conditions. Considering the limited amount of NCA guidance, it is clear that we must turn to the examination of actual cases to understand how justifications of *prima facie* abuses are interpreted and applied in Member State competition practice.

⁷⁹⁶ V. Landes, 'France' in: NautaDutilh (ed), *Dealing With Dominance: The Experience of National Competition Authorities* (Kluwer Law International: Alphen aan den Rijn 2004), p. 39. This position is nuanced by M.-C. Boutard Labarde et al. 2008 (*ibid.*, at p. 286), stating that '[l]es considerations sociales, telles que le maintien de l'emploi, sont peu intégrées'.

⁷⁹⁷ Especially guidance that would be coordinated through the European Competition Network, to ensure consistency across EU Member States.

⁷⁹⁸ OFT guideline of December 2004, Abuse of a dominant position, para 5.3, available at http://www.oft.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft402.pdf. See also, *inter alia*, the OFT draft competition law guideline for consultation of April 2004, assessment of conduct, available at http://www.oft.gov.uk/shared_of/business_leaflets/competition_law/oft414a.pdf, para 8.7.

⁷⁹⁹ OFT questionnaire submitted to the International Competition Network, 4 November 2009, available at <http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/unitedkingdom.pdf>.

3 ANALYSIS OF MEMBER STATE CASE LAW AND DECISIONAL PRACTICE

3.1 Introduction

This Section examines relevant case law and decisional practice in the Member States under review. The cases have been categorised according to three types of justifications.⁸⁰⁰ The first is legitimate business behaviour. This category includes a situation where the dominant firm simply competes on the merits ('commercial freedom'), or that the dominant firm is forced to act in a specific way due to reasons external to it ('objective necessity'). A second type of justification is applicable if the efficiency benefits of the conduct under review outweigh its anti-competitive effects. Under the third category, dominant firms may rely on reasons of public interest to set aside a finding of abuse. Although this subdivision is undoubtedly imperfect,⁸⁰¹ I do believe it can enhance understanding of this concept and also facilitates a comparative study across Member States.

3.2 Legitimate business behaviour

3.2.1 Introduction

Justifications based on 'legitimate business behaviour' should have a broad scope. They reflect the notion that being in a dominant position is not abusive as such. Even dominant firms retain a degree of commercial freedom, as long as they do not go beyond the limits imposed by the 'special responsibility' incumbent upon them.⁸⁰² These types of cases should examine the nexus between the dominant position and the conduct under review. The weaker the link, the easier a justification can be condoned. A weak causal link makes it likely that a firm would have engaged in that conduct even without being in a dominant position, providing a strong indication that it competes on the merits. The following paragraphs provide various examples.

⁸⁰⁰ For further explanation on this subdivision, see the previous chapter.

⁸⁰¹ Primarily because the precise delineation between these types may not always be clear. For example, there may be considerable overlap between conduct that falls within the 'commercial freedom' of a firm, and conduct that is considered to have a net efficient effect.

⁸⁰² See e.g. Case 322/82 *Michelin v Commission* ('*Michelin I*') [1983] ECR 3461, para 57.

3.2.2 Commercial freedom – General

Notwithstanding the traditional concern for the plight of competitors in German competition law,⁸⁰³ the Bundesgerichtshof ('BGH') has also relied on the dominant firm's commercial freedom in several cases.⁸⁰⁴ In the *Strom und Telefon* judgments, the BGH found that local utilities did not abuse their dominant position by providing a combined offer of electricity and telephony services to consumers at a reduced basic fee.⁸⁰⁵ The BGH held that the utilities had not transgressed their commercial freedom ('unternehmerischer Freiraum'),⁸⁰⁶ noting that the dominant firms offered an attractively priced product.⁸⁰⁷ The BGH considered that the conduct did not impair market access and still left customers with the option of buying electricity and telephony services separately.⁸⁰⁸ Similarly, the *Adidas* judgment suggests that a dominant firm may refuse to supply if the refusal follows from the introduction of stricter distribution criteria, as long as these criteria are objective.⁸⁰⁹ Finally, the *Gemeinsamer Anzeigenteil* case suggests a rationalization scheme shall be easier to justify if customers benefit from lower prices.⁸¹⁰

Upholding quality standards may provide a relevant justification, even if this could exclude parties that are unable to meet those conditions. In the *Armor Hélicoptère* decision, the French NCA (currently named Autorité de la concurrence, or 'Autorité'), stressed that dominant firms are allowed to impose quality standards on its suppliers.⁸¹¹ Similarly, in *Jaeger LeCoultre* (a case on sales restrictions related to spare parts of high-end watches), the Autorité emphasised that dominant firms have, in principle, the

⁸⁰³ See e.g. A. Chiriță, 'The analysis of market dominance and restrictive practices under German antitrust law in light of EC antitrust law', available at <http://dro.dur.ac.uk/9488/1/9488>.

⁸⁰⁴ See e.g. Bundesgerichtshof judgment of 12 November 1991, *Aktionsbeiträge*, KZR 2/90. This judgment confirms that dominant firms are, in principle, free to decide with whom they deal.

⁸⁰⁵ Bundesgerichtshof judgment of 4 November 2003, *Strom und Telefon I*, KZR 16/02; Bundesgerichtshof judgment of 4 November 2003, *Strom und Telefon II*, KZR 38/02.

⁸⁰⁶ *Strom und Telefon I* (*ibid*), p. 8-9; *Strom und Telefon II* (*ibid*), p. 11-12.

⁸⁰⁷ *Strom und Telefon II* (*ibid*), p. 11-12.

⁸⁰⁸ *Strom und Telefon I*, *supra* note 805, p. 13.

⁸⁰⁹ Bundesgerichtshof judgment of 30 June 1981, *Adidas*, KZR 19/80.

⁸¹⁰ Bundesgerichtshof judgment of 9 November 1982, *Gemeinsamer Anzeigenteil*, WuW BGH 1965.

⁸¹¹ Autorité decision of 1 March 2000, *Armor Hélicoptère*, Case 00-D-13.

freedom to organise their distribution system according to their own wishes.⁸¹² The Autorité noted that the restrictions that Jaeger LeCoultre imposed in the sale of spare parts were justified, as it helped to improve quality and promote the brand image. Similarly, the Spanish NCA (Comisión Nacional de la Competencia, or ‘CNC’) found the maintenance of a brand image relevant in the *Ryanair* case.⁸¹³ The CNC concluded that Ryanair’s decision to stop allowing the sale of its tickets by online agencies was objectively justified,⁸¹⁴ as the agencies jeopardised Ryanair’s credibility as a low-cost airline. In particular, the resellers made it difficult for Ryanair to maintain its pledge to reimburse twice the price difference with any cheaper ticket that its customers were able to find.⁸¹⁵

Another way to explore the boundaries of a dominant firm’s commercial freedom is by examining whether its behaviour is consonant with the normal business practice in that sector. An example is the UK *Flybe* case.⁸¹⁶ A complainant alleged that Flybe, an airline, had engaged in predatory behaviour by unprofitably entering the Newquay – London Gatwick route and related markets. The OFT closed the case on a number of grounds, *inter alia* because of a lack of dominance on the relevant route. In addition, the OFT found no evidence that Flybe departed from normal, albeit robust, competition.⁸¹⁷ The OFT rightfully took into account the wider context of the case, including the fact that Flybe was a new entrant instead of the incumbent operator, distinguishing *Flybe* from EU case law on predation.⁸¹⁸ The decision did not find that Flybe acted anti-competitively, holding that the ‘initial losses experienced on

⁸¹² Autorité decision of 28 July 2005, *Jaeger LeCoultre*, Case 05-D-46.

⁸¹³ CNC decision of 22 June 2009, *Facua/Ryanair*, Case S/0097/08.

⁸¹⁴ *Ibid.*, under the assumption that Ryanair held a dominant position.

⁸¹⁵ *Ibid.*, p. 6-7.

⁸¹⁶ OFT decision (undated), *Flybe*, Case MPINF-PSWA001–04, available at http://www.of.gov.uk/shared_of/ca98_public_register/decisions/OFT1286.pdf.

⁸¹⁷ *Ibid.*, para 3.13.

⁸¹⁸ *Ibid.*, para 1.5. The OFT referred to *AKZO* (*infra* note 894), *Tetra Pak II* (*infra* note 894) and *Wanadoo* (*infra* note 891).

entering a route are a result of normal commercial practice for an airline'.⁸¹⁹ The OFT considered such initial losses reasonable 'due to the need to stimulate market demand for the route'.⁸²⁰

Although dominant firms are accordingly allowed to engage in 'normal commercial practice', they may need to provide evidence that its actions were triggered by a competitive *rationale* rather than a wish to exclude competitors. The UK *Cardiff Bus* case concerned a below-cost 'no frills' bus service that the dominant firm introduced after the launch of a similar service by a new entrant.⁸²¹ The OFT rejected the argument that Cardiff Bus was simply market testing a new service at prices below average variable costs. The OFT observed that Cardiff Bus's introduction of a service at below-cost prices and on similar routes and times as a new entrant showed its anti-competitive purpose, rather than a wish to fulfil a 'legitimate commercial strategy'.⁸²² According to the OFT, Cardiff Bus's conduct showed no 'genuine attempt to market test new services',⁸²³ for example because it had not conducted 'any predictive assessment' on its profitability.⁸²⁴

In several cases, the dominant firm attempted to justify its conduct by arguing that *a third* party had not abided by regular business conduct. For example, a refusal to deal may be justified if the dominant firm refuses supply if a customer has not paid its overdue bills, as the UK Court of Appeal acknowledged in *Leyland DAF*.⁸²⁵ In *Lüsterbehangsteine*, the German Bundesgerichtshof considered that a dominant firm may cease supply if its customer has unlawfully copied its designs.⁸²⁶

⁸¹⁹ *Ibid.*, para 6.98-6.99. This finding was relatively novel. In an earlier judgment, the CAT held that there 'are as yet no decided cases as to whether a dominant undertaking may price below [AVC] for a period on the grounds that it is launching a new product'. See *Freeserve.com v Director General of Telecommunications* [2003] CAT 5, para 220.

⁸²⁰ *Ibid.*

⁸²¹ OFT decision of 18 November 2008, *Cardiff Bus*, Case CE/5281/04.

⁸²² *Ibid.*, at 1.14-1.16, 7.18 and 7.32.

⁸²³ *Ibid.*, at 7.23.

⁸²⁴ *Ibid.*, at 7.27-7.31.

⁸²⁵ See *Leyland DAF v Automotive Products* [1994] 1 BCLC 245. The ruling affirmed *Leyland DAF v Automotive Products* [1993] WL 964480 (Ch).

⁸²⁶ Bundesgerichtshof judgment of 25 October 1988, *Lüsterbehangsteine*, WuW/E 2540.

A refusal to deal may also be justified if the *request* itself is considered to be unreasonable. In *CR Delta*, the Dutch NCA (currently named Autoriteit Consument en Markt, or ‘ACM’)⁸²⁷ examined a complaint alleging that a refusal to supply certain data electronically was an abuse, as it allegedly imposed high costs on the complainant (as the complainant had to manually process the data). The ACM rejected the complaint. It considered CR Delta’s refusal to be justified,⁸²⁸ noting e.g. the unwillingness by the complainant to pay for the additional costs that CR Delta said it would incur by such electronic supply.⁸²⁹ Similarly, in *Association of British Travel Agents*, the OFT rejected a complaint that British Airways had abused its dominant position by reducing the booking payments it made to travel agents for short haul flights.⁸³⁰ BA’s ticket sales through its own website were considered as a more efficient way of distribution.⁸³¹ The OFT found it reasonable to expect customers that choose to book through travel agents to pay for the extra services that they receive.⁸³²

A dominant firm’s plea referring to unreasonable conduct by a third party is not always successful. In several cases such a plea failed on the facts. An example is the *Burgess* refusal to deal case. The UK Competition Appeal Tribunal (‘CAT’) found no evidence that the company requesting access had acted in a way that would have justified a refusal, for instance because it had been an unreliable payer ‘or the like’.⁸³³ Another example is *Aberdeen Journals*, where the CAT did not find predatory prices justifiable on the basis that a new entrant (allegedly affected by Aberdeen Journal’s prices) was inefficient or behaved like a ‘fireship’.⁸³⁴ This refers to a company that would have been created simply to wreak

⁸²⁷ Before 1 April 2013, the ACM was named Nederlandse Mededingingsautoriteit, or ‘NMa’.

⁸²⁸ ACM initial decision of 28 March 2003, Case 1205/*FRHS v CR Delta*, para 53.

⁸²⁹ The ACM did not alter its earlier findings (*ibid.*) in its administrative appeal decision of 11 October 2004, Case 1205/*FRHS v CR Delta*.

⁸³⁰ OFT decision of 11 December 2002, *The Association of British Travel Agents and British Airways*, Case CE/1471-02, at 46-47.

⁸³¹ *Ibid.*, at 44.

⁸³² *Ibid.*

⁸³³ *J.J. Burgess & Sons v Office of Fair Trading* [2005] CAT 25, para 363. The CAT referred to Case 27/76 *United Brands v Commission* [1978] ECR 207. Although not mentioned by the CAT, a key difference between the two cases seems to be that in *United Brands* the dominant firm invoked regular commercial practice referring to its own conduct, whereas in *Burgess* the dominant firm referred to the supposed absence of regular commercial practice on the part of the undertaking requesting access.

⁸³⁴ *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11, para 450.

havoc and force a sale to Aberdeen Journals.⁸³⁵ Accordingly, the CAT appears to have left open the possibility that such behaviour by a third party may be relevant while assessing a justification in a predation case.⁸³⁶

Similar pleas in other cases also failed because of a lack of evidence. In the *ATOC* decision, the Office of Rail Regulation ('ORR') observed that the dominant firm had not provided evidence of past system failures that could otherwise have justified its refusal to supply certain information.⁸³⁷ In *Eléctrica del Llémana*, the Spanish Competition Tribunal ('Tribunal') examined an energy incumbent's refusal to supply additional electricity to a downstream firm.⁸³⁸ The dominant undertaking argued that the refusal was caused by the downstream firm's poor quality of service. The Tribunal rejected this view, stating that the dominant firm had not provided concrete evidence of this claim. The Tribunal suggested that any possible non-compliance with contractual obligations should be dealt with by a private law court, but cannot in itself serve as an objective justification for a refusal to supply.

Finally, a dominant firm may also wish to dissociate itself from allegedly unlawful conduct by third parties. A noteworthy problem here is that a finding of 'illegality' is rarely a straightforward matter. A case in point is the UK *Floe* case. Vodafone had disconnected SIM cards it had provided to Floe, arguing that it sought to avoid the alleged unlicensed provision of mobile phone services by Floe – a criminal offence under UK law.⁸³⁹ Telecoms regulator Ofcom agreed with Vodafone and rejected Floe's complaint.⁸⁴⁰ On appeal, the CAT agreed with Ofcom that competition law does not, and cannot, require dominant undertakings to commit a criminal offence itself directly or indirectly by enabling another

⁸³⁵ As argued by Aberdeen Journals (*ibid.*, para 194 *et seq.*).

⁸³⁶ Also note that an objective justification was difficult to establish anyway considering the evidence of selective price-cutting (*ibid.*, para 358).

⁸³⁷ ORR non-infringement decision of 17 November 2009, *Association of Train Operating Companies* ('ATOC'), at 166. Available at <http://www.rail-reg.gov.uk/upload/pdf/rtti-decision-011209.pdf>.

⁸³⁸ Tribunal de Defensa de la Competencia judgment of 29 September 1999, *Eléctrica del Llémana*, Case 442/98.

⁸³⁹ Section 1 of the Wireless Telegraphy Act 1949. I do not examine the possibility that Vodafone would itself have acted illegally by not disconnecting the SIM cards.

⁸⁴⁰ Ofcom decision of 3 November 2003, *Floe Telecom*, paras 49 to 52, and 55 to 57. Available at <http://www.ofcom.org.uk/static/archive/oftel/publications/mobile/2003/gsm1103.pdf>.

undertaking to commit a criminal offence (in this case, through the provision of telecom services).⁸⁴¹ However, the CAT expressed doubts whether the law was sufficiently clear to state with certainty that Floe had violated it,⁸⁴² and remitted the matter back to Ofcom for further examination.⁸⁴³ In its second decision, Ofcom reaffirmed that it considered Floe's activities to be unlawful.⁸⁴⁴ In a second appeal, the CAT remained doubtful whether Vodafone truly believed at the time of the disconnection that Floe's conduct was illegal,⁸⁴⁵ even though the case was finally decided on different grounds.⁸⁴⁶ According to the CAT, a legal requirement can only be relied upon if the dominant firm has relied 'at the very least' on 'clear legal advice that it is so precluded'.⁸⁴⁷ Vodafone produced no evidence of such advice.⁸⁴⁸ I agree with the CAT's minimum requirement: in the absence of any documentation examining the alleged illegality, there is little reason to presume that its refusal indeed sought to achieve a benign objective. In a regulated sector, an additional requirement should be that the dominant firm engaged with the competent authorities about the alleged illegality⁸⁴⁹ – even though, as *Floe* shows, agreement by the competent regulator is not always sufficient, as the courts may disagree about the alleged illegality.

In my view, if a dominant firm refuses to deal with a company that allegedly operates illegally, such illegality should be a relevant consideration when determining whether the refusal violates Article 102 TFEU. I believe this statement to be true even after the recent ECJ judgment in *Slovenská*.⁸⁵⁰ The

⁸⁴¹ See *Floe Telecom v Ofcom* [2004] CAT 18, paras 289 and 333. Although the CAT does not expand upon this distinction, I believe that the former situation entails objective necessity; whereas the second situation is more appropriately seen as legitimate business behaviour.

⁸⁴² *Ibid.*, para 336.

⁸⁴³ *Ibid.*, para 338.

⁸⁴⁴ Ofcom decision of 28 June 2005, *Floe (re-investigation)*, Case: CW/00805/12/04, paras 247 and 334. Ofcom refers to this justification as 'legitimate commercial interest' (para 248).

⁸⁴⁵ *Floe Telecom v Ofcom* [2006] CAT 17, para 367.

⁸⁴⁶ *Ibid.*, paras 352-353.

⁸⁴⁷ *Ibid.*, paras 371-372.

⁸⁴⁸ A later judgment by the Court of Appeal partially set aside the CAT's order, but did not rule upon the CAT's interpretation of objective justification. See *Ofcom v Floe Telecom* [2009] EWCA Civ 47.

⁸⁴⁹ In *Floe*, *supra* note 841, the CAT noted at para 333: 'we accept that where the relevant authorities have pronounced that an activity is illegal, competition law cannot and does not require the dominant undertaking to participate in the furtherance of an illegal act'.

⁸⁵⁰ Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa ('Slovenská')* [2013] ECR nyr.

Slovenská case concerned three Slovakian banks that jointly terminated their business dealings with Akcenta, a financial institution from the Czech Republic. The Slovakian NCA found that the bank's coordinated action violated Article 101(1) TFEU. One of the banks appealed against this finding, arguing that Akcenta was operating illegally as it allegedly did not have the required licences. The ECJ held in a preliminary ruling that, when determining whether an agreement that restricts competition by object infringes Article 101(1) TFEU, it is irrelevant that a third party (such as Akcenta) was allegedly operating illegally.⁸⁵¹

The *Slovenská* case does not seem to herald the end of the 'illegality defence' for the purposes of Article 102 TFEU. Competition law is more benign towards refusals to deal under 102 TFEU than to restrictions by object under Article 101(1) TFEU. The first is an exception to the rule that even dominant firms are free to decide with whom they deal or not, whereas the second type of conduct is considered 'injurious' to competition by its 'very nature'.⁸⁵² In addition, the illegality of the conduct in *Slovenská* was anything but evident,⁸⁵³ and the ECJ took into account that none of the banks had challenged the legality of Akcenta's operations *before* they were investigated (suggesting that the outcome could have been different if they *had* challenged the legality earlier).⁸⁵⁴ Finally, even though the ECJ does not mention it explicitly, the element of necessity also appears wanting: if the banks were so concerned with the third party's conduct, why did they need an agreement to withdraw their banking services and did not simply do so individually? In sum, there is ample reason not to transpose the reasoning in *Slovenská* to refusal to deal cases in Article 102 TFEU.

3.2.3 Commercial freedom – Legitimate differentiation

Several domestic cases examined whether a dominant firm's differentiation of prices (or unequal treatment otherwise) could be justified, and therefore does not constitute discrimination that would amount to an abuse.

⁸⁵¹ *Ibid.*, para 19.

⁸⁵² See e.g. Case C-226/11 *Expedia v Autorité de la concurrence* [2013] ECR nyr, para 36.

⁸⁵³ Indeed, according to the Czech government, Akcenta did have the requisite licenses in the Czech Republic (*supra* note 850, para 15).

⁸⁵⁴ *Ibid.*, para 19.

Two telling examples emanate from Dutch competition practice. The first example is *Interpay*, where retailer Superunie alleged that the price differentiation by debit card transaction company Interpay was abusive. The ACM rejected the complaint, as it found the differentiation to be objectively justified.⁸⁵⁵ At a time when the success of Interpay's transaction system was still uncertain, Superunie's rival Ahold committed to large-scale investments and guaranteed that it would process a minimum number of transactions.⁸⁵⁶ The ACM thus considered the additional discounts (that were, at the time, offered to other retailers as well) as an appropriate financial reward for the investments and risks;⁸⁵⁷ and noted that a strict application of the abuse prohibition – as proposed by the complainant – would be detrimental to innovation.⁸⁵⁸

A second example from the Netherlands is *GasTerra*, where a collective of greenhouse farmers complained that gas wholesaler GasTerra charged discriminatory prices.⁸⁵⁹ The ACM rejected the complaint, holding that GasTerra's differentiation of prices was not abusive as it reflected the varying needs of wholesale customers. Lower prices will be available for customers willing to commit to long-term contracts with little flexibility in gas off-take.⁸⁶⁰

In the *EPM/NMPP* case, the French Autorité examined the alleged discriminatory nature of a new pricing scheme of distributor NMPP. It found that the new differentiation was justified, as the pricing method was transparent, objective and cost-based.⁸⁶¹ It also took into account that the new scheme was introduced gradually. The Paris Court of Appeal upheld the decision,⁸⁶² noting that the rates charged

⁸⁵⁵ ACM initial decision of 28 April 2003, Case 2978/*Superunie v Interpay*, para 40. In para 39, the ACM provides two examples of objective justification. First, a rebate could be justified because of ensuing cost benefits that are proportional to the amount of the rebate. Second, if a purchaser has borne specific investment risks they could provide an objective justification for special treatment by the dominant undertaking for a certain period of time.

⁸⁵⁶ *Ibid.*, para 41.

⁸⁵⁷ *Ibid.*, para 47.

⁸⁵⁸ *Ibid.*, para 50. The ACM confirmed the rejection of the complaint in its administrative appeal decision of 29 June 2005, Case 2978/*Superunie v Interpay*.

⁸⁵⁹ ACM initial decision of 26 June 2009, Case 5720/*Productschap Tuinbouw v GasTerra*.

⁸⁶⁰ ACM administrative appeal decision of 28 April 2011, Case 5720/*Productschap Tuinbouw v GasTerra*, para 113.

⁸⁶¹ Autorité decision of 12 July 2007, *EPM/NMPP*, Case 07-D-23.

⁸⁶² Paris Court of Appeal judgment of 17 September 2008, Case 2007/14904.

were based on objective economic criteria.⁸⁶³ The Court also observed that the introduction of new prices had a legitimate aim, namely to correct for the unfair effects of the earlier pricing scheme.

The UK *EWS* case is another price discrimination example, where the ORR held that rail company EWS had abused its dominant position by foreclosing its rivals from the market for the supply of coal to UK industrial users.⁸⁶⁴ According to the ORR, EWS had used several means to achieve this aim, such as charging discriminatory prices for access and providing selective price cuts to (potential) customers of its competitors. The ORR found that EWS had advanced no credible objective justification,⁸⁶⁵ stating: ‘business considerations that in reality amount to anti-competitive behaviour cannot be used as justification for unequal treatment’.⁸⁶⁶ It rejected EWS’s reference to certain operational difficulties encountered by ECSL (the company requesting access), as those issues were not purely ECSL’s fault and would, in any case, not be remedied by price discrimination.⁸⁶⁷

Finally, in *Napp*, the OFT held that pharmaceutical company Napp had abused its dominant position by charging excessive prices for certain drugs to patients in the community segment (i.e. after hospitalisation), after inducing doctors to prescribe these drugs at prices below costs while patients were still in hospital.⁸⁶⁸ After hospitalisation patients usually keep using the same drugs. The CAT held that Napp produced no evidence that the selective discounts during hospitalisation were based on an economic justification such as cost savings,⁸⁶⁹ and concluded that Napp’s conduct could only be explained by a wish to exclude competitors.⁸⁷⁰

⁸⁶³ *Ibid.*, page 6.

⁸⁶⁴ ORR Decision of December 2006, *EWS*, available at http://www.rail-reg.gov.uk/upload/pdf/ca98_decision_ews-dec06.pdf.

⁸⁶⁵ *Ibid.*, at B100.

⁸⁶⁶ *Ibid.*, at B12. The ORR refers to Advocate General Kokott in her Opinion of 23 February 2006 in Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para 114.

⁸⁶⁷ *Ibid.*, at B134.

⁸⁶⁸ OFT decision of 30 March 2001, *Napp*, Case CA98/2/2001.

⁸⁶⁹ *Napp v Director General of Fair Trading* [2002] CAT 1, para 341.

⁸⁷⁰ *Ibid.*, para 347.

3.2.4 Commercial freedom – The recovery of costs

UK competition law seems to accept that the recovery of (sunk) costs may justify an otherwise exclusionary practice. Examples include the *National Grid* and *Welsh Water* cases. In *National Grid*, UK energy regulator Ofgem⁸⁷¹ found that National Grid, an energy network company, had abused its dominant position in the market for the provision and maintenance of domestic-sized gas meters.⁸⁷² National Grid had entered into long-term contracts that allegedly withheld competitors from replacing its meters with less expensive and/or more technologically advanced meters. Ofgem held that such arrangements may be justified to allow for the recovery of customer specific sunk costs,⁸⁷³ but did not accept that the contracts under review were necessary or proportionate.⁸⁷⁴ The CAT dismissed National Grid's subsequent appeal,⁸⁷⁵ laying particular emphasis on the disproportionate nature of the charges that switchers would have to pay for not continuing their contract.⁸⁷⁶ The CAT also noted that there were alternative ways to cover sunk costs while still allowing replacement by competitors.⁸⁷⁷ The Court of Appeal rejected a further appeal,⁸⁷⁸ even though it did criticize the CAT's treatment of possible consumer benefits within the assessment of anti-competitive foreclosure, rather than under the separate heading of objective justification.⁸⁷⁹

A complaint by Albion Water triggered the *Welsh Water* case. UK water regulator Ofwat⁸⁸⁰ investigated the price that Dŵr Cymru ('Welsh Water') set for access to its network.⁸⁸¹ Ofwat found no evidence that the prices under review were excessive, discriminatory or amounted to a margin squeeze. On appeal,

⁸⁷¹ Technically the Gas and Electricity Markets Authority ('GEMA'), but I shall refer to its more commonly used name.

⁸⁷² GEMA decision of 21 February 2008, *National Grid*, Case CA98/STG/06.

⁸⁷³ *Ibid.*, at 4.26 and 4.131.

⁸⁷⁴ *Ibid.*, at 4.132 and 4.186.

⁸⁷⁵ Even though the CAT did lower the fine imposed on National Grid, see *National Grid v GEMA* [2009] CAT 14.

⁸⁷⁶ *Ibid.*, at 93, 98 and 200.

⁸⁷⁷ *Ibid.*, at 143.

⁸⁷⁸ *National Grid v GEMA* [2010] EWCA Civ 114.

⁸⁷⁹ *Ibid.*, at 86-87. The CAT seems to have done so after litigants National Grid and Ofgem agreed that this was an appropriate approach to follow (see the CAT's judgment, *supra* note 875, para 94).

⁸⁸⁰ Formerly referred to as the Director General of Water Services.

⁸⁸¹ Ofwat decision of 26 May 2004, *Dŵr Cymru*, Case CA98/00/48.

the CAT did not agree with Ofwat's use of the Efficient Component Pricing Rule ('ECPR'), a pricing benchmark that takes the prevailing retail price and deducts the cost that the incumbent avoids by not making the supply in question.⁸⁸² The CAT did consider the 'recovery of infrastructure and common costs' as 'a reasonable objective'. However, the CAT did not agree with the use of a benchmark that would have the effect of eliminating all existing competition (including Albion Water, the only entrant in the UK water sector post-liberalisation) and preventing virtually any new market entry.⁸⁸³ In addition, the CAT found that the absence of a margin between the wholesale and retail prices could not be objectively justified, since the evidence strongly suggested that the level of the upstream price was excessive.⁸⁸⁴ The Court of Appeal rejected a subsequent appeal by Welsh Water.⁸⁸⁵

3.2.5 Commercial freedom – Meeting competition

A number of domestic predation cases examined the availability of a meeting competition defence, exploring the right for dominant firms to align their prices with those of their competitors. An example is *EWS*, where the ORR acknowledged that a meeting competition plea may be available to justify prices that are between average total costs and average variable costs, especially if the price cuts are introduced 'across the board'.⁸⁸⁶ At the same time, the ORR held that 'a desire by a dominant undertaking to win business by matching or beating the price of a competitor cannot in itself negate a finding of abusive intent'.⁸⁸⁷ The ORR seemed cognisant of the importance of context in order to determine whether below-cost prices that seek to meet competition are abusive or not. Relevant context includes an analysis of the market position of the dominant firm, the likely effects of the conduct, the degree of selectivity of the relevant prices and the subjective intention of the dominant

⁸⁸² *Albion Water v Water Services Regulation Authority* [2006] CAT 23, at 44, 48 and 941.

⁸⁸³ *Ibid.*, at 836. See also *Albion Water v Water Services Regulation Authority* [2006] CAT 36, at 308.

⁸⁸⁴ *Albion Water*, *supra* note 882, at 874.

⁸⁸⁵ *Dŵr Cymru v Albion Water* [2008] EWCA Civ 536. The Court of Appeal noted that it considers objective justification as a separate step from the margin squeeze test itself, at 106. See, similarly, the Court of Appeal ruling in *National Grid*, *supra* note 879, at 86-87.

⁸⁸⁶ *EWS*, *supra* note 864, at C202.

⁸⁸⁷ *Ibid.*, at C203. Note that abusive intent is a requirement for prices between average total costs and average variable costs to be considered contrary to Article 102 TFEU, see *AKZO*, *infra* note 894, para 146.

firm.⁸⁸⁸ On the facts of the case, the ORR concluded that EWS's prices could not be objectively justified, *inter alia* because they selectively targeted its rival's largest customer.⁸⁸⁹

By contrast, the French Autorité did accept a meeting competition defence on the facts in *Bouygues*. Telecom company Bouygues requested the Autorité to impose interim measures in response to alleged predatory pricing by France Télécom. The Autorité did not find an abuse, concluding that France Télécom was simply aligning its prices to those of its rivals in the competitive mobile telephony market.⁸⁹⁰

The acknowledgment of a right to align prices, even if they are below costs, is worthy of note because the ECJ's *Wanadoo* ruling suggests that such a plea does not exist for the purposes of EU law.⁸⁹¹ However, the author believes that the *EWS* and *Bouygues* decisions provide useful nuances to – and are not necessarily inconsistent with – the *Wanadoo* ruling. The *EWS* decision acknowledges that an in-depth analysis of the relevant context may show that below-cost pricing to meet competition can actually be pro-competitive instead of abusive. There is no reason to assume that *Wanadoo* disallows dominant undertakings from aligning their prices to those of competitors if this does not negatively affect competition.

As to the *Bouygues* case, the Autorité's approach seems to have been influenced by the fact that the case concerned an application for interim relief. Such cases necessarily involve a limited examination of the appropriate cost benchmark, which makes it riskier to attach legal consequences to prices that are allegedly below costs. Indeed, in its more expansive investigation in *GlaxoSmithKline*, the Autorité did reject a meeting competition defence, as it found that GlaxoSmithKline's predation strategy had the

⁸⁸⁸ *Ibid.*, at C204.

⁸⁸⁹ *Ibid.*, at C205. Subsequent court rulings in a follow-on action for damages by the CAT and the Court of Appeal focus on the issue of causation, but do not provide relevant observations on the question of objective justification. See *Enron Coal Services (in liquidation) v EWS* [2009] CAT 36 and *Enron Coal Services (in liquidation) v EWS* [2009] EWCA Civ 647.

⁸⁹⁰ Autorité decision of 23 December 1999, *Bouygues/France Télécom*, Case 99-MC-12.

⁸⁹¹ See Case T-340/03 *France Télécom v Commission* ('*Wanadoo*') [2007] ECR II-107, para 182; as confirmed by Case C-202/07 P *France Télécom v Commission* ('*Wanadoo*') [2009] ECR I-2369, para 47.

effect of hindering the entry of certain generic drugs.⁸⁹² More generally, the Autorité suggested in that case that the meeting competition defence is, in principle, not available to a dominant firm.⁸⁹³ Like *EWS*, the Autorité's decisions thus show the importance of context while examining a meeting competition plea.

A meeting competition defence should require particularly persuasive reasoning if prices are not only below average total costs, but also below average variable costs. In *Tetra Pak II*, building upon its precedent in *AKZO*, the ECJ held that such prices 'must always be considered abusive'.⁸⁹⁴ This statement implies that prices below average variable costs can never be justified. The more recent *Wanadoo* and *Post Danmark* judgments, however, suggest that the ECJ has become more permissive in its approach. Although prices below average variable costs must 'in principle' be regarded as abusive,⁸⁹⁵ the dominant firm may argue that it had 'economic justifications other than the elimination of a competitor'.⁸⁹⁶

Notwithstanding *Wanadoo* and *Post Danmark*, the precise scope of available justification pleas vis-à-vis prices below average variable costs remains unclear. This is why the Irish *Drogheda Independent Company* ('DIC') case is of interest. In *DIC*, the Irish Competition Authority ('ICA')⁸⁹⁷ examined whether prices for advertising space could be justified even though they were below average variable costs.⁸⁹⁸ Assuming that DIC held a dominant position,⁸⁹⁹ the ICA observed that it had a 'business justification' for its prices.⁹⁰⁰ The ICA considered that DIC's conduct was designed to meet competition and had

⁸⁹² Autorité decision of 14 March 2007, *GlaxoSmithKline*, Case 07-D-09.

⁸⁹³ *Ibid.*, at 179.

⁸⁹⁴ Case C-333/94 P *Tetra Pak International v Commission* ('*Tetra Pak II*') [1996] ECR I-5951, para 41; Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, para 71.

⁸⁹⁵ Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] nyr, para 27. See also *Wanadoo*, *supra* note 891, para 109, where the ECJ suggested that prices below average variable costs are *prima facie* abusive (instead of abusive as such).

⁸⁹⁶ See *Wanadoo* (*ibid.*, para 111) and *Post Danmark* (*ibid.*, para 27).

⁸⁹⁷ Officially the Irish NCA is called The Competition Authority, but I think the use of that name would be confusing in a comparative article such as this one.

⁸⁹⁸ ICA decision of 7 December 2004, *Drogheda Independent Company*, Case COM/05/03.

⁸⁹⁹ The ICA was not convinced that DIC actually held a dominant position.

⁹⁰⁰ *Ibid.*, paras 2.53 and 2.55. The ICA's assessment of a business justification seems to focus on an alternative explanation as to what motivated the relevant behavior.

benefitted consumers by offering more choice and better quality of local newspapers. In sum, the ICA saw no obvious adverse effect that resulted from DIC's prices.⁹⁰¹ The *DIC* decision is a fine example how an in-depth examination of the relevant context can show that practices that appear abusive at first sight may not be abusive after all. Caution is warranted, however. NCAs should be particularly meticulous in their analysis when they consider justifications that EU case law seems to allow only in exceptional circumstances.⁹⁰²

3.3 Objective necessity

Objective necessity can be a compelling type of justification, but should be applied with care. In my opinion, objective necessity ought only be accepted if circumstances leave the dominant with no possibility to act otherwise. Some domestic cases seem to have used the concept of objective necessity even in the absence of such impossibility,⁹⁰³ but I think such an approach risks rendering the whole idea of 'necessity' superfluous.⁹⁰⁴

An example of *force majeure* is the *Aberdeen Journals* case, where the OFT investigated below-cost pricing of advertising space.⁹⁰⁵ Although *Aberdeen Journal's* prices were at some point below average

⁹⁰¹ *Ibid.*, para 2.64.

⁹⁰² Also consider that the *DIC* decision was taken in 2004, *before* the ECJ laid down its rulings in *Wanadoo* (*supra* note 891) and *Post Danmark* (*supra* note 895).

⁹⁰³ For example, the *Saint-Honorat* (*infra* note 949) and *Total* (*infra* note 941) cases in France refer to 'objective necessity', but I believe they are more properly understood as applications of a public interest plea, because the dominant firm could still have acted otherwise (as discussed in paragraph 3.5). Another example is the decision in *Flybe* (*supra* note 816, at 6.99), where the OFT examined whether an airline can justify below-cost pricing on a new route. Although the OFT does refer to 'objective necessity', its analysis does not emphasize Flybe's (lack of) alternatives, but rather focuses on whether Flybe's conduct can be seen as 'normal commercial practice'.

⁹⁰⁴ See also Guidance on the Commission's enforcement priorities in applying Article [102] of the [TFEU] to abusive exclusionary conduct by dominant undertakings, OJ [2009] C 45/7, para 29: 'The question of whether conduct is objectively necessary and proportionate must be determined on the basis of factors external to the dominant undertaking'.

⁹⁰⁵ In July 2001, the OFT laid down its first decision (OFT decision of 16 July 2001, *Aberdeen Journals*, Case CA98/5/2001). In March 2002, the CAT set aside the decision on procedural grounds (*Aberdeen Journals v Director General of Fair Trading* [2002] CAT 4). According to the CAT, the OFT had provided insufficient reasoning for its

variable costs,⁹⁰⁶ the OFT did accept an objective justification for the period in which Aberdeen Journals incurred high costs due to a threat of industrial action.⁹⁰⁷ The *prima facie* predatory prices were seemingly caused by exceptionally high costs, rather than low prices targeted at excluding competition.⁹⁰⁸ There is a sound reason to condone prices below average variable costs if it is truly impossible for the dominant firm to prevent the *prima facie* abuse. Allowing such a justification can be aligned with EU case law, as the ECJ's predation case law is based on the premise that the dominant firm sets its prices *by choice*.⁹⁰⁹

Objective necessity may also exist if the dominant firm refuses supply because of a lack of available capacity. An example is the Luxembourg *Tanklux* case, where the NCA ('Conseil de la Concurrence', or 'Conseil') found that insufficient capacity justified a refusal by a manager of a port facility to provide fuel storage capacity.⁹¹⁰ Similarly, the Spanish Competition Tribunal held in *Pharma/Glaxo* that a refusal to supply may be justified if a client suddenly and substantially increases its orders to such an extent that the dominant firm cannot meet its request.⁹¹¹

In my view, objective necessity requires more than simply stating in general terms that the available capacity is insufficient (as the Conseil seems to have done in *Tanklux*). Such a plea should explain why the dominant firm could not have acted in a less anti-competitive manner. Perhaps a simple readjustment in capacity allocation could have avoided the exclusion. Indeed, the German NCA

market definition. The OFT's second decision confirmed its earlier findings, and included a more elaborate treatment of the market definition (OFT decision of 25 September 2002, *Aberdeen Journals (remitted case)*, Case CA98/14/2002). The CAT upheld the second OFT ruling (*Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11).

⁹⁰⁶ The OFT presumes this conduct to be abusive in accordance with the *AZKO* case (*supra* note 894). See the OFT decision of 25 September 2002 (*ibid*), paras 175-180.

⁹⁰⁷ *Ibid.*, para 205.

⁹⁰⁸ One could also wonder if the prices under review were capable of excluding competition, and thus whether they were *prima facie* abusive in the first place.

⁹⁰⁹ See, eg *AKZO* and *Tetra Pak II* (*supra* note 894).

⁹¹⁰ Conseil decision of 3 August 2009, *Tanklux*, Case 2009-FO-02. See also Conseil decision of 23 April 2007, *Rock Fernand Distributions*, Case 2007-FO-01.

⁹¹¹ Tribunal de Defensa de la Competencia ruling of 13 October 2004, *Spain Pharma/Glaxo*, Case R 611/2004.

(‘Bundeskartellamt’, or ‘BKartA’) displays a strict approach towards insufficient capacity in its *Scandlines* decision. The decision notes that such a plea requires compelling evidence, and may be rejected if the refusal results in the removal of all competition at the downstream level.⁹¹² I support a rigorous analysis of alleged capacity constraints. However, once it appears that those constraints are genuine, there is little reason to examine the effects on competition (as the BKartA seems to have done in *Scandlines*) as objective necessity implies that the dominant firm had no alternative course of action.

Objective necessity may also exist if the State forces the dominant firm to act in a particular way. As was shown above, the UK and Irish Competition Acts explicitly provide for such a situation. The CAT confirmed in *Floe* that competition law does not require a dominant firm to act illegally; in such cases a dominant firm can rely on its lack of alternatives.⁹¹³ Otherwise, however, I have not found cases examining this topic in any more detail.

3.4 Efficiency

3.4.1 Introduction

The following paragraphs discuss various cases that assessed whether efficiency benefits could justify a *prima facie* abuse. The plea requires that, on balance, the conduct under review entails efficiency benefits that lead to an increase in consumer welfare. Allowing such a plea is consistent with ECJ case law, notably the *British Airways* and *Post Danmark* judgments.⁹¹⁴

3.4.2 Domestic cases on efficiencies

Tenants of storage facilities triggered the Luxembourg *Tanklux* case, complaining *inter alia* that they were required to deal with a transport company pre-selected by port manager Tanklux.⁹¹⁵ The Conseil disagreed with the complaint, finding the requirement to be justified based on several grounds,

⁹¹² Bundeskartellamt decision of 27 January 2010, *Scandlines*, Case B9-188/05. For the reasoning on objective justification, see pages 49 *et seq.*

⁹¹³ *Supra* note 841.

⁹¹⁴ *British Airways*, *supra* note 866. See also Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] ECR nyr, para 42.

⁹¹⁵ *Tanklux*, *supra* note 910, paras 51-52.

including its efficiency benefits. According to the Conseil, regular contacts between a limited number of companies can bring down costs and thus produce considerable efficiency benefits.⁹¹⁶

In the *Canal+* decision, the French Autorité focused on the question whether Canal+, a pay-TV company, abused its dominant position by tying its flagship Canal+ product with other TV content.⁹¹⁷ The Autorité found that the tie produced cost savings,⁹¹⁸ and provided consumers the benefit of receiving only one invoice and of obtaining both services through one decoder.⁹¹⁹ The Autorité concluded that Canal+ had not abused its dominant position. The Paris Court of Appeal upheld the Autorité's decision, confirming that the conduct lead to cost reductions and efficiency gains.⁹²⁰ Another relevant decision from the Autorité is *Coca-Cola*, triggered by a complaint against Coca-Cola's new pricing scheme with a tiered structure.⁹²¹ The Autorité held that the new scheme lead to efficiencies and produced distribution costs savings that could be passed on to clients and consumers.⁹²²

Of course, the efficiency plea does not always succeed. Although the OFT saw no reason for further action in the *Flybe* predation case (introduced in Section C.2.b), it did reject Flybe's efficiency plea. First, the OFT did not find that the claimed efficiencies were fully attributable to Flybe.⁹²³ Second, the OFT considered that if Flybe were to become the sole operator of the relevant route, the current efficiencies would not be sufficient to offset the long-term detrimental effects that would result.⁹²⁴ This approach is worthy of note, as it allows the efficiency analysis to take into account future effects instead of merely considering effects that have already materialised. Although I agree that this is the most comprehensive and correct approach vis-à-vis the efficiency approach, it is clear that quantification of all the potential effects will be anything but easy.

⁹¹⁶ *Ibid.*, para 56.

⁹¹⁷ Autorité decision of 18 March 2005, *Canal+*, Case 05-D-13.

⁹¹⁸ *Ibid.*, para 67.

⁹¹⁹ *Ibid.*

⁹²⁰ Paris Court of Appeal judgment of 15 November 2005, *Canal+*, Case 2005/08308, page 9.

⁹²¹ Autorité decision of 18 April 2003, *Coca-Cola*, Case 03-D-20.

⁹²² *Ibid.*, para 54-55.

⁹²³ *Flybe*, *supra* note 816, at 6.97.

⁹²⁴ *Ibid.*, at 6.104 and 6.108.

Another issue is how the benefits should be distributed. There is obviously little reason to condone an efficiency defence in the absence of *any* net benefit to consumer welfare. The *Genzyme* case, on an alleged margin squeeze, offers an example. Genzyme produced a drug and also provided homecare services, delivering that drug to patients in their homes. A complaint by an alternative provider of homecare services alleged that it was left with an insufficient margin to viably compete. Both the OFT⁹²⁵ and the CAT⁹²⁶ agreed that Genzyme had entered into an illegal margin squeeze. The CAT rejected Genzyme's argument that its conduct led to efficiencies, because the concept of objective justification requires that benefits not only accrue to the dominant undertaking, but to customers as well.⁹²⁷

Perhaps a more difficult question is whether the mere existence of *any* net benefit to consumer welfare is sufficient for the efficiency plea, or if it also requires that consumers must at least receive a 'fair' share of the resulting benefits. French statutory law indeed contains such a fair share requirement, but the other jurisdictions under review do not make clear how large the benefit to consumer welfare must be. In my view, the proportionality (*stricto sensu*) criterion, as examined in Section 4.4 below, could be used to reject a justification if the benefit to consumer welfare is blatantly unfair compared to the benefits that accrue to the dominant firm.

Finally, a common weakness of the cases described above is that the efficiency reasoning tends to be too generic. The cases should include a clear balancing act between pro- and anti-competitive effects. Decisions would also gain in clarity if NCAs and domestic courts explicitly mention which *type* of efficiencies they consider particularly relevant for their examination (i.e. allocative, productive and dynamic efficiency).⁹²⁸ For example, cases such as *Tanklux* and *Coca-Cola* could have made clear that productive efficiency cost savings were considered to outweigh a possible decline in allocative efficiency.

⁹²⁵ OFT decision of 27 March 2003, *Genzyme*, Case CA98/3/03.

⁹²⁶ *Genzyme v OFT* [2004] CAT 4.

⁹²⁷ *Ibid.*, para 583. The CAT also considered that Genzyme's conduct bereft patients of a choice between homecare providers, see paras 585 and 612.

⁹²⁸ In essence, allocative efficiency implies output maximization; productive efficiency implies cost minimization and dynamic efficiency implies innovation maximization. These various types of efficiency are often at odds: for example, cost minimization can have an adverse effect on innovation. For a further explanation of these types of efficiencies, see e.g. A. Jones & B. Sufrin, *EC Competition Law* (OUP: Oxford 2008), at 8.

3.5 Public interest

3.5.1 Introduction

Several domestic cases have accepted public interest grounds as a reason to justify *prima facie* abusive conduct. These cases can offer valuable lessons for our understanding of such justifications, considering the lack of clear ECJ guidance.⁹²⁹ In my view, it makes sense that NCAs and domestic courts acknowledge that competition law does not exist in a vacuum, and that non-competition interests may be able to trump the finding of an abuse. However, the plea does require careful analysis to ensure that it is not used simply as a pretext for anti-competitive conduct.

3.5.2 Security & safety standards

The *Hilti* case raised the question whether the protection of security and safety standards could justify a *prima facie* abuse under Article 102 TFEU. Although the General Court rejected this plea on the facts, it did not reject the possibility to invoke such considerations as a matter of law.⁹³⁰ Similarly, in the UK *Genzyme* case (introduced in Section 3.4.2 of this Chapter), the dominant firm tried to justify the exclusion of an alternative provider of homecare services by stating that it was unfit to deliver such services. The CAT rejected this submission, as the National Health Service had approved the new entrant as a capable and competent homecare provider.⁹³¹

However, some domestic cases *did* accept the need to uphold safety or security standards as a justification. Two examples originate from the ORR's decisional practice. The ORR's *Portec* decision was triggered by a complaint from NTM, a supplier of grease for use in trackside lubricators.⁹³² NTM alleged that Portec (a supplier of both trackside lubricators and grease) had unlawfully demanded lengthy field

⁹²⁹ See e.g. Case T-30/89 *Hilti v Commission* [1990] ECR II-163 and Case T-83/91 *Tetra Pak International v Commission* [1994] ECR II-755. The ECJ upheld both judgments. For an elaborate examination of public policy's relevance as to Article 101 TFEU, see C. Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford and Portland, Oregon: 2009).

⁹³⁰ See *Hilti* (*ibid.*).

⁹³¹ *Genzyme*, *supra* note 926, para 612.

⁹³² ORR decision of 12 August 2005, *NTM v Portec*, paras 168-185. Available at http://www.oft.gov.uk/shared_of/ca98_public_register/decisions/orr.pdf.

trials (instead of the standard tests) before allowing the use of NTM's grease in Portec's new trackside lubricator.⁹³³ In its assessment of a possible objective justification,⁹³⁴ the ORR referred extensively to a report that found the performance of various greases to be substandard. The poor performance risked ineffective protection of trackside lubricators, leading to operational and safety hazards.⁹³⁵ The ORR concluded that the need for extended field trials was objectively justified.⁹³⁶

In *P. Way & Suretrack*, complainants alleged that the London Underground Group ('LUG') had abused its dominant position by not allowing them to supply safety critical personnel.⁹³⁷ The ORR found insufficient evidence that LUG's policy adversely affected competition or consumers.⁹³⁸ But even if there would have been such evidence, the ORR held that safety reasons justified LUG's conduct.⁹³⁹ The ORR considered LUG's safety policy as 'fair and objective', notably because its criteria sought to directly address safety failings identified in a report following the 1999 Ladbroke Grove rail accident.⁹⁴⁰

In *Total*, the French Autorité did not regard the refusal by oil company Total to provide access to its sea-line (an off-shore docking platform) as abusive.⁹⁴¹ Besides the fact that the Autorité did not consider the sea-line to be an essential facility, it held that Total's conduct could be objectively justified in any case. Total refused to provide access if a party requesting access did not comply with certain security rules on verification and acceptance of boats. These so-called 'vetting rules', designed to minimize the risk of accidents, were not published and thus unknown to third parties.⁹⁴² The Autorité accepted Total's argument that its vetting rules need not be disclosed, as it was customary for oil companies not to do so

⁹³³ *Ibid.*, para 11.

⁹³⁴ *Ibid.*, paras 168-185.

⁹³⁵ *Ibid.*, paras 168, 178 and 179.

⁹³⁶ *Ibid.*, para 184.

⁹³⁷ ORR non-infringement notice of 23 June 2004, *Suretrack Rail Services Ltd and P. Way Services Ltd*, available at http://www.offt.gov.uk/shared_offt/ca98_public_register/decisions/suretrackrailservices.pdf.

⁹³⁸ *Ibid.*, para 65.

⁹³⁹ *Ibid.*, paras 61-65.

⁹⁴⁰ *Ibid.*, paras 64-65.

⁹⁴¹ Autorité decision of 20 November 2008, *Total*, Case 08-D-27, para 32.

⁹⁴² *Ibid.*, para 26.

for reasons of security.⁹⁴³ The case aptly shows the importance of context, in particular as to the degree that a dominant undertaking can rely on the fact that the conduct under review is simply normal business practice in its sector.

In *Tanklux*, the Luxembourg Conseil examined the requirement for tenants of a port facility to deal with a pre-selected transport company. It observed that domestic law requires operators of petroleum storage facilities, such as Tanklux, to manage all potential security issues.⁹⁴⁴ The Conseil found that Tanklux's pre-selection of a single transport company would facilitate safety management.⁹⁴⁵

Finally, the *Scandlines* decision by the BKartA shows that a plea based on security standards to justify a refusal to provide access may be rejected in the absence of concrete evidence that the refusal was genuinely based on such worries.⁹⁴⁶ In the BKartA's view, the alleged security issues seemed solely based on the fear of competition and of losing customers rather than actual safety concerns. The BKartA also appears to have taken into account that, in this case, the refusal resulted in a complete lack of competition on the downstream market for the provision of ferry services.

3.5.3 Public interest – other reasons

Several cases mention the potential relevance of public interest concerns other than upholding security or safety standards. In the Luxembourg *Tanklux* case, for instance, the Conseil found the pre-selection of one particular transport company benefitted the national interest, as it was 'likely' to contribute to the security of Luxembourg's energy supply.⁹⁴⁷

Maintaining the security of energy supply was also invoked in the Dutch *SEP* case. The case involved a refusal by electricity transmission grid SEP to provide access to new entrant Hydro Energy. The ACM rejected the argument that the security of supply would be at risk, as bilateral agreements between SEP

⁹⁴³ *Ibid.*, para 33.

⁹⁴⁴ *Tanklux*, *supra* note 910, para 51.

⁹⁴⁵ *Ibid.*, paras 51-52.

⁹⁴⁶ *Scandlines*, *supra* note 912.

⁹⁴⁷ *Tanklux*, *supra* note 910, para 58.

and energy companies should have been able to solve any potential production planning difficulties.⁹⁴⁸ As SEP could have resorted to less anti-competitive alternatives, the ACM rejected the justification plea.

Finally, in the *Saint-Honorat* case, the French Autorité reviewed a refusal by the organization in charge of traveling services to the island of Saint-Honorat to accept third parties to deliver such services as well.⁹⁴⁹ The Autorité considered that the refusal was justified, considering the unique geography and privacy of the island, and the need to ensure the control of the flow of visitors by the island's only inhabitants, a local congregation.⁹⁵⁰

4 ASSESSING OBJECTIVE JUSTIFICATION PLEAS

4.1 Introduction

The analysis of domestic case law and decisional practice has shown that many factors can influence the availability of an objective justification. The type of procedure is one of them. The French *Bouygues* decision⁹⁵¹ and the UK *Getmapping* ruling⁹⁵² suggest that a dominant firm may find it relatively easy to rely on objective justification where a third party seeks interim relief. In *Getmapping*, for instance, Laddie J held that the conduct by the dominant firm must be 'clearly unjustified'.⁹⁵³ Other cases in France⁹⁵⁴ and the UK⁹⁵⁵ indicate, however, that the lessons of *Bouygues* and *Getmapping* cannot be

⁹⁴⁸ ACM administrative appeal decision of 27 March 2000, Case 650/*Hydro Energy v SEP*, para 98. In its decision, the ACM sides with the views of the advisory committee. The Trade & Industry Appeals Tribunal ('CBb') upheld the ACM decision, but did lower the fines substantially. See CBb judgment of 28 May 2004, LJN: AP 1336, para 6.3.

⁹⁴⁹ Autorité decision of 8 November 2005, *Saint-Honorat*, Case 05-D-60.

⁹⁵⁰ The Paris Court of Appeal rejected an appeal against the decision; see its judgment of 4 July 2006, Case 2005/23732.

⁹⁵¹ *Supra* note 890.

⁹⁵² *Getmapping v Ordnance Survey* [2002] UKCLR 410.

⁹⁵³ *Ibid.*, at 52. In *Suretrack Rail Services v Infracore* [2002] EWHC 1316 (Ch), Laddie J mentioned a test where 'no rational and fair person could justify the relevant conduct'.

⁹⁵⁴ Autorité decision in *GlaxoSmithKline*, *supra* note 892, at 179.

easily transposed to situations outside the scope of proceedings for interim relief. Apart from the type of procedure, several substantive elements should be considered as well. This shall be the focus of the following paragraphs, which follow the structure of the proportionality test as is often used in EU law. This test includes an examination of (i) whether the conduct has a legitimate aim and is suitable to achieve that aim; (ii) is necessary for achieving that aim ('the necessity test') and (iii) whether there is no disproportional balance between the interests of the parties involved ('the proportionality test *stricto sensu*').

4.2 Legitimate aim & suitability

A dominant firm cannot rely on objective justification in the abstract, but should make clear why the goal it pursues is legitimate. In my view, such a legitimate aim should relate to one of the 'types' of objective justification described earlier, i.e. considerations based on legitimate business behaviour, efficiencies or public interest. None of the cases in this study seem to have rejected a particular legitimate aim as such,⁹⁵⁶ displaying the wide scope of available goals that a dominant firm may, in principle, legitimately pursue. Notwithstanding this wide scope, an objective justification plea shall be more persuasive if the dominant firm invokes a clearly delineated objective. A precise description of the legitimate aim allows the conduct under review to be subjected to an accurate legal test.

Timing can be a crucial factor when assessing a legitimate aim. A justification is less persuasive if the dominant firm is unable to produce any evidence that it sought to achieve a legitimate aim *before* engaging in the *prima facie* abusive conduct. The *Cardiff Bus* case offers an example, as the dominant firm was unable to produce evidence showing the will to conduct a market test.⁹⁵⁷ Another revealing example is *Purple Parking*. Two parking services companies accused Heathrow Airport Limited ('HAL') of

⁹⁵⁵ OFT decision in *Genzyme*, *supra* note 925, at 352. See also the High Court judgment in *Purple Parking and Meteor Parking v Heathrow Airport* [2011] EWHC 987 (Ch), at 234.

⁹⁵⁶ In *EWS* (*supra* note 864, at C253), the ORR did appear very skeptical of EWS's plea that EWS simply sought to secure additional revenue. The ORR noted: 'The fact that a dominant undertaking wishes to secure additional revenue in this way, regardless of whether or not the additional business is profitable, cannot generally act as a justification for adopting methods that depart from normal competitive practices and have the effect of strengthening its dominant position'.

⁹⁵⁷ *Supra* note 821.

an abuse, as HAL decided to deny them access to the forecourts at various airport terminals.⁹⁵⁸ HAL argued that its refusal sought to remedy various congestion, safety, security and environmental issues.⁹⁵⁹ The High Court rejected the plea, finding that the ‘real motivation’ for HAL’s conduct was not based on the alleged justifications that ‘had never really occurred to anyone in the decision-making process’.⁹⁶⁰ Careful analysis of the evidence should reveal the ‘real motivation’ for the conduct. Apart from timing, differentiated treatment may also be suspect. If HAL genuinely wanted to reduce congestion, there is no clear reason why it should have excluded two rival parking operators while leaving its own parking venture unaffected.

The question whether the conduct is suitable to attain the relevant goal may also play a part. In *EWS*, the ORR considered that the price differentiation under review would not be able to remedy the alleged operational difficulties by the company requesting access.⁹⁶¹ Suitability was also highly relevant in *Purple Parking*, as the High Court rejected the plea that the exclusion of two parking operators would work towards solving the apparent congestion issues. Notwithstanding these examples, most cases have focused on the question if the conduct was *necessary* – rather than suitable – to achieve the stated aim.

4.3 Necessity & availability of alternatives

A necessity test examines whether a legitimate aim could have been achieved through alternative, less anti-competitive, means. To my mind, a separate necessity test has little added value if a situation of *force majeure* has been established, as the acceptance of that plea means that the dominant firm had no alternative ways to act.⁹⁶²

A necessity test is relevant, however, vis-à-vis a public interest plea. Several domestic cases denied such a plea because the dominant firm had less anti-competitive alternatives available to achieve its desired objectives. In cases such as *Genzyme (UK)*⁹⁶³ and *Scandlines (Germany)*,⁹⁶⁴ the exclusionary conduct

⁹⁵⁸ *Supra* note 955.

⁹⁵⁹ *Ibid.*, at 179.

⁹⁶⁰ *Ibid.*, at 189, 195-196 and 204.

⁹⁶¹ *Supra* note 864.

⁹⁶² See e.g. *Aberdeen Journals*, *supra* note 444.

⁹⁶³ *Supra* note 931.

under review was not considered indispensable to uphold safety and security standards. Another example includes the *Purple Parking* ruling. Mann J rejected an objective justification plea, noting that there were alternative solutions to deal with congestion and potential security issues short of refusing access to rival parking operators.⁹⁶⁵ Similarly, in *Mainova*, the BKartA held that an electricity network company had abused its dominant position by refusing to deal with other energy companies.⁹⁶⁶ According to the decision, Mainova's refusal was unnecessary for the protection of the security of supply.⁹⁶⁷ The decision appears to require a dominant firm to choose the conduct that is capable of achieving its legitimate aims with the least possible 'hindrance' to other market participants.⁹⁶⁸

The necessity test is also relevant if a dominant firm wishes to invoke efficiencies as a justification. There is no reason to condone an efficiency plea if the conduct under review is not indispensable for the claimed efficiencies to materialise (as was found, for example, in *Flybe*),⁹⁶⁹ because the efficiencies would have arisen even in the absence of the *prima facie* abuse.

Unfortunately, several domestic cases on public interest and efficiencies do not provide a clear analysis of indispensability, making their reasoning less persuasive. For example, in the *Saint-Honorat* case, the French Autorité accepted a ban for third parties to deliver traveling services to the Saint-Honorat island, but did not explain why there were no other means to protect the island's apparently unique character.⁹⁷⁰ Another example is *P. Way & Suretrack*, in which the ORR upheld a justification based on security benefits without explaining why excluding various companies from delivering so-called 'safety critical personnel' (rather than simply requiring them to abide by certain quality standards) was indispensable to safeguard security standards.⁹⁷¹ Several domestic cases that have accepted an

⁹⁶⁴ *Supra* note 946.

⁹⁶⁵ *Supra* note 955, at 209 and 227-228.

⁹⁶⁶ Bundeskartellamt decision of 8 October 2003, *Mainova*, Case B11–12/03.

⁹⁶⁷ The Dutch *SEP* case contains similar reasoning, see *supra* note 948.

⁹⁶⁸ Bundesgerichtshof judgment of 22 September 1981, *Original-VW Ersatzteile II*, KVR 8/80.

⁹⁶⁹ *Supra* note 816.

⁹⁷⁰ *Supra* note 949.

⁹⁷¹ *Supra* note 937.

efficiency plea similarly lack a clear necessity test: notable examples include the French *Total* decision⁹⁷² and the Luxembourg *Tanklux* decision.⁹⁷³

Analysis of the necessity criterion should take a less prominent role when a dominant firm invokes its commercial freedom. Such freedom implies that the dominant firm is not necessarily required to opt for a particular course of action, such as the one with the least anti-competitive impact. This position appears to be supported by several of the cases under review, such as *Ryanair* (Spain),⁹⁷⁴ *Interpay* (the Netherlands),⁹⁷⁵ as well as *Armor Hélicoptère*⁹⁷⁶ and *Jaeger LeCoultre* (France).⁹⁷⁷

On the other hand, some cases do suggest that the necessity test is not wholly irrelevant when examining a plea based on commercial freedom. In *Burgess*, the justification plea failed, partly because the CAT considered that the dominant firm still had a wealth of solutions available – other than a refusal to deal – to solve its strenuous business relationship with the firm requesting access.⁹⁷⁸ Similarly, in *National Grid*, both Ofgem and the CAT considered that National Grid had several alternatives to cover sunk costs without completely foreclosing the market.⁹⁷⁹

4.4 Proportionality & reasonableness

The proportionality criterion, *stricto sensu*, involves a balancing exercise between the various interests at stake. It can be particularly useful to explore the outer rims of a dominant firm's commercial freedom. This method allows a balanced approach between the interests of the dominant firm and the effects on competition. In *Krankentransportunternehmen II*, the German Bundesgerichtshof examined a health insurer's refusal to deal with a private provider of patient transports, because it wanted to

⁹⁷² *Supra* note 941.

⁹⁷³ *Supra* note 910.

⁹⁷⁴ *Supra* note 813.

⁹⁷⁵ *Supra* note 856.

⁹⁷⁶ *Supra* note 811.

⁹⁷⁷ *Supra* note 812.

⁹⁷⁸ *Supra* note 833, paras 364-365.

⁹⁷⁹ National Grid could have done so by still allowing replacement of gas meters by competitors. See Ofgem decision in *National Grid*, *supra* note 872, at 4.186, and CAT ruling in *National Grid*, *supra* note 875, at 143.

preserve the market exclusively for public providers of such transports. The Bundesgerichtshof rejected the justification plea, as the refusal had a disproportionate adverse effect on competition by raising a significant barrier to entry.⁹⁸⁰ In *EWS*, the ORR rejected a justification plea as it found EWS's price differentiation to be disproportionate.⁹⁸¹ Finally, in *National Grid*, the CAT emphasized that the arrangements under review were disproportionate, as they involved high charges for switchers and led to a foreclosure effect that was 'too severe' to be justified by National Grid's 'admittedly legitimate interest'.⁹⁸²

In several other cases, however, the dominant firm did meet the proportionality test (*stricto sensu*). In the German *Lufthansa* case, the dominant firm was not found to have acted disproportionately, thus removing the need of an in-depth examination.⁹⁸³ Before cancelling certain commissions paid to travel agencies, Lufthansa allowed them ample time for readjusting their business. The *EPM/NMPP* decision of the French Autorité offers another example that a dominant firm will find it easier to justify a new pricing scheme if it is introduced gradually.⁹⁸⁴ Turning back to *Lufthansa*, the BKartA also found no adverse effect on competition, because travel agencies would be able to charge their customers directly for their services. The OFT used similar arguments to reject a complaint that British Airways had abusively reduced the booking payments to travel agents.⁹⁸⁵ The OFT found it reasonable to expect customers that choose to book through travel agents to pay more to cover the additional costs and to enjoy the benefits of the extra services that they provide.⁹⁸⁶

The OFT's decision also suggests that a dominant firm will find it easier to meet the proportionality test if its conduct is considered to be 'reasonable'. For example, in *Leyland DAF*, the UK High Court found a

⁹⁸⁰ Bundesgerichtshof judgment of 12 March 1991, *Krankentransportunternehmen II*, WuW/E 2707. See, similarly, Bundesgerichtshof judgment of 7 October 1980, *Neue Osnabrücker Zeitung*, KZR 8/80.

⁹⁸¹ *Supra* note 864, at B134.

⁹⁸² *Supra* note 875, at 98.

⁹⁸³ Bundeskartellamt press release of 26 July 2004, *Lufthansa*, available at http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2004/2004_07_26.php.

⁹⁸⁴ Autorité decision of 12 July 2007, *EMP/NMPP*, Case 07-D-23.

⁹⁸⁵ *Supra* note 830, paras 46-47.

⁹⁸⁶ *Ibid.*, at 44.

refusal to supply to be justified, as the party requesting supply had not paid its bills.⁹⁸⁷ In *Floe*, Ofcom found that a refusal to deal served a legitimate interest, because the refusal prevented the provision of a service that was allegedly contrary to UK law.⁹⁸⁸ Finally, the Irish High Court noted in the *Irish League of Credit Unions* ('ILCU') case that, while examining a refusal to deal, 'fair play' and 'equitable considerations' 'must have some importance' while considering an objective justification plea.⁹⁸⁹ Indeed, it seems that 'reasonable' conduct can be largely equated with conduct that strikes an equitable balance between the interests of various market participants – hence its conceptual proximity with proportionality *stricto sensu*.

5 PROMISING PRACTICES

From the examination above, I distil a number of promising practices that I think will lead to a better and more consistent application of the objective justification concept in the EU. A first observation is that it does not seem necessary to enact objective justification in domestic legislation. It is not codified in Article 102 TFEU either, and the jurisdictions under review that have no such codification seem to have little difficulty incorporating the concept into their competition practice.

However, where such (partial) codification *does* exist, NCAs and domestic courts should clarify whether the justification they examine is derived from domestic legislation or rather an interpretation of objective justification as meant by the ECJ. They rarely make this distinction clear. More generally, NCAs should provide more transparency by publishing guidance on their interpretation of objective justification. In my view, the guidance ought to focus on the types of available justifications and the

⁹⁸⁷ *Supra* note 825.

⁹⁸⁸ *Supra* note 844, para 248. Ofcom considered its approach to be in line with Case 27/76 *United Brands v Commission* [1978] ECR 207, para 189.

⁹⁸⁹ Irish High Court 22 October 2004, decision by Kearns J. [2004] IRLHC 330, at page 85. Although the Irish Supreme Court overturned the High Court ruling on the basis of market definition (Irish Supreme Court 8 May 2007, [2005] No. 077), it did not rule upon Kearns J.'s observations on objective justification. At page 86, Fennelly J. suggests that a justification will be more difficult to uphold in the case of 'super-dominance', a concept that Fennelly also applied in his capacity as Advocate-General in Case C-395/96 P *Compagnie Maritime Belge* [2000] ECR I-1365, para 136.

appropriate legal conditions. Ideally, NCAs should discuss the substance of such guidance within the framework of the European Competition Network to avoid undue divergences between Member States. Next to providing such guidance, NCAs and domestic courts should attempt, in individual cases, to make a clear distinction between the analysis of the *prima facie* abuse and the objective justification plea. Although such a distinction will not always be easy to make, it does have the potential of improving analytical clarity – as the UK Court of Appeal also emphasised in *National Grid*.⁹⁹⁰

Justifications should only be accepted on the basis of specific and persuasive evidence explaining the reason why the dominant firm acted in a particular way (*Scandlines* offers a prime example).⁹⁹¹ Conversely, it should be rejected if the dominant firm supports its justification plea only by generic reasoning and fails to clearly explain the link between the justification and the *prima facie* abuse (contrary to the decision in *Tanklux*).⁹⁹²

As to the available types of justification, NCAs and domestic courts have often relied on a notion of legitimate business behaviour. Such a justification can accommodate the commercial freedom of dominant firms, and accordingly should not have pre-defined limitations. An analysis of such a justification should pay heed to the relevant nexus between the dominant position and the conduct under review: the more likely it is that the dominant firm would also have engaged in that conduct *without* being in a dominant position, the easier a justification can be applied. A plea based on legitimate business behaviour shall be more persuasive if the dominant firm can provide evidence that, at the time when the relevant decision was taken, it sought to achieve a regular business objective rather than an anti-competitive purpose.

There ought to be a particularly convincing case if a justification plea is based on a reasoning that has been awarded only limited scope in the ECJ's case law. Notable examples are the meeting competition defence,⁹⁹³ and the possibility to legitimately price below average variable costs.⁹⁹⁴

⁹⁹⁰ *Supra* note 878.

⁹⁹¹ *Supra* note 912.

⁹⁹² *Supra* note 910.

⁹⁹³ See e.g. *EWS* (*supra* note 864) and *Bouygues* (*supra* note 890).

⁹⁹⁴ See e.g. *Aberdeen Journals* (*supra* note 442).

As to the applicable legal conditions, an analysis of potentially less anti-competitive conduct would be inappropriate, as that would defeat the very idea of commercial freedom. At the same time, several domestic cases – rightfully, in my view – acknowledge the importance of a proportionality test *stricto sensu*, and often also assess whether the dominant firm’s conduct is reasonable.⁹⁹⁵

I believe that objective necessity can be a particularly forceful form of legitimate business behaviour, provided it is properly understood as an actual impossibility for the dominant firm to act otherwise – for instance in the case of government compulsion or a situation of *force majeure*.⁹⁹⁶ A refusal to deal triggered by a lack of capacity could also be subsumed under this heading, but only if there is a genuine constraint on the dominant firm that cannot be resolved through less anti-competitive means.⁹⁹⁷ While examining an objective necessity, the suitability and necessity conditions should take centre stage. Once those hurdles have been taken, there is little reason to examine proportionality *stricto sensu*, as the analysis has already pointed out that the dominant firm could not have acted differently.

Another type of justification is an efficiency plea. This plea is likely to gain importance in a more effects-based understanding of dominance law.⁹⁹⁸ NCAs and domestic courts should make clear what type of efficiencies they deem relevant, and how they strike a balance between various pro- and anti-competitive effects. Moreover, the dominant firm must show that the conduct under review is indispensable to achieve the pro-competitive effects. Many domestic cases, however, simply state in general terms that the conduct will lead to certain efficiencies, but fail to make an explicit balancing test.⁹⁹⁹ This allows much room for improvement. I recognize that an elaborate quantification of effects will often prove highly difficult. However, at the very least, NCAs and domestic courts should clearly explain why they decided that one effect should be considered greater than the other, for example by an approximation of the magnitude of the relevant effects.

⁹⁹⁵ See e.g. *Krankentransportunternehmen II* and *Neue Osnabrücker Zeitung* (*supra* note 980), and *EWS* (*supra* note 864).

⁹⁹⁶ See e.g. *Aberdeen Journals* (*supra* note 442).

⁹⁹⁷ See e.g. *Scandlines* (*supra* note 912).

⁹⁹⁸ Commission guidance on Article 102 TFEU enforcement priorities, OJ [2009] C 45/7-20.

⁹⁹⁹ See e.g. *Tanklux* (*supra* note 910) and *Coca-Cola* (*supra* note 921).

Thirdly, dominant firms may also rely on public interest to justify their conduct. In a number of domestic cases, NCAs have acknowledged the importance to uphold safety and security standards.¹⁰⁰⁰ A public interest plea should make clear what objective the conduct seeks to attain and why it should prevail over competition concerns (so, in other words, why the dominant firm is right to go beyond its legal requirements vis-à-vis a particular public interest). The conduct should be suitable and necessary to the stated aim. In addition, if the dominant firm engaged in conduct that differentiates between its own (downstream) operations and third parties, it should clarify why working towards the public interest leaves its own activities unaffected.¹⁰⁰¹ The quality of domestic decisions and judgments would increase if they would include a systematic analysis of these elements.

6 CONCLUSION

This chapter has sought to shed light on the concept of objective justification at the Member State level through the examination of domestic cases. The cases have shown the importance of objective justification for the purposes of competition law at the EU Member State level. The examination has revealed that the types of justification identified in the previous chapter – legitimate business behaviour, efficiency and public interest – are all present in domestic cases. In particular, there have been many cases exploring the degree of commercial freedom (in my view part of ‘legitimate business behaviour’) that dominant undertakings are still considered to have. In addition, several domestic cases – in particular decisions by NCAs – have relied on public interest concerns to condone *prima facie* abusive conduct; an interesting finding considering the scepticism that many have on the relevance that public interest can play in abuse cases.

The domestic cases serve as a source of inspiration for further debate on this issue. Such a debate would hopefully create more clarity on the available types of justifications and the applicable legal conditions at the domestic level. The chapter counsels in favour of NCA guidance, preferably through international fora such as the ECN, to mitigate the risk of an undue divergent approach towards justifications. Such guidance is likely to improve the quality and consistency of decisions and rulings, and would strengthen

¹⁰⁰⁰ See e.g. *Portec* (*supra* note 932), *P. Way & Suretrack* (*supra* note 937), *Total* (*supra* note 941) and *Tanklux* (*supra* note 910).

¹⁰⁰¹ The dominant firm failed to do so in *Purple Parking*, *supra* note 955.

legal certainty. It is time to take objective justification out of its benighted situation and into the area where it belongs – shone upon by the limelight of the competition law arena.