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

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CHAPTER VI JUSTIFICATIONS IN THE COMMON LAW WORLD[·]

1 INTRODUCTION

As the previous chapters have shown, in the EU a dominant firm may invoke a justification for *prima facie* abusive conduct. This chapter will show that several jurisdictions outside of the EU have, similarly, accepted that a firm with market power may offer a justification for unilateral conduct that would otherwise be contrary to the competition rules.[1002] In order to obtain a better understanding on how jurisdictions around the world deal with the justification concept, this chapter examines the laws of various countries: Australia, Canada, Hong Kong, South Africa, Singapore and the United States.

The examination focuses on legislative texts, cases and – where available – guidance documents by National Competition Authorities (NCAs) of the countries under review. The chapter seeks to clarify, discuss and compare how these jurisdictions deal with justifications. The jurisdictions have been selected because of various commonalities that facilitate a comparison between them. They share a common law tradition[1003] and boast similar prohibitions of anti-competitive unilateral conduct.[1004] In addition, the economies of these countries are global or regional leaders, suggesting that their legal regimes have an impact well beyond their respective borders.

[·] A revised version of this chapter has been published as T. van der Vijver, 'Justifications and anti-competitive unilateral conduct: an international analysis', (2014) 37 World Competition 27.

[1002] See e.g. Brian A. Facey and Dany H. Assaf, *Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey*, 70(2) Antitrust L.J. 513, 521 (2002-2003).

[1003] Of course common law reception varies from country to country: South Africa, for example, has also had notable influence from the civil law tradition through Roman Dutch law. Although this study focuses on common law countries, it does not examine the common law doctrine of restraint of trade, but rather the interpretation of competition statutes enacted in the jurisdictions under review.

[1004] The chapter does not examine cases on price discrimination since such conduct is usually regarded to be separate from the standard prohibition of unilateral anti-competitive conduct; notably in US (see also *infra* note 1174) and South African competition law.

Of course a comparative analysis must take into account that there are many underlying differences between these jurisdictions. Canada and the US have had a competition regime for over a century, whereas Hong Kong's competition rules have been enacted as recently as 2012. In addition, a competition regime cannot be detached from the context in which it functions. The historical, economic and societal backgrounds of the competition regimes under review vary substantially, and (should) have an impact on the interpretation and the objectives of competition law.

In South Africa, for example, the competition rules were not only designed to promote economic efficiency, but also to ensure *inter alia* that small and medium-sized enterprises have a fair opportunity to participate in the economy; and compensate for the imbalances caused by Apartheid.[1005] By contrast, in Singapore there is a strong focus on stimulating efficiency and innovation.[1006] Australian competition law focuses on the welfare of Australians,[1007] but also expresses concern for the plight of small businesses.[1008] A 2007 report by the International Competition Network provides a broad overview of the many different types of goals that competition law regimes throughout the world seek to achieve.[1009] Justifications of otherwise illegal unilateral conduct, being an integral part of competition law, should be interpreted consistently with the law's stated objectives.

Apart from their stated objectives, the competition regimes under review differ in many other respects as well. To name but one example, anti-competitive unilateral conduct may lead to an award of treble

[1005] Sections 2(a), 2(e) and 2(f) of the South African Competition Act.

[1006] Section 6(1)(a) of the Singaporean Competition Act provides that the Competition Commission shall have the function 'to maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore'.

[1007] Section 2 CCA, which also mentions the means to achieve this goal: 'the promotion of competition and fair trading and provision for consumer protection'.

[1008] See e.g. Senate Inquiry into the Effectiveness of the Trade Practices Act 1974 in protecting small business (March 2004), available at http://www.aph.gov.au/binaries/senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/report/report.pdf.

[1009] See the International Competition Network's Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, May 2007, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf.

damages (US),[1010] or simply an order to discontinue the conduct under review (Canada).[1011] It is submitted that the first case warrants a more prudent and less expansive interpretation of competition law than the second. Notwithstanding these differences, however, it is possible – and worthwhile – to draw comparisons as to the way these jurisdictions deal with justifications of otherwise illegal unilateral conduct. Stripped down to their core, the unilateral conduct laws clearly share a common focus. They all purport to examine 'the nature and purpose of the acts that are alleged to be anticompetitive and their impact on competition in the market, while taking into account business and/or efficiency justifications for such acts'.[1012]

Even though this point of departure still leaves many divergences, I do think that it provides sufficient common ground to build on. The jurisdictions under examination have comparable legal backgrounds, which facilitates a joint discussion of their legal reasoning on a particular topic. More importantly, all the jurisdictions under review have embraced the idea that a defendant may invoke a justification for otherwise prohibited unilateral conduct. Apparently the possibility to invoke a justification appeals to common legal sense, as a way to fine-tune the application of the prohibition. No type of justification should, *a priori*, be precluded as a matter of law. Only a thorough examination of all known factors[1013] can reveal whether a particular justification plea is acceptable within the specific circumstances of that case.

The driving force behind this chapter is the realization that, even though the importance of justifications related to anti-competitive unilateral conduct is well established, there is little sign of a true international debate on this topic. This chapter therefore seeks to provide insights for future debate by exploring common ground and relevant differences on this topic. The chapter shall first give an account of the jurisdictions under review, examining Australia (Section 2), Canada (Section 3), Hong Kong (Section 4), Singapore (Section 5), South Africa (Section 6) and, finally, the US (Section 7). Section 8

[1010] See Section 4 of the US Federal Clayton Act. See, also, *Eastman Kodak Co. v Southern Photo Man. Co*., 273 US 359 (1927).

[1011] Under Canadian federal competition law. Such an order is made by the Competition Tribunal on the basis of Section 79(1) of the Competition Act.

[1012] Facey and Assaf 2002-2003, *supra* note 1002, at 521.

[1013] *Canada Pipe*, *infra* note 1075, at 88.

provides various comparative notes, including lessons for EU law, while paragraph 9 makes some concluding remarks.

2 AUSTRALIA

2.1 Introduction & legislation

In Australia, Section 46(1) of the Competition and Consumer Act 2010 (CCA), formerly known as the Trade Practices Act 1974, prohibits a corporation with (i) a substantial degree of power in a market, to (ii) take advantage of that power (iii) for the purpose of: (a) eliminating or substantially damaging a competitor, (b) preventing market entry or (c) deterring or preventing a third party from engaging in competitive conduct. Such conduct is also referred to as the 'misuse' of market power.

The statutory text of the CCA does not explicitly mention the possibility to invoke a business justification for conduct that falls within the scope of Section 46(1) CCA. However, Section 46(4A(b)) CCA does provide that the courts may have regard to the 'reasons' for such conduct, seemingly allowing courts to have regard to an alternative, pro-competitive, motive for the conduct. In addition, Section 51 CCA provides a 'State action' defence, holding *inter alia* that the prohibition does not apply if the relevant conduct is specifically authorised by an Act or regulation.

Apart from the express provisions in the CCA, case law unambiguously shows the possibility to invoke efficiency or other business justifications. The key cases shall be examined below.

2.2 Case law

The Australian public enforcement procedure is as follows. The Australian Competition & Consumer Commission (ACCC) may bring cases to the trial judge in case of an alleged violation of the CCA. Appeals are subsequently open to the Full Federal Court (FFC) and, finally, to the High Court.

Several Australian cases on misuse of market power, especially those on refusals to deal, make clear that a defendant may invoke a justification plea.[1014] The scope of potential justifications appears to be relatively broad. As Marshall has noted,[1015] justifications for a refusal to deal have been accepted for several reasons, including the protection of legitimate trade and business interests,[1016] to prevent the unauthorised use of the defendant's material and to maintain the integrity of its licensing system,[1017] as a response to inappropriate product labelling and to rationalize the distribution chain,[1018] and to secure payment of a debt.[1019]

The *Queensland Wire* case showed some of the contours of business justifications.[1020] The High Court examined Queensland Wire's claim that BHP had misused its market power by effectively refusing to supply[1021] Y-Bar, a steel product. The Court made clear that, once it is established that a firm has a substantial degree of market power, the issue is whether it has taken advantage of that power for one of the proscribed purposes,[1022] requiring a causal link between the market power and the conduct under

[1014] See e.g. Brenda Marshall, *The Resolution of Access Disputes Under Section 46 of the Trade Practices Act*, 22(1) University of Tasmania Law Review 9, 38 (2003), referring to various authors who attach much relevance to the examination of a possible legitimate business reason. See also e.g. *Pont Data Australia v ASX Operations*, FCA 30 (9 February 1990), per Wilcox J., at 100, referring to (but not giving much guidance on) the concept of 'legitimate commercial interests'. See also *ACCC* v *Australian Safeway Stores* [2003] FCAFC 149 (30 June 2003). At 330, the Full Federal Court suggested that issues relating to the quality of the product, reliability of supply or 'other legitimate business consideration' could be relevant for the assessment of an exclusive dealing arrangement.

[1015] Brenda Marshall, *Refusals to Supply Under Section 46 of the Trade Practices Act: Misuse of Market Power or Legitimate Business Conduct?*, 8 Bond Law Review 182, 193 (1996); Marshall 2003 (*ibid.*), at 43.

[1016] *Top Performance Motors v Ira Berk (Queensland),* [1975] ATPR 40-004.

[1017] *Australasian Performing Rights Association v Ceridale,* [1990] ATPR 41-042.

[1018] *Berlaz v FineLeather Care Products,* [1991] ATPR 41-118.

[1019] *Natwest Australia Bank v Boral Gerrard Strapping Systems,* [1992] ATPR 41-196.

[1020] *Queensland Wire Industries v BHP*, [1989] HCA 6. See also F. Hanks & P.L. Williams, 'Queensland Wire Industries v BHP, Judgment of the High Court of Australia', (1990) 27 Common Market Law Review 151; K. McMahon, 'Refusals to supply by Corporations with Substantial Market Power', (1994) 22 Australian Business Law Review 7, 29-30; Marshall 1996, *supra* note 1015, at 183.

[1021] Queensland Wire argued that it was a constructive refusal because of particularly high prices.

[1022] *Queensland Wire*, *supra* note 1020, per Mason C.J. and Wilson J., at 22.

review.[1023] This means that a firm will not be found to have taken advantage of its market power if it can show that it would have acted in the same way *absent* its market power.[1024] On the facts of the case, the High Court was not convinced that BHP would have refused to supply absent its market power, and concluded that it had misused its market power.[1025]

Hanks and Williams have suggested that the *Queensland Wire* judgment requires that the notion of 'taking advantage' must be seen in terms of efficiency.[1026] I prefer a broader reading: nowhere did the High Court state that quantifiable efficiencies should be the exclusive means of assessment. The High Court *did* try to make the point that 'taking advantage' is 'morally indifferent'.[1027] It does not require hostile intent,[1028] nor does it demand morally blameworthy conduct.[1029] The judgment makes clear that the High Court regards competition, 'by its very nature', as a 'deliberate and ruthless' process. Indeed, 'little criticism can be made of the conduct involved' if 'success is due to no more than superior skill and efficiency'.[1030] This means that companies, even those with market power, are allowed to injure their competitors.[1031]

[1023] *Queensland Wire* (*ibid*.), at 24. I.e. the conduct must be made possible by the absence of competition; considered by the Trade Practices Commission as the 'true test' of Section 46 CCA. See its report *Misuse of Market Power: Section 46 of the Trade Practices Act: Background Paper* (February 1990), at 33.

[1024] *Queensland Wire* (*ibid.*), per Mason CJ and Wilson J, at 28. See also *Rural Press v ACCC*, [2002] FCAFC 213, confirmed by the majority of the High Court in *Rural Press v ACCC*, [2003] HCA 75. See further Marshall 1996, *supra* note 1015, at 189, referring e.g. to possible explanations of a firm's refusal to supply in competitive conditions. Finally, see F. Hanks and P.L. Williams, 'Implications of the Decision of the High Court in Queensland Wire', (1990) 17(4) Melbourne University Law Review 437, 445-446.

[1025] Also note that BHP apparently 'did not offer a legitimate reason for the effective refusal to sell', see *Queensland Wire* (*ibid*.), per Mason C.J. and Wilson J., at 29.

[1026] Hanks & Williams 1990, *supra* note 1024. See also Marshall 2003, *supra* note 1014, at 40-41. She argues that efficiencies should be considered under the 'taking advantage' requirement. In her view, a wider range of justification pleas is available vis-à-vis the 'purpose' requirement.

[1027] *Queensland Wire*, *supra* note 1020, per Deane J, at 3.

[1028] *Ibid*., per Mason C.J. and Wilson J., at 22.

[1029] *Ibid*., per Deane J, at 2-3.

[1030] *Ibid*., per Toohey J, at 27.

[1031] *Ibid*., per Mason C.J. and Wilson J., at 24.

The *Melway Publishing* case, concerning an exclusive distributorship that resulted in a refusal to deal, confirms that the acceptance of a justification means that a firm has not misused its market power.[1032] The case also shows the relevance of examining whether the conduct under review can only be explained by way of the firm's market power. Applying the commercial conduct test of *Queensland Wire*, the Trial Judge and the majority of the FFC rejected a business justification plea. Both instances considered that a firm in a competitive market would not have refused this particularly large order, and thus observed a link between Melway's market power and its refusal to supply.[1033]

However, in an opinion dissenting from the FFC majority, Heerey J held that Melway had *not* taken advantage of its market power. Heerey J cautioned that courts 'should be very reluctant to tell the operators of businesses how to make commercial decisions'.[1034] On the facts, his Honour held that Melway had a legitimate business purpose for its refusal, as it simply wanted to continue the distribution model that predated its position of market power.[1035]

Upon a further appeal, the majority of the High Court held that Melway had not taken advantage of its market power.[1036] It largely endorsed Heerey J's dissenting opinion and seemingly attached much relevance to an economic analysis of the conduct under review. Referring to US precedent,[1037] the majority considered Melway's refusal as a legitimate termination of a distribution agreement. The majority found no relevant connection between Melway's market power and its distribution system (as the latter already existed).[1038] This is a potent argument. If the company would not have behaved

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[1032] *Robert Hicks v Melway Publishing,* [1998] FCA 1379 (30 October 1998) (Trial Judge); *Melway Publishing v Robert Hicks,* [1999] FCA 664 (20 May 1999) (Full Federal Court).

[1033] *Melway* (*ibid*.), per Sundberg and Finkelstein JJ, at 44.

[1034] *Ibid*., at 19.

[1035] *Ibid*., per Heerey J, at 18-25.

[1036] *Melway Publishing v Robert Hicks,* [2001] HCA 13, per Gleeson CJ, Gummow, Hayne and Callinan JJ. At 104, Kirby J notes that the Court did unanimously agree that the conduct was covered by one of the proscribed purposes, as it prevented the respondent from engaging in competitive conduct.

[1037] *Ibid*., at 18. The majority refers to *Burdett Sound Inc v Altec Corporation*, 515 F.2d 1245 (5th Cir. 1975). See also *United States* v *Colgate & Co*, 250 US 300 at 307 (1919); *Byars v Bluff City News*, 609 F 2d 843 at 854 (6th Cir. 1979).

[1038] *Ibid*., at 61, 62, 66-68.

differently without its market power, there is little ground to conclude that it has taken advantage of that market power.

A dissenting opinion by Kirby J suggested that the majority had given too much leeway for unilateral conduct.[1039] At the same time, his Honour agreed that, as a matter of principle, there may several legitimate reasons for a refusal to supply. Such may be the case, for example, if the party requesting supply is considered (as):[1040]

- 'incompetent to handle a product that in some hands might be dangerous;
- a person with a poor credit record or with unacceptable business ethics;
- unqualified to offer essential after-sales service;
- liable to damage the reputation of the supplier;
- being unable to maintain accurate records;
- prone to engage in deceptive advertising or unfair practices; or
- likely to breach persistently the reasonable terms of a distribution agreement.'

On the facts, Kirby J did not find any of the justifications listed above to be applicable.[1041] However, his Honour gives no clear explanation why the enumeration given above should be considered exhaustive. The red thread of the list appears to be 'reasonable' or 'normal' business behaviour that any company, irrespective of its market power, would engage in. I agree that, if such a link between conduct and market power is completely absent, one cannot conclude that a company has misused its market power.

A final relevant case is *Boral Besser Masonry* (*BBM*). According to the ACCC, BBM had engaged in predatory pricing with the purpose to exclude a competitor.[1042] The Trial Judge, Heerey J, dismissed the ACCC's application, holding that BBM did not have market power[1043] and, in any case, had not taken advantage of that power. Heerey J considered that a business *rationale* could be 'a factor' indicating

[1039] *Ibid*., per Kirby J, e.g. at 103.

[1040] *Ibid*., at 104. His Honour cites various cases and academic articles.

[1041] *Melway*, *supra* note 1036, per Kirby J, at 117. His Honour argues that his approach is consistent with overseas approaches, referring, *inter alia*, to Joined Cases C-6/73 & C-7/73, *ICI and Commercial Solvents v Commission*, [1974] ECR 223; and *United States v Aluminum Co of America*, 148 F 2d 416 (1945).

[1042] *ACCC v BBM,* [1999] FCA 1318 (22 September 1999).

[1043] *Ibid*., at 155.

that there is no misuse of market power.[1044] His Honour also observed that if a company *without* market power 'would engage in certain conduct as a matter of commercial judgment, it would ordinarily follow that a firm with market power which engages in the same conduct is not taking advantage of its power'.[1045] Heerey J observed that selling below avoidable cost, even for a prolonged period, can be a rational business decision as it may simply be the expression of ruthless competition.[1046] I agree that below-cost pricing is not necessarily anti-competitive, especially if it is a loss-minimizing strategy. An examination of the counterfactual, being the situation in the absence of market power, may shed light on a company's *rationale* for entering into particular conduct. However, it should be remembered that predatory conduct is *only* harmful to competition in the presence of market power – thus weakening the value of the counterfactual for determining whether the practice should be condoned or not. It should also be examined whether the conduct under review is capable of excluding equally efficient competitors.

On appeal, the FFC disagreed with the Trial Judge's findings.[1047] The Judges held unanimously, yet in separate opinions, that BBM had violated Section 46 CCA. Finkelstein J noted that there is a strong inference of predation if a dominant firm persistently prices below average variable cost, and that it is for the dominant firm to show that there was a legitimate purpose for its conduct.[1048]

In a further appeal, the majority of the High Court overturned the FFC's ruling.[1049] The majority held that BBM did not have substantial market power,[1050] but, even if it did, had not taken advantage of that power for a proscribed purpose. The majority seemed sceptical to prohibit a practice of cutting prices to

[1044] *Ibid*., at 158.

[1045] *Ibid*.

[1046] *Ibid*., at 175.

[1047] *ACCC v BBM*, [2001] FCA 30 (27 February 2001).

[1048] Even though, in Finkelstein J's view, there is no cost below which prices should be *per se* illegal (*ibid*., at 269).

[1049] *BBM v ACCC,* [2003] HCA 5 (7 February 2003). Kirby J's dissenting opinion criticizes 'those who want to dissect the concepts in s 46' (at 382), but does not offer further insights into the issue of justifications.

[1050] *Ibid.,* per McHugh J, at 198.

below costs,[1051] and considered that evidence on the subjective intent to hurt competitors is little helpful in deciding whether the firm has taken advantage of its market power.[1052]

Furthermore, Gleeson CJ and Callinan J noted that there may be several legitimate business reasons to sell below costs. For example, the defendant may wish to bear short-term losses in the hope that market circumstances would improve, or has to deal with sunk or historic costs.[1053] I agree with the majority's apparent broad interpretation of 'legitimate business considerations', but think that the opinion could have been much clearer about the applicable legal conditions.

Without such a framework, it is difficult to gauge whether or not conduct is considered legitimate. At the moment, one is left with the impression that the High Court is simply inclined to provide a wide margin of discretion for conduct by firms with market power, with the result that their conduct will *ex post facto* usually be considered legitimate. Some commentators couch this approach in terms of efficiency.[1054] Although I agree that providing much discretion to companies with market power may very well lead to efficiencies, the term can be misleading as the judgments discussed above did not seem to engage in an actual examination of effects.

3 CANADA

3.1 Introduction & legislation

The Combines Investigation Act of 1910 introduced the Canadian prohibition of monopolization, as it was then called. The prohibition remained largely unchanged until the entry into force of the Canadian Competition Act (CA) in 1986.[1055] The law prior to 1986 contained mainly criminal sanctions that also

[1051] *Ibid.,* per Gaudron, Gummow and Hayne JJ, at 159: 'the Act has never contained any specific and comprehensive prohibition of a practice of cutting prices to below cost'.

[1052] *Ibid.*, per Gleeson CJ and Callinan J, at 122-123.

[1053] *Ibid.*, at 70.

[1054] Hank & Williams 1990, *supra* note 1024.

[1055] M. Trebilcock, R.A. Winter, P. Collins & E.M. Iacobucci, *The Law and Economics of Canadian Competition Policy*, Toronto, Buffalo & London: University of Toronto Press 2003, at 504.

applied to unilateral anti-competitive conduct such as predation. Because of weak criminal enforcement, the abuse of dominance is currently targeted by a non-criminal sanction regime. I shall focus on the law *post*-1986.

Section 79 CA prohibits the abuse of dominance. Section 79(1) CA provides that the Competition Tribunal (CT), on application by the Commissioner of the Competition Bureau ('Competition Bureau'), may prohibit conduct where it finds that there is (a) market power, (b) an anti-competitive act and (c) a substantial negative effect on competition in a market. Although Section 79(1) CA does not explicitly mention the possibility to invoke a justification for otherwise abusive conduct, other provisions do provide clues as to the type of pleas that the dominant firm may put forward.

Section 78(1) CA provides a non-exhaustive enumeration with examples of abusive conduct. The examples include predation, margin squeeze and the temporary introduction of 'fighting brands' to discipline or eliminate a competitor. Several of the examples explicitly require an anti-competitive purpose, suggesting that there is no abuse absent such a purpose.

Furthermore, Section 79(4) CA requires the Competition Tribunal, in its assessment of anti-competitive effects, to consider whether the practice can be subsumed under 'superior competitive performance'. The provision seems to allow companies to argue that they simply competed on the merits, and that their success is due to superior efficiency rather than anti-competitive behaviour. In addition, Section 79(5) CA provides that the exercise of Intellectual Property rights will not violate the competition rules.

Another example is Section 75 CA, which deals with refusals to deal. Section 75(1)(c) CA holds that a refusal shall only be problematic if the company requesting supply is willing an able to meet 'usual trade terms' in respect of 'payment, units of purchase and reasonable technical and servicing requirements'.[1056] Reversely, if a company requesting supply does not abide by such terms, a refusal to supply by a dominant company can be justified.

[1056] Section 75(3) CA.

Although the statutory text does not explicitly provide other reasons to condone behaviour, the following paragraphs will show such reasons do in fact exist – especially where they promote efficiencies.[1057]

3.2 Case law

The enforcement of Canadian competition law takes place by the Competition Bureau[1058] or a private party bringing a case before the Competition Tribunal. Subsequently an appeal may be lodged before the Federal Court of Appeal (FCA). If allowed, a further appeal may be brought before the Canadian Supreme Court. Before discussing the landmark *Canada Pipe* judgment by the FCA, it is apt to examine three rulings by the Competition Tribunal to provide sufficient context on the issue of justifications. These judgments are *Nielsen*, *Tele-Direct* and *NutraSweet*.

The *Nielsen* case focused on the use of exclusive contracts to deny (potential) competitors access to scanner data used for market tracking services.[1059] The Tribunal examined whether the exclusive agreements were based on a valid 'business justification' rather than an anti-competitive purpose.[1060] The Tribunal held that it may consider 'any credible efficiency or pro-competitive business justification'. I believe that this terminology aptly reflects the wide range of available justification pleas. The Tribunal also noted that the justification plea must be weighed 'in light of any anti-competitive effects' with the aim 'to establish the overriding purpose' of the challenged act.[1061] I agree that such a balancing test is indeed instructive by accommodating all the different grounds and implications that can be attributed to the conduct under review.[1062]

[1057] See Trebilcock *et al*., *supra* note 1055, at 528: 'efficiency considerations are crucial to deciding whether an act has the requisite anti-competitive purposes to be classified as an "anti-competitive act" pursuant to section 79'.

[1058] Formally speaking, Competition Tribunal cases were brought by the Director of Investigation and Research or, more recently, the Commissioner of Competition.

[1059] *Canada (Director of Investigation and Research) v D&B Companies of Canada* ('*Nielsen*'), [1995] CT-1994-001.

[1060] *Ibid*., at 67.

[1061] *Ibid*., at 69. Confirmed by *Tele-Direct* (*infra* note 1063), at 259.

[1062] As long as 'purpose' is not simply equated with subjective intent, which does not seem to be the case.

The *Tele-Direct* ruling largely confirmed these principles.[1063] The Competition Bureau argued that Tele-Direct (a company active in the telephone directory market) had behaved anti-competitively, in particular by tying advertising space to sales services and refusing to deal with advertising consultants. The Tribunal used a weighing exercise, holding that a business justification is a relevant factor to decide whether an act is, on balance, anti-competitive or not – other relevant factors include subjective intent and the actual effects arising from the conduct.[1064] The Tribunal may reject a business justification if the impugned act is not 'in the public interest' or 'socially beneficial'.[1065] I agree that there is no clear reason to condone anti-competitive behaviour if the alleged benefits only accrue to the firm with market power.[1066] On the facts, the Tribunal accepted that Tele-Direct's conduct was justified in order to protect certain commercial interests, such as securing payment for its services.[1067] The Tribunal also found that the conduct was justified because it facilitated customers to understand with whom they are dealing; even though this plea had not actually been raised by Tele-Direct.[1068]

The *NutraSweet* case revolved around various contract clauses between NutraSweet and its customers for the purchase of aspartame, an artificial sweetener.[1069] Allegedly these contract arrangements required or induced exclusivity, creating barriers for NutraSweet's (potential) competitors. NutraSweet held that the arrangements were justified, arguing that risks and costs are reduced if only a single supplier holds inventory.[1070] Although the Tribunal did accept that efficiencies are relevant while assessing whether conduct can substantially lessen competition, it rejected NutraSweet's plea on the facts. The Tribunal held that '[i]t can always be claimed that the risk and cost of holding plant and

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[1063] *Canada (Director of Investigation and Research) v Tele-Direct*, [1997] CT-1994-003.

[1064] *Ibid.*, at 259 (referring to *Nielsen*, *supra* note 1059). The Tribunal confirmed this position in *Air Canada*, *infra* note 1086, at 55.

[1065] *Ibid*., at 215-216 and 248-249.

[1066] An interesting example in UK competition law is *Genzyme v OFT*, [2004] CAT 4, at 583.

[1067] *Tele-Direct*, *supra* note 1063, at 349-350. Here, the Tribunal examines Tele-Direct's refusal to deal with consultants who do not accept responsibility for payment for the advertising.

[1068] *Ibid*., at 357-358. In a minority view, Roseman J. held Tele-Direct had not advanced 'any valid business justification' (*ibid*., at 359-360).

[1069] *Canada (Director of Investigation and Research) v The NutraSweet*, [1990] CT-1989-002.

[1070] *Ibid*., at 90. The Tribunal considered that the impugned conduct leaves (i) customers, on balance, better off and (ii) that the customers pass on these cost savings to consumers.

inventory are reduced if there is a single supplier rather than several.'[1071] Such a plea thus requires specific evidence, for instance on the special characteristics of the company's industry.[1072] The Tribunal also rejected NutraSweet's plea that the contracts were necessary to prevent competitors from free riding on its investments.

Even though the three cases discussed above continue to be relevant, the *Canada Pipe* judgment is currently the leading Canadian case on justifications. The Competition Bureau argued that Canada Pipe foreclosed competition by offering rebates to distributors in exchange for exclusive purchasing agreements. The Tribunal disagreed, accepting Canada Pipe's submission that the conduct under review led to higher sales volumes and allowed it to 'maintain in inventory smaller, less profitable but nevertheless important products'.[1073] The Tribunal thus concluded that the practice under review produced efficiencies and did not lead to any exclusionary effects.[1074]

On appeal,[1075] the FCA held that, even though evidence of subjective intent is not required for the purposes of paragraph 79(1)(b), intention is an important element. The FCA observed that 'a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein'.[1076] The FCA thereby confirmed and clarified the Tribunal's earlier approach in *Nielsen* and *Tele-Direct* that a business justification can establish the 'overriding purpose'.[1077]

The FCA rejected, however, the Tribunal's earlier ruling in *Canada Pipe* to the extent that it relied primarily upon consumer welfare benefits to establish a business justification while assessing whether the act was anti-competitive. The FCA made a sharp distinction between the finding of an 'anti-

[1071] *Ibid*.

[1072] *Ibid*.

[1073] *Canada (Commissioner of Competition) v Canada Pipe*, [2005] CT-2002-006, at 212. Apparently the Competition Tribunal considered these arguments more persuasive than those in *NutraSweet*, *supra* note 1069, at 90.

[1074] *Ibid*., at 256-60.

[1075] *Canada (Commissioner of Competition) v Canada Pipe,* [2006] FCA 233.

[1076] *Ibid*., at 87-88.

[1077] *Ibid.,* at 73, 87 and 88.

competitive act' (paragraph 79(1)(b)) and the question whether the practice substantially lessens competition on the market (paragraph 79(1)(c)). The FCA considered that, although the effects on consumers may 'be relevant in assessing the credibility and weight of a professed business justification', such evidence is 'largely irrelevant' for the purposes of the paragraph 79(1)(b) assessment, and is more appropriately considered under paragraph 79(1)(c).[1078]

The FCA further held that the examination of paragraph 79(1)(b) must focus on the effect on a competitor rather than the wider effects on economic efficiency or consumer welfare.[1079] This appears to be an overly formalistic reading of what constitutes 'anti-competitive acts', and seems to have little ground in business reality. A firm with market power may hurt its competitors simply because it is more efficient or competes more vigorously, instead of acting anti-competitively. The rejection of a justification plea in such a context risks chilling the very competitive behaviour the Competition Act seeks to protect.[1080] However, the FCA's reasoning may still allow for an overall effects-based approach to the extent that the effects upon other market participants are only considered by way of a *prima facie* finding of an illegal unilateral act[1081] – after which any efficiencies may still be fully taken on board under paragraph 79(1)(c).[1082] If an act has a net efficient effect, it is difficult to see how it could substantially lessen competition at the same time – thus failing the test set by paragraph 79(1)(c).

Apart from the question whether *Canada Pipe* can be interpreted more or less formalistically, the FCA does provide a clear enumeration as to the legal conditions that should apply for the purposes of this provision. It requires (i) a credible efficiency or pro-competitive rationale for the relevant conduct, showing the relevance of the underlying purpose. In addition, the justification must be (ii) attributable to the respondent. Finally, the justification must (iii) relate to and (iv) counterbalance the anti-

[1078] *Ibid.*, at 79.

[1079] *Ibid.,* at 68. According to the FCA, the inquiry under paragraph 79(1)(c) should relate to the broader state of competition (*ibid.,* at 83).

[1080] See G. Addy, J. Bodrug & C. Tingley, 'Abuse of Dominance in Canada: Reflections on 25 Years of Section 79', (2012) 25(2) Canadian Competition Law Review 276, 289-290.

[1081] One should consider that *any* exclusionary act may lead to a reduction of consumer welfare *through* the harm inflicted upon other market participants.

[1082] Indeed, the FCA suggests that the effects on consumers are more appropriately considered under paragraph 79(1)(c). See *Canada Pipe* (FCA), *supra* note 1075, at 79-83.

competitive effects and/or subjective intent of the conduct.[1083] On the facts of the case, the FCA concluded that the Tribunal had insufficiently shown why Canada Pipe had a legitimate explanation to engage in the impugned conduct.[1084]

Other Canadian cases on justifications include the following. The *Xerox* case made clear that a refusal to deal may be justified if an upstream supplier's decision to vertically integrate is dictated by reasons of economic efficiency or if it is the norm in the industry.[1085] It shows that the examination of a justification plea should, *inter alia*, pay heed to what are considered normal business practices in a particular business sector.

The *Air Canada* ruling concerned Air Canada's response to the entry of competitors of certain routes by engaging in selective capacity increases and price decreases in a manner that did not cover avoidable costs.[1086] The Competition Bureau accepted that so-called 'network benefits' could constitute a legitimate business justification for operating a flight below average avoidable costs.[1087] In the Competition Bureau's view, a legitimate business justification is also related to efficiency or actions that favour competition.[1088] It referred to the 1981 *Consumer's Glass* judgment. That judgment considered that below-cost prices can be justified if they are part of a loss-minimizing strategy such as selling excess, obsolete or perishable products below cost.[1089] For its part, the Tribunal confirmed that legitimate business justification is one of the elements to determine whether a practice is an anti-competitive act contrary to section 79 CA.[1090]

[1083] *Canada Pipe* (*ibid*.), at 73.

[1084] *Ibid.*, at 91.

[1085] *Canada (Director of Investigation and Research) v Xerox (Canada)*, [1990] CT-1989-004. The Tribunal did, however, reject the justification plea on the facts.

[1086] *Commissioner of Competition v Air Canada*, [2003] CT-2001-002, at paragraph 1-2.

[1087] *Ibid*., at 35.

[1088] *Ibid*., at 50-51. The Commissioner gives the example of the operation of a flight at the end of the end in order to position it for the following day, a so-called 'balancing' or 'positioning' flight.

[1089] *R. v Consumers Glass Co. Ltd.*, [1981] 57 C.P.R. (2d) 1 (Ont. H.C.J.).

[1090] *Air Canada*, *supra* note 1086, at 55.

In *Laidlaw*,[1091] a case concerning various allegedly exclusionary contractual clauses, shows that a justification plea requires cogent evidence. The Tribunal was not convinced that these clauses, taken as a whole, had an 'identifiable efficiency rationale'.[1092] The Tribunal rejected the efficiency justifications invoked by Laidlaw, observing that the clauses only had the effect of retaining customers and excluding competitors.[1093] The Tribunal also held that actions are presumed to have intended the effects that actually occur in the absence of evidence showing otherwise.[1094]

Finally, the *B-Filer* ruling shows how a regulatory framework may provide a justification.[1095] The applicant in *B-Filer* argued that the termination of banking services by its bank was an illegal refusal to deal. The Competition Tribunal rejected the application, finding that it did not make sufficiently clear that the refusal to deal had an adverse effect on competition.[1096] But even if such an effect had been shown, the bank would still not necessarily have breached the Competition Act. A refusal to deal may be caused by a customer's failure to meet usual contractual terms or by a dominant firm's wish to comply with a regulatory framework. In such a case, the refusal to deal does not result from 'insufficient competition',[1097] but rather from an 'objectively justifiable business reason'.[1098] On the facts, the refusal could be justified as a continuation of the banking services would have exposed the Bank to various legal, regulatory and reputational risks.[1099] The *B-Filer* judgment thus shows the breadth of potential justification pleas that are available under Canadian competition law.

[1091] *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd*, [1992] CT-1991-02.

[1092] *Ibid*., at 91.

[1093] *Ibid*., at 93-96. The Tribunal held: 'The tying of the customers to Laidlaw operates to exclude other competitors from the market'. The Tribunal also took into account that the relevant services only represented a minor cost for customers, which means there is little incentive to contest price increases.

[1094] *Ibid*., at 96.

[1095] *B-Filer Inc. et al. v The Bank of Nova Scotia*, [2006] CT-2005-006. Note that this case concerned Section 75 CA, that deals specifically with refusals to deal, rather than the general prohibition of dominance abuses in Section 79 CA.

[1096] *Ibid*., at 2.

[1097] *Ibid*., at 193.

[1098] *Ibid*., at 147.

[1099] *Ibid*., at 148.

3.3 Competition Bureau guidance

The Competition Bureau has published various documents that provide guidance on the topic of justifications. I shall focus on those elements that have not already been discussed, as the guidance relies to a great extent on the case law discussed above.[1100]

3.3.1 The 2009 draft enforcement guidelines

In January 2009, the Competition Bureau published a draft update of its 2001 enforcement guidelines ('the 2009 draft').[1101] Largely inspired by the FCA ruling in *Canada Pipe*, the 2009 draft contains an elaborate discussion of business justifications. The document upholds a particularly wide notion of justifications, stating that it could include any activities that seek to minimize costs or that improve a firm's business.[1102] If a firm's conduct leads to efficiencies as well as anti-competitive effects, the Bureau will examine the credibility and likelihood of any efficiency claims before assessing the overall purpose of these activities. The Bureau also requires that the conduct is necessary for achieving the claimed efficiencies.[1103]

3.3.2 The 2012 enforcement guidelines

In September 2012, the Competition Bureau published a final version of its new enforcement guidelines on the abuse of dominance, replacing the 2001 guidelines ('the 2012 guidelines').[1104] The 2012

[1100] Such as the Predatory Pricing Enforcement Guidelines, published by the Competition Bureau in July 2008, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02713.html.

[1101] See the 2009 draft guidelines http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html. This document gives much more clarity on 'business justifications' than the enforcement guidelines of July 2001. See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01251.html.

[1102] 2009 draft guidelines (*ibid*.), page 17. The Bureau adds: 'Beyond this definition, there may be general business justifications that are not strictly credible efficiencies or pro-competitive rationales, but might nevertheless be accepted as valid by the Tribunal'.

[1103] *Ibid*. The Bureau adds: 'When assessing any cost-related business justification, the Bureau will focus on verified efficiencies that do not arise from anti-competitive reductions in output or service'.

[1104] Competition Bureau, *Enforcement Guidelines: The Abuse of Dominance Provisions* (September 2012), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html .

guidelines no longer contain the thorough discussion of legitimate business justifications that was found in the 2009 draft.

However, the 2012 guidelines still appear to give a broad interpretation of business justifications. Pro-competitive aims that shall be taken into account include 'reducing the firm's costs of production or operation, or improvements in technology or production processes that result in innovative new products or improvements in product quality or service'.[1105] In its assessment of the overriding purpose of an alleged anti-competitive act, the Competition Bureau shall examine:[1106] (i) the credibility of any efficiency or pro-competitive claims, (ii) its link to the alleged anti-competitive practice, and (iii) the likelihood of these claims being achieved.

Although the 2012 guidelines thus provide *some* clarity on how the Competition Bureau seeks to implement case law on justifications in its enforcement policy, it remains unclear why it has vacated the elaborate treatment of justifications in the 2009 draft.[1107] The lack of guidance as to how the Competition Bureau will apply this concept has an adverse impact on legal certainty.[1108]

[1105] *Ibid*., at 11.

[1106] *Ibid*.

[1107] This issue drew criticism, *inter alia*, from the Canadian Bar Association. See the Association's comments on a March 2012 draft text that, with few major changes, eventually led to the September 2012 guidelines, available at http://www.cba.org/cba/submissions/pdf/12-34-eng.pdf, at 6 and 15.

[1108] *Ibid*., at 15. For similar remarks, see e.g. J.B. Musgrove and A. Neil Campbell, 'More abuse?: the Competition Bureau proposes revised guidelines on abuse of dominant market position', available at http://www.mcmillan.ca/more-abuse--the-Competition-Bureau-proposes-revised-guidelines-on-abuse-of-dominant-market-position.

4 HONG KONG

4.1 Introduction

After years of intense debate, the Legislative Council of the Hong Kong Special Administrative Region ('Hong Kong') adopted the final text of the Competition Ordinance in June 2012.[1109] The Secretary for Commerce and Economic Development will decide the exact date on which the Competition Ordinance (CO) will enter into force.[1110] The CO establishes the Competition Commission (HKCC) as an investigative body and the Competition Tribunal as an adjudicative body. Section 35 of the CO provides that the HKCC will issue guidelines to indicate the manner in which it expects to interpret and give effect to the conduct rules. Only after the guidelines have been finalized will the substantive provisions enter into force. At the time of writing, no enforcement action has yet taken place, as the guidelines have not yet been finalized. As a consequence, the analysis below is limited to the legislative text.

4.2 Legislation

Section 21(1) of the CO prohibits the abuse of a substantial degree of market power in Hong Kong. The prohibition is also referred to as the 'second conduct rule'.[1111] Section 21(2) CO provides two examples of abuses: (i) predatory behaviour and (ii) limiting production, markets or technical development to the prejudice of consumers. The legislative text refers to 'market power', which in economic theory is a more gradient concept than the rather binary legal notion of dominance. Hopefully the HKCC will specify in its guidelines if the second conduct rule will indeed be applied according to a sliding scale approach, where firms with a high degree of market power will be scrutinized more severely compared to firms with a weaker degree of market power.

The CO does not contain a general provision on justifications within the framework of the second conduct rule. However, it does contain a number of exclusions and exemptions that the second conduct

[1109] The Hong Kong Competition Ordinance, as passed in June 2012, is available at http://www.legco.gov.hk/yr11-12/english/ord/ord014-12-e.pdf.

[1110] Section 1(2) CO.

[1111] Section 21(4) CO. The 'first conduct rule' prohibits anti-competitive agreements between undertakings, see Section 6 CO.

rule would otherwise prohibit. Schedule 1 of the CO provides various exclusions. The second conduct rule does not apply to conduct that seeks to comply with a legal requirement.[1112] In addition, the conduct rules do not apply to an undertaking entrusted with the operation of services of general economic interest in so far as the conduct rule would obstruct the performance of those services.[1113]

Subdivision 2 of division 3 of the CO specifies various exemptions from the conduct rules. The Chief Executive in Council (the head of the Hong Kong government) may exempt specific conduct from the application of the second conduct rule, provided that there are exceptional and compelling reasons of public policy. The exemptions apply in the event of public policy issues[1114] and Hong Kong's international obligations.[1115]

The exemptions and exclusions mentioned by the CO primarily relate to State intervention, giving the Hong Kong executive an important role to determine the scope of such justifications. A key challenge shall be to create guidance that clearly explains what dominant firms may expect under these headings. In addition, the HKCC should make clear to what extent companies may rely on justifications *other* than the exclusions and exemptions mentioned by the CO. Perhaps it can look for inspiration in other jurisdictions, such as the enumeration provided by Kirby J in *Melway*.

Although the CO is not particularly clear on justifications, the legislative text does suggest that they shall not be easily condoned. Section 22 CO provides that, where conduct has more than one object or effect, *including* the object or effect to prevent, restrict or distort competition, such conduct will be considered to *solely* have such an anti-competitive object or effect.

It seems that this provision is likely to limit the availability of justifications within the scope of the second conduct rule. A justification should only become relevant if the conduct under review has at least *some* anti-competitive 'object' or 'effect'. But if, on the basis of Section 22 CO, such a *prima facie* finding leads to the conclusion that the conduct *solely* had an anti-competitive 'object' or 'effect', there

[1112] Section 2(2) of Schedule 1 CO.

[1113] Section 3 of Schedule 1 CO.

[1114] Section 31 CO.

[1115] Section 32 CO.

appears to be no room left for a justification plea stating e.g. that the pro-competitive effects outweighed the anti-competitive effects.

The HKCC should make clear that justifications are available even beyond of the scope of the statutory exemptions and exclusion, in order to avoid an overly broad application of the second conduct rule. Other jurisdictions with similar legislative acts, such as Singapore and the UK,[1116] have also acknowledged the relevance of a justification plea even in the absence of a comprehensive codification of that principle. As to Section 22 CO, the HKCC may indicate that conduct will only be seen as anti-competitive by 'object' or 'effect' if a contextual analysis, *including* an examination of possible justification, has shown such to be the case. This may be a way to consider justifications while still respecting the framework of the legislative text.

5 SINGAPORE

5.1 Introduction & legislation

Section 47 of the Singaporean Competition Act (SCA), as of January 2006, prohibits the abuse of a dominant position in Singapore. Section 47(2) SCA provides a non-exhaustive list of examples of abusive conduct:

- 'predatory behaviour towards competitors;
- limiting production, markets, or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts'.

Apart from the suggestion in Section 47(2)(d) SCA that the 'nature' or 'commercial usage' can justify a tying arrangement, Section 47 contains no general reference to justifications of otherwise abusive

[1116] For an examination of Singaporean competition law, see below. See also the UK Competition Act 1998.

conduct. The SCA does, however, provide various exclusions of the competition rules insofar they are related to conduct required by the government.

The Third Schedule of the SCA excludes certain activities from the scope of Section 47 SCA. The Schedule contains a general reference to services of general economic interest, but also refers to specific activities such as the supply of piped potable water. In addition, the Third Schedule of the SCA makes clear that Section 47 SCA does not apply in the following cases: (i) if the conduct seeks to comply with a legal requirement, or (ii) if the Singaporean Minister for Trade and Industry has issued an order indicating that the conduct is necessary for exceptional and compelling reasons of public policy.

Such 'State action' provisions show that the Singaporean executive plays an important role in determining the SCA's scope of application. The absence of an enumeration of the applicable legal conditions suggests that the legislator has attempted to provide the executive with ample discretionary powers, similar to the statutory text in Hong Kong. This may risk arbitrary application. Policy guidelines may be able to improve legal certainty and, in draft, could foster a debate on what kind of conduct should (or should not) be condoned in the name of public policy.

As the statutory text of the SCA provides little guidance on objective justification, it is wise to turn to different sources. The Competition Commission of Singapore (CCS), the enforcement body of the SCA, has published particularly useful guidance on the issue of objective justification. The following paragraph examines these guidelines.

5.2 Guidelines

In 2007, the CCS published guidelines on the prohibition of the abuse of dominance in Singapore. According to these guidelines, Section 47 SCA prohibits unilateral conduct only if it is unrelated to competitive merit.[1117] The guidelines cautiously state that the CCS 'may consider' the possibility of an

[1117] CCS guidelines on the Section 47 prohibition (2007), at 2.1, available at http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/s47_Jul07FINAL.pdf.

objective justification while assessing an alleged abuse.[1118] The guidelines refer to two types of an objective justification.

First, the guidelines mention the possibility to justify conduct based on 'legitimate commercial interest'.[1119] For example, poor creditworthiness of the buyer or capacity constraints may justify a refusal to supply.[1120] The CCS also suggests that a dominant firm is not allowed to take more restrictive measures than are necessary to achieve the legitimate interest.[1121] Such a necessity criterion should be used with caution, as it may prove overly burdensome. For example, a dominant firm that wishes to discontinue supply based on poor creditworthiness of its customer will almost surely fail the necessity test, as there will usually be less restrictive measures available (such as requiring a bank guarantee).

A second possibility for a justification applies if the dominant undertaking is able to demonstrate that its conduct has countervailing benefits.[1122] Seemingly a broad range of gains may be subsumed under this heading. The main question should be whether the dominant firm has succeeded in providing a coherent narrative as to why the benefits that it relies on should be deemed relevant in the specific circumstances of that case. Again the dominant undertaking will have to show that its conduct is proportionate to the claimed benefits. Such conduct will not be allowed if its 'primary purpose' is to harm competition.[1123]

Apart from the two types of justifications introduced above, the guidelines also mention justifications while discussing various types of abuses. In its treatment of predation, the CCS notes that prices below

[1118] *Ibid*., at 4.4. See for an earlier reference to justifications, C. Tay Swee Kian, 'New Developments in Competition Law in Singapore', (2006) 27 Business Law Review 120, 122.

[1119] *Ibid*., at 4.4.

[1120] *Ibid*., at 11.26. See also the CCS answers to a questionnaire by the International Competition Network on the issue of refusal to deal (November 2009), available at http://www.internationalcompetitionnetwork.org/uploads/questionnaires/uc%20refusals/singapore.pdf, at 7.

[1121] CCS guidelines, *supra* note 1117, at 4.4.

[1122] *Ibid*. See also the CCS answers to a questionnaire by the International Competition Network, *supra* note 1120, at 7.

[1123] *Ibid*.

average variable costs, even though presumed to be abusive,[1124] may still be objectively justified.[1125] The CCS guidelines refer to three legitimate commercial reasons in particular, such as in the event of short-run promotions.[1126] Other types of *prima facie* abuses that can be justified include discounts[1127] and discriminatory practices.[1128]

It should be applauded that the CCS has endeavoured to provide clarity on justifications of otherwise prohibited unilateral conduct. It is also appealing that the CCS steers clear of a formalistic approach, and instead focuses on the overall context and the likely effects of the conduct under review. This may lead to fewer hard-and-fast rules, but it does bring more business reality into the enforcement of competition law.

5.3 Case law

The Singaporean public enforcement procedure in Singapore is similar to that of the UK. The CCS can adopt an infringement decision if it finds that a company has acted contrary to the SCA. Such a decision can be appealed to the Competition Appeal Board (CAB).[1129] A further appeal is open to the High Court,[1130] and finally to the Court of Appeal – Singapore's highest court.

The 2010 *SISTIC* decision was the first case in which the CCS found an abuse.[1131] The decision held that SISTIC, the dominant ticketing company in Singapore, contravened Section 47 SCA by foreclosing competition in the ticketing services market through a web of exclusive agreements.[1132]

[1124] *Ibid*., at 11.4.

[1125] *Ibid*., at 11.6.

[1126] *Ibid*., at 11.6.

[1127] *Ibid*., at 11.12.

[1128] *Ibid*., at 11.16.

[1129] Sections 71 and 72 SCA.

[1130] Section 74 SCA.

[1131] CCS decision of June 2010, *SISTIC*, available at http://www.ccs.gov.sg/content/dam/ccs/PDFs/Public_register_and_consultation/Public_register/Abuse_of_Dominance/SISTIC%20Infringement%20Decision%20(Non-confidential%20version).pdf.

Referring to its own guidelines, the CCS devotes an entire chapter on the examination of objective justification.[1133] The CCS examined whether the following conditions applied: [1134]

1. The conduct was in defence of a legitimate commercial interest,
2. The firm has not taken more restrictive measures than were necessary,
3. The restriction resulted in certain benefits;
4. The restrictions are proportionate to the claimed benefits.

On the facts, the CCS rejected SISTIC's plea that exclusivity was necessary to maintain investments, holding that it is competition, rather than immunity from competition, that fosters investment and innovation.[1135] In addition, the CCS held that SISTIC failed the necessity test,[1136] as it had not demonstrated that its investments were (i) specific and (ii) directly attributable to the exclusivity agreements.[1137] The approach by the CCS makes sense, as there is no reason to condone behaviour because of benefits that would have arisen even without that conduct. The CCS also noted that the conduct under review does not meet the proportionality test, as third-party event promoters (a group which it considers one of the 'stakeholders') do not benefit from the discounts.[1138] It is unclear why the CCS has relied on this observation. As the SCA statute is clearly geared towards encouraging efficient market conduct,[1139] it is unclear why every stakeholder should necessarily benefit from the conduct under review.

[1132] The CCS found that SISTIC was the dominant ticketing service provider in Singapore with a persistent market share of around 85-95%.

[1133] See Chapter 8 of the *SISTIC* decision, *supra* note 1131. This chapter provides several references to case law by the European Court of Justice.

[1134] *Ibid*., at 8.1.2. The CCS refers to at 4.4 of the CCS guidelines (*supra* note 1117).

[1135] *Ibid*., at 8.2.2. and 8.2.3. The CCS refers to the Second Reading speech for the Competition Bill on 19 October 2004.

[1136] *Ibid*. See e.g. at 8.2.12. and 8.2.13. Unfortunately large parts are left blank due to confidentiality.

[1137] *Ibid*., at 8.2.8. The CCS refers to the Commission's guidance on enforcement priorities, at 30.

[1138] *Ibid*., at 8.3.6.

[1139] See Section 6(1)(a) SCA.

On appeal, the CAB confirmed the CCS's findings on the facts of the case.[1140] Crucially, the CAB found that the exclusive agreements under review had an adverse effect on competition and did not have any net economic benefit.[1141] As the exclusivity arrangements had no legitimate purpose, the CAB concluded that SISTIC had indeed abused its dominant position.

6 SOUTH AFRICA

6.1 Introduction

Perhaps more than with the other jurisdictions, it is fitting to discuss the wider context in which the South African competition rules came into being.[1142] During the Apartheid regime, major corporations – exclusively under white ownership – were often heavily protected by the State, leading to high concentration levels and limited competition.[1143] After the fall of Apartheid, the 1998 Competition Act was introduced to benefit society, *inter alia* by providing more opportunities for smaller firms.[1144] History has left a mark on the type of dominance cases brought in South Africa, where most of the cases that have been brought relate either to (formerly) State-owned companies (such as South African

[1140] Competition Appeal Board decision of 28 May 2012, *SISTIC v CCS*, at 287, available at http://www.mti.gov.sg/legislation/Documents/SISTIC%20Appeal%20-%20CAB%20Decision%20(1%20June%202012)%20-%20Redacted.pdf.

[1141] *Ibid*., at 318.

[1142] The introduction makes use of a publication by the Competition Commission and Competition Tribunal to celebrate the tenth anniversary of the South African Competition Act: *Unleashing Rivalry: Ten years of enforcement by the South African competition authorities* (2009), available at http://www.comptrib.co.za/assets/Uploads/Reports/unleashing-rivalry.pdf.

[1143] *Ibid*., at 2. See also the preamble of the South African Competition Act, which reads that: 'apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti- competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans'. For a further assessment, see e.g. V. Chetty, *The place of public interest in South Africa's competition legislation: some implications for international antitrust convergence*, paper submitted for the 53rd Spring Meeting by the ABA Section of Antitrust Law (2005), available at http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/spring/05/aba-paper.pdf.

[1144] See Section 2 SACA, noting the purpose of the Act.

Airways, Telkom and Sasol) or to companies that have otherwise been extensively supported by government (such as Senwes). In such a context, a company cannot be said to have achieved its market power through superior efficiency. It is therefore understandable that the Act has a relatively tough stance on the abuse of dominance.

6.2 Legislation

Section 8 of the South African Competition Act (SACA) prohibits the abuse of dominance.[1145] The provision brings forward several of examples of abuses, covering both exclusionary and exploitative abuses. It is prohibited for a dominant firm to:

- 'charge an excessive price to the detriment of consumers;
- refuse to give a competitor access to an essential facility when it is economically feasible to do so;
- engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
- engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act.' This subsection is followed by a list of five exclusionary practices, such as tying and predation.

Section 8 SACA does not provide a general reference to the possibility of justifications. Section 8(a) SACA appears not to allow any justification, whereas Section 8(b) SACA seems to allow dominant firms to argue that providing access to an essential facility is not economically feasible. By contrast, Sections 8(c) and 8(d) SACA provide a broad possibility to justify otherwise prohibited conduct on the ground that it has a technological, efficiency or other pro-competitive gain. The main difference between the two subsections is that Section 8(c) SACA places the burden to negate a justification on the complainant, whereas the burden under Section 8(d) SACA is on the respondent.[1146]

[1145] See, more generally, the anniversary document by the Competition Commission and Competition Tribunal, *supra* note 1142, at 3. The South African Competition Act 'drew heavily from laws in jurisdictions such as Canada, Australia and the European Union'.

[1146] *Competition Commission v South African Airways* ('*SAA I*'), [2005] Case 18/CR/Mar01, at 99.

6.3 Case law

Competition law enforcement in South Africa takes place as follows. The South African Competition Commission (SACC) – or another appellant – may bring competition cases before the Competition Tribunal (SACT). A further appeal is possible before the Competition Appeal Court (CAC). Although competition cases usually do not go beyond this point, the Supreme Court of Appeal may review a judgment by the CAC. A final appeal is possible before the Constitutional Court if a constitutional issue is at play.

South African case law shows particular concern for the effects of the conduct under review. In the *SAA II* judgment, a case dealing with various incentive schemes, the Competition Tribunal noted that an anti-competitive effect could manifest itself in two ways: either by direct evidence of an adverse effect on consumer welfare or, alternatively, by evidence that the exclusionary act has a substantial or significant foreclosure effect. [1147]

If there is evidence that certain conduct has an anti-competitive effect,[1148] the dominant firm may invoke efficiency gains that outweigh those effects.[1149] In *Senwes*,[1150] the SACT confirmed that such a plea calls for a balancing exercise between pro- and anti-competitive effects.[1151] The evidence on

[1147] *Nationwide Airlines and Comair v South African Airways* ('*SAA II*'), [2010] Case 80/CR/SEPT06, at 183.

[1148] *Ibid*., at 189. For instance due to higher prices and/or reduced choice.

[1149] *Ibid*., at 240.

[1150] *Competition Commission v Senwes*, [2009] Case 110/CR/Dec06. Senwes, dominant in the South African grain storage market, had allegedly made it impossible for storage users to compete with its downstream trading operations. For an analysis of the Tribunal judgment, see L. Kelly & T. van der Vijver, 'Less is more: *Senwes* and the concept of "margin squeeze" in South African competition law', (2009) 126 South African Law Journal 246. Subsequently, the case went to the Competition Appeal Court, the Supreme Court of Appeal and the Constitutional Court. Finally, the parties settled the case by a Competition Tribunal Order of 25 April 2013, *Competition Commission v Senwes*, Case 110/CR/Dec06.

[1151] *Ibid*., at 170. This may include a quantitative analysis of the anti-competitive effects at stake; see *SAA I*, *supra* note 1146, at 110.

efficiencies must have a minimum level of credibility. The CAC held that if the proof is of 'dubious quality', there is no need to enter into a balancing exercise.[1152]

Quite rightly, the case law requires a 'logical nexus' between the efficiency claims and the mechanism according to which the conduct leads to the alleged benefits.[1153] This means that the exclusionary conduct must be necessary, or a *sine qua non*, for the pro-competitive gains to be realized.[1154] This condition was not met in the *Patensie* case, which involved an agricultural cooperative that induced its members not to deal with a competitor.[1155] The SACT held that the respondent had not shown that the exclusionary act was necessary for the alleged benefits of raising capital or achieving scale economies.[1156]

Apart from efficiencies *stricto sensu*, the statutory justifications in Sections 8(c) and 8(d) SACA clearly allow other benefits as well. Conduct may be condoned based on its 'technological' or 'other pro-competitive gain[s]', allowing for the consideration of a wide range of alleged benefits. In *SAA I*, for instance, the SACT agreed to consider quality benefits as producing pro-competitive benefits, even though it rejected the plea on the facts.[1157] Another example is the *BATSA* judgment.[1158] The case concerned agreements between tobacco company BATSA and retailers that allowed BATSA to determine the position and space allocation for its own cigarette brands and those of competitors in dispensing units at the retailer's premises. Although the Tribunal did not engage into a balancing test in the *BATSA* case (as it did not find anti-competitive effects), it did suggest that the notion of pro-competitive benefits is relatively broad. In *BATSA*, such benefits included the free provision of cigarette

[1152] *Senwes v Competition Commission*, [2009] Case 87/CAC/FEB09, at 70. See also *South African Airways v Comair and Nationwide Airlines*, [2011] Case 92/CAC/MAR10, at 147. The CAC noted that there was no credible evidence of any efficiency achieved through the incentive schemes under review.

[1153] *SAA I*, *supra* note 1146, at 256.

[1154] *Patensie v Competition Commission*, [2003] Case 16/CAC/Apr02, at page 30.

[1155] *Competition Commission v Patensie*, [2002] Case 37/CR/Jun01.

[1156] *Ibid.*, at 99-105.

[1157] *SAA I*, *supra* note 1146, at 248-250.

[1158] *Competition Commission & JTI v BATSA*, [2009] Case 05CRFeb05.

dispensing units by BATSA and maintenance of an orderly point of sale.[1159] The Tribunal concluded that BATSA chose a legitimate form of competition – namely that for retail shelf space and positioning.[1160]

Apart from a balancing test to weigh pro- and anti-competitive effects, South African competition law also seems to allow dominant firms to engage in 'normal' or 'reasonable' business conduct (what was earlier termed 'legitimate commercial conduct'). Even dominant firms still have a degree of commercial freedom. Such a plea is particularly persuasive if the dominant firm abides by generally accepted business standards. In *York Timbers*,[1161] the CAC confirmed that even exclusionary behaviour can still be seen as a 'normal [act] of competition'.[1162] In that case, the dominant firm did not abuse its dominance, because its conduct simply sought to improve the terms of its contracts – instead of extending its market power.[1163]

Another example is the *Bulb Man* judgment, in which the applicant sought interim relief against the refusal of a supplier to keep supplying on the terms that they had previously agreed upon.[1164] The SACT considered that the refusal was more probably caused by a 'breakdown in the business relationship', rather than 'an attempt to wield market power or to exclude the applicant for an anti-competitive end'.[1165] It appears that, in the assessment of anti-competitive effects, commercial considerations such as a lack of trust may provide reason to accept a 'legitimate business justification' for the refusal.[1166]

The SACT's *Telkom* judgment offers a further confirmation that a justification plea may be available beyond those mentioned in Section 8 SACA. The case concerned, *inter alia*, a refusal to provide access with the aim of excluding independent value added network service (VANS) providers.[1167] Telkom

[1159] *Ibid*., at 314.

[1160] *Ibid*., at 282.

[1161] *York Timbers v SA Forestry Company*, [2001] Case 09/CAC/May01, at 6.9.

[1162] *Ibid*., at 6.9.

[1163] *Ibid*., at 8.3 and 8.4. See, for the earlier ruling, *York Timbers v SA Forestry Company*, [2001] Case 15/IR/Feb01, at 91 and 97.

[1164] *The Bulb Man (SA) v Hadeco*, [2006] Case 81/IR/Apr06.

[1165] *Ibid*., at 61.

[1166] *Ibid*., at 57.

[1167] *Competition Commission v Telkom SA,* [2012] Case 11/CR/Feb04.

argued that its refusal was justified, as the VANS providers were allegedly engaged in conduct contrary to the South African Telecommunications Act, thereby invoking the so-called 'illegality defence'.[1168] The SACT rejected the plea on the facts. An examination by the South African telecom regulator ICASA had revealed that the VANS providers had not engaged in illegal activities.[1169] But even in the absence of such a finding by the regulator, the SACT would have rejected the plea as Telkom had been inconsistent and selective in its refusal – freezing some, but not all, of the networks that it considered illegal.[1170] The SACT thus appears open to consider an illegality defence as a matter of law, and is right to be sceptical of such a plea if the dominant firm cannot offer a sound reason for the selectivity of its behaviour.[1171]

In sum, the *York Timbers*, *Bulb Man* and *Telkom* cases above confirm that (even apart from efficiencies) exclusionary conduct can be justified if it is based on perfectly acceptable reasons, such as a 'normal' or 'reasonable' business conduct or the illegality defence.

7 UNITED STATES

7.1 Introduction & legislation

The 1890 Sherman Act is the key US statute governing federal antitrust law. Section 2 of the Sherman Act prohibits anti-competitive unilateral conduct, referring to the act of monopolization or the attempt to monopolize.

[1168] *Ibid*., at 31. Cf. UK law, where telecom regulator Ofcom clearly endorsed the illegality defense. See Ofcom decisions of 3 November 2003 and 28 June 2005 in *Floe Telecom*. The UK Competition Appeal Tribunal agreed with that position in principle. However, on the facts of the case, it held that it was anything but clear that the firm requesting access had acted illegally. See *Floe Telecom v Ofcom*, [2004] CAT 18, at 289, 333 and 336; *Floe Telecom v Ofcom* [2006] CAT 17, at 352-353.

[1169] *Ibid*., at 87 and 94.

[1170] *Ibid*., at 88. The evidence thus suggested that the refusal was a matter of commercial strategy, rather than legal compliance.

[1171] Selectivity has also been found relevant in cases in other jurisdictions. See e.g. the judgment by the High Court of England & Wales in *Purple Parking and Meteor Parking v Heathrow Airport* [2011] EWHC 987 (Ch).

The Sherman Act does not elaborate on the legal requirements of monopolization, nor does it refer to any possible justifications. It is clear, however, that if an entity in a regulated sector acts in compliance with a detailed statutory scheme, it may be shielded from antitrust scrutiny by the doctrine of implied immunity.[1172] In addition, the case law has shown that a monopolist may invoke so-called 'valid business reasons'[1173] to justify conduct that would otherwise have been prohibited under Section 2 of the Sherman Act.[1174] The following paragraph discusses what this concept means for the purposes of US federal antitrust law.

7.2 Case law

In terms of procedure, a plaintiff may bring a federal antitrust case before a District Court. Such a plaintiff is usually a private party, but can also be one of the enforcement agencies of US federal antitrust law; namely the Federal Trade Commission ('FTC') or the Antitrust Division of the Department of Justice ('DoJ'). A subsequent appeal is open to a Circuit Court. If granted certiorari, a further appeal is open to the US Supreme Court.

The seminal US Supreme Court judgment in *Grinnell* has made clear that a claim based on Section 2 of the Sherman Act requires evidence of **'**the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'[1175] Such an exercise of monopoly power involves 'specific intent'[1176] to behave anti-

[1172] See e.g. *United States v National Assn. of Securities Dealers, Inc*., 422 US 694 (1975); *Gordon v New York Stock Exchange, Inc*., 422 US 659 (1975).

[1173] Also referred to as 'legitimate business justification', see T.A. Piraino, Jr., 'Identifying Monopolists' Illegal Conduct under the Sherman Act', (2000) 75 NYU L. Rev. 847. At 851, the author proposes a standard for refusal to deal cases where the hurdle of a finding of *prima facie* monopolization is relatively low, and the examination of a justification plea takes centre stage.

[1174] The analysis does not cover justifications of conduct that would otherwise be prohibited under different laws, such as the prohibition of price discrimination under the Robinson Patman Act.

[1175] *United States v Grinnell Corp.*, 384 US 563, 571 (1966). This position was confirmed*, inter alia*, by *Eastman Kodak* v *Image Technical Services, Inc.,* 504 US 451 (1992); *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 US 585, 596 (1985).

[1176] Also referred to as 'monopolistic' intent.

competitively, implying that the defendant's conduct cannot be explained by a 'valid business reason or concern for efficiency'.[1177] A defendant can provide a pro-competitive justification for its conduct once a *prima facie* case under Section 2 of the Sherman Act has been established.[1178] If accepted, a legitimate business reason can offset a finding of 'specific intent',[1179] by providing an alternative explanation for the monopolist's predominant motivation.[1180]

If a plaintiff has carried its initial burden of showing a restraint on competition,[1181] the defendant bears the burden of persuasion that its conduct can be justified by a business purpose.[1182] A business justification has to be 'credible' rather than simply 'plausible'.[1183] The plea shall be accepted if a

[1177] So '[i]f there is a valid business reason for [the defendant's] conduct, there is no antitrust liability', *High Tech. Careers v San Jose Mercury News*, 996 F.2d 987, 990 (9th Cir. 1993). See also, *inter alia*, *LePage's v 3M*, 324 F.3d 141 (3rd Cir. 2003); *Great Western Directories v Sw. Bell Tel. Co*., 63 F.3d 1378, 1385-86 (5th Cir. 1995); *Midwest Radio Co., Inc. v Forum Pub. Co*., 942 F.2d 1294, 1297-1298 (8th Cir. 1991); *Oksanen v Page Memorial Hosp*., 945 F.2d 696, 710 (4th Cir. 1991) (en banc); *Becker v Egypt News Co*., 713 F.2d 363, 366 (8th Cir. 1983) at 370.

[1178] Facey and Assaf 2002-2003, *supra* note 1002, at 566-567.

[1179] *Times-Picayune Publ. Co. v United States*, 345 US 594, 627 (1953); *United States v Columbia Steel Co*., 334 US 495 (1948). See also *Eastman Kodak Co. v Southern Photo Material Co*., 295 F. 98 (5th Cir. 1923), Aff'd 273 US 359 (1927) and *Six Twenty-Nine Prods., Inc. v Rollins Telecasting*, *Inc*. 365 F.2d 478, 486 (5th Cir. 1966). See also A.Y. Kapen, 'Duty to cooperate under Section 2 of the Sherman Act: Aspen Skiing's slippery slope', (1986-1987) 72 Cornell L. Rev. 1047, 1062. He explains that anti-competitive intent is inferred from proof of adverse effects and that, subsequently, '[t]he monopolist can negate this inference only by establishing a valid business justification for its conduct.' See also See B. Hawk, 'Attempts to Monopolize - Specific Intent as Antitrust's Ghost in the Machine', (1973) 58 Cornell L. Rev. 1121, 1163.

[1180] *Times-Picayune* (*ibid.*), at 622 and 627. See also S.C. Salop, 'Preserving Monopoly: Economic Analysis, Legal Standards and Microsoft', (1999) 7 George Mason Law Review 617. He advocates a test based on the company's primary purpose.

[1181] *Capital Imaging v Mohawk*, 996 F.2d 537 (2nd Cir. 1993). In *Jefferson Parish*, 466 US at 31, 104 S.Ct. at 1568, the US Supreme Court also held that an 'actual adverse effect on competition' must be shown.

[1182] *Aspen Skiing*, *supra* note 1175, at 608-611. According to the Court, the petitioner had failed to offer any efficiency justification for its conduct. For an analysis of the implications of *Aspen*, see e.g. Kapen 1986-1987 (*supra* note 1179); and J.B. Baker, 'Promoting innovation competition through the Aspen/Kodak rule', (1998-1999) 7 George Mason Law Review 495.

[1183] *Eastman Kodak*, *supra* note 1175, at 478-79.

defendant can show that pro-competitive benefits outweigh the anti-competitive effects.[1184] This does not necessarily entail an actual weighing of effects,[1185] but appears to require an examination 'of whether the challenged action purports to promote or to destroy competition.'[1186] Once the defendant has discharged its burden of showing a valid business justification, the burden shifts to the plaintiff to prove that the justification brought forward is 'pretextual'.[1187]

US case law offers few discernable legal tests applicable to justifications. Some judgments did suggest that the objectives proffered by a defendant could not have been achieved through less anti-competitive means.[1188] Other judgments, however, have cast doubt on the relevance of such a test. For example, in *Trinko*, the US Supreme Court held that the Sherman Act 'does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition'.[1189] This statement appears to have an impact for justifications: the more commercial liberty is awarded to a monopolist, the wider the scope becomes of a potential business justification plea.

The importance of this link clearly emerged from *Byars v Bluff City News*. The Sixth Circuit held that '[a] finding of anti-trust liability in a case of a refusal to deal should not be made without examining reasons which might justify the refusal to deal', because 'we must give [monopolists] some leeway in making

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[1184] *California ex rel. Harris v Safeway*, *Inc*., 651 F.3d 1118, 1133 n.10 (9th Cir. 2011). However, see *United States v Microsoft Corporation*, 253 F.3d 34 (DC Cir. 2001), where the plaintiff had to show that the anti-competitive effects outweighed the pro-competitive effects.

[1185] For example, the D.C. Circuit Court did not do so in *Microsoft* (*ibid*., at 59), even though it did attach much weight to the effects of the practices under review.

[1186] *Capital Imaging*, *supra* note 1181.

[1187] See e.g. *Morris Commc'ns Corp. v PGA Tour, Inc*., 364 F.3d 1288, 1295 (11th Cir. 2004). An example where an efficiency justification was found to be 'pretextual' is *United States v Dentsply Int'l, Inc*., 399 F.3d 181, (3rd Cir. 2005) at 197.

[1188] *Eastman Kodak*, *supra* note 1175, at 483. *California Dental Association v FTC*, 128 F 3d 720 (9th Cir. 1997); rev'd 526 US 756 (1999).

[1189] *Verizon Communications, Inc. v Law Offices of Curtis V. Trinko*, LLP, 540 US 398 (2004), 124 S.Ct. at 883. For an analysis of this judgment, see e.g. H.A. Shelanski, 'The case for rebalancing Antitrust and Regulation', (2011) 109 Michigan Law Review 683; E.D. Cavanagh, 'Trinko: A Kinder, Gentler Approach To Dominant Firms Under The Antitrust Laws', (2007) 59 Maine Law Review 111.

business decisions'.[1190] Other judgments by Circuit Courts affirmed that a lawful monopolist should be 'free to compete like everyone else'[1191] and is 'encouraged to compete aggressively on the merits'.[1192] In *Trinko*, the US Supreme Court followed this line of reasoning by holding that the opportunity to charge monopoly prices is precisely what attracts business acumen.[1193] Lower courts have often relied on *Trinko* to justify a refusal to provide access, especially if the plaintiff is considered to be a 'free rider'.[1194]

This hands-off approach seems induced by a wish not to chill pro-competitive behaviour. It raises questions as to the continued relevance of case law that required benefits not only to accrue to the monopolist. For example, earlier judgments had rejected business justification pleas that were simply based on the desire to maintain a monopoly market share[1195] or on the monopolist's promotion of its (economic) self-interest alone.[1196] The *laissez-faire* approach may also partly explain why US Antitrust, for all its preoccupations with efficiency, rarely enters into an actual balancing test of effects. Instead, the focus is on providing ample commercial freedom for monopolists that allow them to engage in conduct that is almost automatically associated with efficiency.

Various precedents seem to confirm the importance of commercial freedom as a justification. For example, as to a work protected by IP law, the First Circuit considered a monopolist's 'desire to exclude others' from this work 'a presumptively valid business justification for any immediate harm to consumers.'[1197] In the *Brunswick* case, which focused on a scheme of discounts, the Eighth Circuit simply

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[1190] *Byars*, *supra* note 1037, at 862. Kapen (*supra* note 1179, at 1070) noted that the US Supreme Court in *Aspen Skiing* 'apparently ignored the need to allow monopolists some discretion in making business decisions'.

[1191] See *Olympia Equipment Leasing Company v Western Union Telegraph Company*, 797 F.2d 370 (7th Cir. 1987).

[1192] *Foremost Pro Color, Inc. v Eastman Kodak Co*., 703 F.2d 534, 544 (9th Cir. 1983).

[1193] *Trinko*, *supra* note 1189, 124 S. Ct. at 879.

[1194] J.A. Keyte, 'The Ripple Effects of Trinko: How It Is Affecting Section 2 Analysis', (2005) 20 Antitrust 44, 46.

[1195] *Data Gen. Corp. v Grumman Sys. Support Corp*., 36 F.3d 1147, 1183 (1st Cir. 1994). In *Aspen Skiing* (*supra* note 1175, at 608-11), the Court found no *rationale* for the conduct under review other than a wish to eliminate the plaintiff as a competitor. See also *Otter Tail Power Co. v United States*, 410 US 366, 378 (1973).

[1196] *Otter Tail* (*ibid*.), at 389. The Court transposed the reasoning that it had applied earlier vis-à-vis Section 1 of the Sherman Act in *United States v Arnold, Schwinn & Co*., 388 US 365, 375 (1967). For a more recent confirmation of this line of reasoning, see *LePage, supra* note 1177, at 153, 154 and 163.

[1197] *Data General*, *supra* note 1195, at 1187.

referred to the business justification that Brunswick was 'trying to sell its product.'[1198] In *Grinnell*, the First Circuit held that an exclusive dealing arrangement was justified considering the desire to achieve 'a stable source of supply', 'a stable, favorable price' and 'production planning that was likely to lower costs.'[1199] In addition, in terms of a predation case, no inference of predatory intent arises when the defendant shows that below-cost price level was reached defensively,[1200] or where the price cuts constituted a legitimate competitive response to market conditions.[1201]

Furthermore, a defendant may bring forward a valid business reason in the context of a refusal to deal case (*Aspen Skiing*),[1202] and in the presence of exclusionary conduct (*Eastman Kodak*[1203]). Examples of valid business reasons included the prevention of free-riding,[1204] 'engineering factors' that prevented the defendant from entering into a wholesale contract,[1205] and the abandonment of an unprofitable operation.[1206] Courts have also accepted a defendant's reluctance to deal with other firms on the following grounds:

- The customer is unable to maintain accurate records.[1207]
- The customer has engaged in deceptive advertising or unfair practices.[1208]

[1198] *Brunswick*, 207 F.3d 1039, 1062 (8th Cir. 2000).

[1199] *Barry Wright Corp. v ITT Grinnell Corp*., 724 F.2d 227, 236-237 (1st Cir. 1983).

[1200] *General Foods Corporation*, 103 FTC 204 (1984).

[1201] *Richter Concrete Corp. v Hilltop Concrete Corp*., 691 F 2d 818 (6th Cir. 1982).

[1202] *Aspen Skiing*, *supra* note 1175, at 602-605, 608-611, where the US Supreme Court found that the defendant had failed to offer any 'efficiency justification' for its conduct. See also *US Football League v National Football League,* 842 F.2d 1335, 1359 n.21 (2nd Cir. 1988). Note that in *Trinko*, supra note 1189, the US Supreme Court held that it had never acknowledged the essential facilities doctrine.

[1203] *Eastman Kodak*, *supra* note 1175, at 453 and 483-486.

[1204] *Cont'l T.V., Inc. v GTE Sylvania Inc.*, 433 US 36, 55 (1977). In this case the Supreme Court referred to 'legitimate business purpose'. See also *Int'l Rys. of Cent. Am. v United Brands Co*., 532 F.2d 231, 239-40 (2nd Cir. 1976), cert. denied, 429 US 835 (1976). This ruling states that proof of a company's reasonable steps to preserve its business interests does not, without more, raise a genuine issue of material fact under Section 2 of the Sherman Act, and appears comparable to the ECJ ruling in Case 27/76 *United Brands v Commission* [1978] ECR 207.

[1205] *Otter Tail*, *supra* note 1195, at 378.

[1206] *Intern'l Railways of Cent. America v United Brands*, 532 F.2d 231, 239-40 (2nd Cir. 1976), cert. denied, 429 US 835 (1976).

[1207] *Byars*, *supra* note 1037.

- The defendant has moral or ethical concerns with the customer.[1209]

The US approach should be applauded for giving no pre-defined limits of what may constitute a valid business reason, enabling a wide range of possible pleas that take due account of the relevant context. At the same time, US courts could step up their effort in making clear what legal requirements apply when a company invokes such justifications. At the moment the examination of valid business reasons seems to be too dependent on an *ad hoc* examination, providing limited legal certainty for future cases.

7.3 Guidance

The Antitrust Division of the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) could equally step up their efforts to clearly explain their views of valid business reason for the purposes of Section 2 of the Sherman Act, as current guidance documents provide little insight.

The DoJ's guidance on single firm conduct under Section 2 of the Sherman Act of September 2008 does provide a number of references to the concept of valid business reason.[1210] For example, the guidance document notes that the DoJ is open to consider an efficiency defence within the context of a predation case. Overall, however, the document provides limited guidance on the DoJ's own views of this topic. In addition, the 2008 guidelines were not endorsed by the FTC and were withdrawn in May 2009. They have not yet been replaced by another comprehensive guidance document. Hopefully the DoJ and FTC will be able to provide a joint guidance document on Section 2 that also deals with justifications.

[1208] *Homefinders of America Inc v Providence Journal Co*, 621 F 2d 441 (1980).

[1209] *America's Best Cinema Corp v Fort Wayne Newspapers, Inc.* 347 F Supp 328 (1972), concerning a refusal to accept advertisements of X-rated films.

[1210] DoJ single firm conduct guidelines of September 2008, at 71, available at http://www.justice.gov/atr/public/reports/236681.pdf. This may be the case if 'the conduct is part of a firm's procompetitive efforts to promote or improve its product or reduce its costs and may, in the long term, reduce the price consumers pay for its goods and services or increase the value of those goods or services'.

8 COMPARATIVE NOTES

8.1 Introduction

In a study that spans a variety of jurisdictions with many diverging characteristics, it is tempting to focus on their differences rather than their commonalities. In my opinion, such a focus would risk missing the forest for the trees. The analysis above has shown that, despite the obvious differences, there are also many cross-border similarities. The paragraphs below examine the elements that I found particularly interesting.

8.2 Cross-border influences

Several of the judgments discussed above refer explicitly to foreign case law justifications of *prima facie* anti-competitive conduct. Such references confirm that it is possible to transpose lessons and best practices regarding justifications across borders.

Australian case law on unilateral conduct provides many references to US and EU case law.[1211] US case law has been particularly influential, prompting Williams to note: 'the [Australian] High Court, has in effect, adopted the business justification test used in the United States'.[1212] More generally, South African competition law also seems relatively open to overseas jurisprudence,[1213] referring to case law in the EU,[1214] the UK[1215] and the US.[1216] In Singapore, the CCS used the legal test mentioned by the European Commission's guidance on enforcement priorities in its *SISTIC* decision.[1217]

[1211] See e.g. *Queensland Wire*, *supra* note 1020, at 23 (referring to *Olympia Leasing*, *supra* note 22); *Melway*, *supra* note 1032, at 26 (referring to *Aspen Skiing*, *supra* note 1175); *BBM*, *supra* note 1049, at 138 (referring to Case C-395/96 P *Compagnie Maritime Belge v Commission* [2000] ECR I – 1365) and 249 (referring to Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461).

[1212] M. Williams, *Section 46 of the Trade Practices Act 1974: Misuse of Market Power - A modern day catch 22?*, 22 Queensland Law Society Journal 377, 384 (1992).

[1213] Indeed, the South African Competition Act 'drew heavily from laws in jurisdictions such as Canada, Australia and the European Union'. See the anniversary document, *supra* note 1144, at 3.

[1214] E.g. *SAA I*, *supra* note 1146, at 35, referring to *Commercial Solvents*, *supra* note 1041.

[1215] E.g. *Senwes*, *supra* note 1150, at 142, referring to *Genzyme*, *supra* note 1066.

It should be applauded that some judges and NCAs are open to consider interpretations of foreign jurisdictions, and apply such interpretations if they find them persuasive. An open-minded approach is likely to enhance the quality of their case law, as it infuses domestic competition law with well-considered deliberations from overseas institutions that have tackled similar issues in the past. Strong cross-border influences may also support substantive convergence, thus facilitating legal certainty and consistency across borders.

8.3 The legal framework of justifications

Justifications exist to exonerate conduct that is considered acceptable behaviour, even though it may be *prima facie* anti-competitive. It is thus wise to consider what type of conduct competition law does *not* seek to prohibit.

It is clear that US law prohibits a monopolist from wilfully acquiring or maintaining monopoly power only when it competes on some basis other than the merits.[1218] Similarly, Canadian law allows conduct that results from 'superior competitive performance'.[1219] In addition, Singaporean and South African law seem to permit conduct that is related to 'competitive merit'[1220] or 'competition on the merits'.[1221]

I agree that competition law should allow firms to compete on the merits. It reflects the idea that competition law does not bar firms to compete vigorously simply because they have market power. Prohibiting such conduct would have a serious competition chilling effect, and would come close to banning market power as such. Justifications can play a valuable part in exempting conduct that is seen

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[1216] E.g. *SAA I*, *supra* note 1146, at 116, referring to *Microsoft* (*supra* note 1184); at 118, referring to *Brooke Group Ltd. v Brown & Williamson Tobacco Corp*., 509 US 209 (1993); at 121, referring to *Lorain Journal Co. v United States,* 342 US 143 (1951) and *Otter Tail* (*supra* note 1195).

[1217] *SISTIC*, *supra* note 1131, at 8.2.8; referring to at 30 of the Commission's guidance on Article 102 TFEU [ex 82 EC] enforcement priorities, OJ [2009] C 45.

[1218] *Aspen Skiing*, *supra* note 1175.

[1219] Subsection 79(4) Canadian Competition Act.

[1220] CCS guidelines, *supra* note 1117, at 2.1.

[1221] *SAA I*, *supra* note 1146, at 313.

as competition on the merits, as shall be shown below.[1222] Australian competition law has a commendable approach, as it puts great weight on the causal link between a firm's market power and its conduct. A weak link indeed provides a strong indication that a firm is simply competing on the merits in a way that it would also have done absent its market power.[1223]

This brings us to the role that justifications play in the legal analysis of unilateral conduct. Some jurisdictions have made this role perfectly clear. For example, in US law, a valid business justification may provide an alternative explanation why the firm was not 'predominantly motivated' by its monopolistic intent.[1224] A justification plea under Singaporean law, if accepted, connotes that the 'primary purpose' of the firm was not anti-competitive.[1225] Similarly, in Canada, unilateral conduct shall be allowed if the 'overriding purpose' is not anti-competitive.[1226]

One should be cautious to not equate the notion of such 'purpose' with subjective intent. Australian and Canadian law are particularly clear that subjective anti-competitive intent is not required for conduct to be prohibited, even though it may be taken into account as a relevant circumstance.[1227] Similarly, in US antitrust intent 'is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct'.[1228] In my view, this should also mean that the *lack* of subjective anti-competitive intent is, in itself, insufficient to serve as a justification, even though it can be relevant while assessing a justification plea. A finding of subjective intent to hurt competitors is of limited value in jurisdictions that explicitly encourage firms, even those with market power, to compete aggressively. US and Australian law, for

[1222] Another possibility is that such conduct falls outside the scope of competition law in the first place.

[1223] Even though the conduct may still have an anti-competitive effect precisely because of the market power.

[1224] *Times-Picayune*, *supra* note 1179, at 622 and 627.

[1225] CCS guidelines, *supra* note 1117, at 4.4.

[1226] See e.g. *Canada Pipe*, *supra* note 1075, at 87, and the Canadian Competition Tribunal's judgments in *Nielsen*, *supra* note 1059), at 69 and *Tele-Direct* (*supra* note 1063), at 259.

[1227] In terms of Australian law, see Kirby J in *Rural Press*, *supra* note 1024; *Queensland Wire*, *supra* note 1020, per Mason C.J. and Wilson J., at 22. In terms of Canadian law, see *Tele-Direct*, *supra* note 1063, at 259.

[1228] *Microsoft*, *supra* note 1184, at 58-59.

example, consider a firm's wish to harm its competitors as one of the hallmarks of competition, rather than an indication of anti-competitive conduct.[1229]

In addition, case law should make clear that an alternative 'purpose' can not only set aside a finding of anti-competitive intent, but a finding of anti-competitive effect as well; a position clearly set out in Canadian case law.[1230] In my view, this is a commendable approach as it shows that a justification can apply in two distinct ways. If it concerns a plea based on commercial freedom, one should focus on whether a dominant firm's overriding purpose was truly anti-competitive or not. However, in terms of an efficiency plea, the examination should concentrate on effects. If the conduct under review does not have a net anti-competitive effect, one may – with hindsight – then conclude that the primary purpose was pro-competitive.

Finally, competition law should clarify who bears the evidentiary burden showing a justification. After an act has been identified as *prima facie* anti-competitive, the evidentiary burden to prove a justification should, first, be put on the defendant. The defendant is the most likely party to have the requisite information and has the greatest incentive to offer a comprehensive justification plea. Canadian,[1231] South African[1232] and US[1233] case law have confirmed this approach. Considering this allocation of the evidentiary burden, courts should be hesitant to entertain pleas that have not been raised by the defendant, as was seemingly done by the Canadian Competition Tribunal in *Tele-Direct*.[1234] As to the appropriate standard of proof, Canadian and US law make clear that the justification plea must be

[1229] For US law, see e.g. *Olympia Leasing* (*supra* note 22), *Eastman Kodak* (*supra* note 1192) and *Trinko* (*supra* note 1189). For Australian law, see e.g. *Melway*, dissenting opinion by Heerey J, *supra* note 1032, at 19. The High Court agreed with the approach by Heerey J, *supra* note 1036.

[1230] See also *Canada Pipe*, *supra* note 1075, at 87. According to the FCA, the relevant effects under paragraph 79(1)(b) are those on competitors.

[1231] *B-Filer*, *supra* note 1095. On the other hand, see the submission by the Canadian Bar Association, *supra* note 1107, at 16, noting that 'the business justification doctrine is not a defence'.

[1232] *SAA I*, *supra* note 1146, at 243.

[1233] *Aspen Skiing*, *supra* note 1175, at 608.

[1234] *Tele-Direct*, *supra* note 1063, at 357-358.

credible.[1235] Indeed, a justification plea should go beyond merely asserting that there was 'some' justification for the plea.[1236]

8.4 Available types of justification

8.4.1 Introduction

The analysis of statutory provisions, case law and NCA guidance has not revealed clearly pre-defined limitations to the types of pleas that can function as a justification. I agree that the law should not *a priori* preclude firms to invoke a particular justification plea that befits their situation. This does not, and should not, mean that every single justification plea will be treated alike. It simply means that only an in-depth examination of the relevant context can reveal whether such a plea should be accepted.[1237] There is one important proviso, however. The success or failure of a justification plea should not depend on factors that seem irreconcilable with the stated objectives of a jurisdiction's competition law. For instance, if a jurisdiction only attaches relevance to efficiencies, harm to competitors should not be a factor in rejecting a justification plea.[1238]

The case law examination above has revealed several broad descriptions as to the available types of justification. In US law, a defendant may justify its conduct either based on 'concern for efficiency' as well as 'valid business reason'.[1239] Similarly, the Canadian Competition Tribunal held that it is open to efficiency pleas as well as any other 'pro-competitive business justification'.[1240] Likewise, Sections 8(c) and (d) of the South African Competition Act not only take into account efficiency benefits, but 'technological' and 'other pro-competitive gain[s]' as well. Finally, guidelines by the Singaporean regulator CCS mention that a dominant firm may justify conduct either based on its 'benefits' or because

[1235] *Eastman Kodak*, *supra* note 1175, at 478-79. See also e.g. Canadian Competition Tribunal rulings in *Nielsen* (*supra* note 1059) and *Tele-Direct* (*supra* note 1063).

[1236] Contrary e.g. to the Canadian Competition Tribunal's finding in *NutraSweet*, *supra* note 1069.

[1237] Canadian competition law seems particularly sensitive to context. See e.g. *NutraSweet* (*ibid*.), at 90. See also *Canada Pipe*, *supra* note 1075, at 88.

[1238] Apart from the question whether attaching relevance to the impact on competitors is desirable in the first place.

[1239] See the case law cited at *supra* note 1177.

[1240] See e.g. *Nielsen*, *supra* note 1059.

of the 'legitimate commercial interest' at play. [1241] The following paragraphs shall first examine the efficiency plea, and subsequently discuss other possible justifications.

8.4.2 Efficiencies

The efficiency plea is the most widely used justification in the case law of the jurisdictions under review. The plea should succeed if the conduct under review has greater pro-competitive than anti-competitive effects. This relevance of efficiencies is clearly acknowledged in Australia,[1242] Canada,[1243] Singapore,[1244] South Africa[1245] and the US.[1246]

However, the precise role of these efficiencies often remains unclear. Although an efficiency analysis conceptually calls for an effects analysis, I have not found cases on unilateral conduct in which the courts actually engage in a balancing test. This is perhaps understandable, as it is difficult for courts and regulators to provide a reliable quantification. The US Supreme Court already noted this problem in its 1949 *Standard Oil* ruling, suggesting that courts are 'ill-suited' to the task of weighing pro- and anti-competitive effects.[1247] This is particularly the case for dynamic efficiencies, as the extent to which conduct contributes to innovation is inherently difficult to gauge.[1248] More fundamentally, courts and regulators may be hesitant to decide potential conflicts between effects on allocative efficiency (welfare maximisation), productive efficiency (cost minimisation) and dynamic efficiency (innovation maximisation).[1249] From a court's perspective, there may not be a clear reason to favour one type of

[1241] CCS guidelines, *supra* note 1117, at 4.4.

[1242] Hanks & Williams 1990, *supra* note 1024.

[1243] See e.g. the Canadian cases *Canada Pipe*, *supra* note 1075; and *Nielsen*, *supra* note 1059.

[1244] *SISTIC*, *supra* note 1131.

[1245] See e.g. Sections 8(c) and 8(d) of the SA Competition Act, and the South African Competition Tribunal rulings in *Senwes* (*supra* note 1150) and *SAA I* (*supra* note 1146).

[1246] See e.g. *Safeway*, *supra* note 1184: the concept of 'valid business reasons' includes efficiency benefits.

[1247] *Standard Oil Co. of California v United States*, 337 US 293, 311 (1949).

[1248] OECD Policy Roundtable, *The Role of Efficiency Claims in Antitrust Proceedings*, (2012), available at http://www.oecd.org/daf/competition/EfficiencyClaims2012.pdf. At 7-8, the document stresses the importance of dynamic efficiencies. *SISTIC* (*supra* note 1131) is an example of a case where dynamic efficiencies were relevant.

[1249] OECD 2012 (*ibid*.).

efficiency over the other. In addition, a court may struggle with deciding whether it should focus on consumer welfare or total welfare.[1250]

These difficulties may explain why courts, even if they appear to attach great weight on effects,[1251] rarely examine what precise welfare effects the conduct under review has had.[1252] Instead, courts have often preferred a looser examination, working with a less detailed approximation of effects. For example, in *SAA I*, the South African Competition Tribunal held it simply requires 'some notion' of the quantitative effects.[1253] The examination focuses on whether a practice *tends* to have pro-competitive effects or not. The more value a jurisdiction attaches to efficiency and effects, the stronger the case must be founded in economic price theory.[1254]

Another possibility is that courts may use a proxy for efficiencies. US case law suggests that conduct by companies with market power is associated with efficiency as long as it takes place within the realm of the commercial freedom afforded to them. This may explain why US cases have often examined

[1250] A. Neil Campbell and J. William Rowley, 'The Internationalization of Unilateral Conduct Laws – Conflict, Comity, Cooperation and/or Convergence?', (2008-2009) 75(2) Antitrust L.J. 267, 319-320. See also OECD 2012 (*ibid*.), at 5-7, noting that economists are split over this issue. For example, Oliver Williamson supported a total welfare approach, whereas Alfred Marshall advocated a consumer welfare approach.

[1251] Or even where courts explicitly state that an efficiency plea calls for a balancing exercise between pro- and anti-competitive effects, see *Senwes*, *supra* note 1150.

[1252] See e.g. *Microsoft*, *supra* note 1184. For a critical view of the added value of efficiency balancing within merger law, see e.g. W. Rosenfeld, *Superior Propane: the case that broke the law*, available at http://www.goodmans.ca/docs/SuperiorPropane.pdf. At 1, Rosenfeld notes: 'The Canadian experience in elevating efficiencies to a level which outranks anti-competitiveness has been confused, costly, and proven ultimately unacceptable'. See, differently, Campbell and Rowley 2008-2009, *supra* note 1250, at 319. They do favour an approach based on efficiencies and argue that, because such efficiencies are usually not properly addressed, the subsequent result has been a 'piecemeal, ad hoc treatment of an issue of fundamental importance'.

[1253] *SAA I*, *supra* note 1146, at 110. At the same time, the Competition Tribunal seems to gradually put more emphasis on a comprehensive analysis of effects.

[1254] See also Eleanor M. Fox, 'Eastman Kodak Company v Image Technical Services, Inc. – Information Failure as Soul or Hook', (1993-1994) 62 Antitrust L.J. 759, 767.

whether the conduct under review 'purports to promote or to destroy competition',[1255] instead of actually engaging into a balancing test.[1256] Australian law seems to take a similar approach.[1257]

Finally, the case law analysis also offers food for thought as to the applicable legal test vis-à-vis an efficiency plea. Of course the defendant must be able to show that efficiencies exist, as shown e.g. by the Canadian Competition Tribunal's judgment in *Laidlaw*[1258] and the Competition Commission of Singapore's *SISTIC* decision.[1259] The most important requirement, however, is that the relevant benefits would not have arisen absent the conduct under review. There is no reason to accept anti-competitive conduct on the basis of efficiencies if those benefits would have materialized anyway. A clear example is the South African Competition Appeal Court ruling in *Patensie*, noting that the efficiencies relied upon must directly relate to and be dependent upon the conduct under review.[1260] Similarly, the *SISTIC* decision suggests that the necessity test is also relevant for the purposes of Singaporean competition law, as the proclaimed benefits must be 'directly attributable' to the conduct under review.[1261] Other jurisdictions would do well in providing more guidance as to the applicable legal conditions.

8.4.3 Justifications other than efficiencies

The examination of this chapter has revealed that justifications have a much wider scope than simply encompassing efficiencies. It usually concerns conduct that, in its specific context, can be considered as legitimate business behaviour. In Hong Kong and Singapore, legislation provides that the prohibition of unilateral anti-competitive conduct does not apply if a compelling reason of public policy is at stake.[1262] Both jurisdictions award their respective executive bodies with a high level of discretion to determine the scope of the public policy exemption, and would benefit from guidance making clear how the executive intends to make use of this discretion in order to reduce the risk of arbitrary application.

[1255] See *Capital Imaging*, *supra* note 1181.

[1256] *Microsoft*, *supra* note 1184.

[1257] *Queensland Wire*, *supra* note 1020.

[1258] *Laidlaw supra* note 1091, at 91.

[1259] *SISTIC*, *supra* note 1131.

[1260] *Patensie*, *supra* note 1154, at 30. See also *SAA I*, *supra* note 1146, at 256.

[1261] *SISTIC*, *supra* note 1131, para.8.2.8.

[1262] Subdivision 2 of division 3 of the Hong Kong Competition Ordinance and the Third Schedule of the Singapore Competition Act.

Australian, Hong Kong and Singaporean legislation also clearly provide that the conduct shall not be forbidden if it seeks to comply with a legal requirement.[1263] In addition, US case law has confirmed that the doctrine of implied immunity may shield an entity that seeks compliance with another statute from antitrust scrutiny.[1264] Similarly, in Canada and South Africa, a refusal to deal is likely to be justified if the company requesting supply does not comply with its regulatory obligations.[1265] I agree that unilateral conduct should not be prohibited if a firm with market power does not act out of free will, but rather out of necessity to abide by its legal obligations.[1266]

Apart from these exemptions, however, the jurisdictions under review have also acknowledged the relevance of what I term 'legitimate commercial conduct'. The jurisdictions under review refer to this concept in strikingly similar ways: 'valid business reason' or 'legitimate business justification' (US);[1267] 'legitimate commercial interests' (Singapore);[1268] a '(pro-competitive) business justification' (Canada),[1269] 'legitimate business considerations' (Australia)[1270] or a 'legitimate business justification' (South Africa).[1271] These expressions reflect a similar concept, namely that unilateral conduct is not illegal if the company under review does not transcend the boundaries of legitimate business behaviour (even though, admittedly, the precise boundary between this plea and efficiencies is not always easy to draw).

[1263] Section 51 of the Australian Competition and Consumer Act; Section 2(2) of Schedule 1 of the Hong Kong Competition Ordinance; Third Schedule of the Singapore Competition Act.

[1264] See e.g. the cases cited at *supra* note 1172.

[1265] See *B-Filer*, *supra* note 1095; and *Telkom*, *supra* note 1167. See also the UK Competition Appeal Tribunal judgments in *Floe*, *supra* note 1168.

[1266] In my view, this exemption should even be expanded to *any* unilateral conduct where the firm with market power did not choose its course of action. However, due to the lack of legislation or cases on this issue in the jurisdictions under review, it shall not be discussed here.

[1267] See the case law cited at *supra* note 1177.

[1268] CCS guidelines, *supra* note 1117, at 4.4. Singapore also refers to 'objective justification', the standard term also used by the European Court of Justice in its case law.

[1269] See e.g. *Nielsen*, *supra* note 1059.

[1270] See e.g. *BBM*, *supra* note 1049, at 70.

[1271] *Bulb Man*, *supra* note 1164, at 57 and 60.

An obvious follow-up question is how far such commercial freedom extends. In my view, it is instructive to consider whether there is any nexus between a firm's market power and the conduct under review. Such an examination may reveal if the firm would have acted in the same way absent its market power. As a result, it can be an important indicator to show whether certain conduct is competitive or rather an expression of the lack of competition.[1272]

Such an assessment relies on the assumption that firms with market power may usually act in the same way as firms that lack market power. Under Australian and US law, such companies are clearly allowed to compete just as vigorously compared to other companies.[1273] This approach suggests that companies with market power do not have to show that their actions benefit a greater good – their competitive conduct, as long as it stays within the sphere of their commercial freedom, can already considered to benefit the economy at large.

It is thus no surprise that the scope for a justification plea is narrower to the extent that a jurisdiction affords less commercial leeway to companies with market power. For example, the Canadian Competition Tribunal has taken into account whether the invoked justification is 'in the public interest' or 'socially beneficial',[1274] rather than solely in the 'self-interest' of the firm invoking the justification.[1275] It is understandable that a justification plea will fail if the alleged benefits accrue only to the firm with market power.

[1272] See *Queensland Wire*, *supra* note 1020.

[1273] For Australian law, see e.g. *Queensland Wire* (*ibid.*), at 191. For US law, see *Olympia Leasing*, *supra* note 22. See, similarly, the Judicial Committee of the Privy Council in *Telecom Corp of New Zealand v Clear Communications (New Zealand)*, [1994] UKPC 36, at 20: 'A monopolist is entitled, like everybody else, to compete with its competitors: if it is not permitted to do so it "would be holding an umbrella over inefficient competitors"'.

[1274] *Tele-Direct*, *supra* note 1063, at 215 and 248-249. At 216, the Tribunal reiterated its doubts on whether 'the unrestricted pursuit of completeness, while it may be in Tele-Direct's interest, is wholly in the public interest or "socially optimal"'.

[1275] *Ibid*., at 67-68. Note that certain US judgments, such as *Otter Tail* (*supra* note 1195), have rejected a justification plea as it was solely based on the monopolist's self-interest. It could be questioned, however, if this is still good law considering more recent case law such as *Trinko*, *supra* note 1189.

At the same time, such requirements may go too far. In Singapore, one of the arguments to reject a justification plea was that one of the 'stakeholders' did not benefit from the conduct under review, even though it is unclear why benefits should accrue to each and every market participant.[1276] Equally puzzling is the stance by the Canadian Federal Court of Appeal that the law should take due account of the impact upon competitors;[1277] a stance that risks a serious competition-chilling effect. I think that the law should make clear *who* must benefit from the alleged gains of the conduct (apart from the dominant firm), and *how* a balance should be struck between the various interests. For example, in *BATSA*, the South African Competition Tribunal accepted that a dominant firm's category management was a legitimate form of competition and left sufficient alternatives for competitors to augment their market share – even though the practice undoubtedly had *some* adverse effect on third parties. [1278]

The scope of commercial freedom appears to be particularly important in refusal to deal cases. Australia,[1279] Canada,[1280] Singapore,[1281] and the US[1282] have confirmed that a refusal to supply may be justified if the company requesting supply does not abide by 'normal' business practice. Of course several factors may indicate what, in the particular circumstances of the case. Again, a helpful analytical tool is to consider whether a firm without market power would, in the same situation, also have discontinued supply.

In terms of the applicable legal conditions, the FCA's judgment in *Canada Pipe* provides a useful enumeration. A business justification requires a credible pro-competitive rationale that is not only attributable to the respondent, but also relates to and counterbalances the anti-competitive elements of the conduct.[1283] Although these conditions relate specifically to the assessment of paragraph 79(1)(b) CA, I think they can and should be considered by courts in other countries. A strong cross-border dialogue is, in my opinion, a good way to identify promising practices. And even if it does not bring

[1276] *SISTIC, supra* note 1131, at 8.3.6.

[1277] *Canada Pipe*, *supra* note 1075.

[1278] *BATSA*, *supra* note 1158, at 273-282.

[1279] See the dissenting opinion by Kirby J in *Melway*, *supra* note 1036, at 104, and the case law cited.

[1280] *Tele-Direct*, *supra* note 1063.

[1281] CCS guidelines, *supra* note 1117, at 4.4. It gives the example of a customer's poor creditworthiness.

[1282] See the case law cited at *supra* note 1204 – 1209.

[1283] *Canada Pipe*, *supra* note 1075, at 73.

competition law regimes closer together, it can at least show where competition law regimes differ and where they resemble. This outcome would, in itself, be valuable for firms that operate globally and have to take into account a growing number of competition law regimes.

8.5 Lessons for EU law

Before concluding this chapter, it is apt to consider what lessons can be drawn for the purposes of EU law. For a start, all the jurisdictions under review have acknowledged the importance of efficiencies *as well as* a category of legitimate business conduct. In essence, the latter type of justification reflects the notion that the firm with market power still has a degree of commercial freedom left – a position that the ECJ would do well to articulate more clearly in its future case law.

The experience of the non-EU jurisdictions under review shows that the quantification of efficiencies is highly complex. It explains why many cases show the use of proxies to establish why certain conduct should be deemed efficient or not. The ECJ should be aware of such difficulties, and make clear to what extent it allows the use of proxies to establish whether or not the conduct has a net pro-competitive effect. To the extent that the ECJ does require a quantification of effects, it should make clear how a bias in favour of easily quantifiable effects can be avoided. The ECJ should also allow for efficiencies that are difficult to gauge, but may have a vast welfare effect. A key assessment should be the causal link between the *prima facie* anti-competitive conduct and the efficiencies.

In terms of justifications other than efficiencies, it is submitted that the ECJ should enunciate more clearly that a dominant undertaking is still allowed to enter into 'normal' competitive behaviour – reflecting the commercial freedom that it still has. In essence, it calls for a contextual analysis of the conduct, showing whether or not the conduct was truly anti-competitive or not. Notwithstanding the 'special responsibility' incumbent upon dominant firms, the ECJ should be very cautious to consider conduct as an abuse if it is simply a normal business practice in that particular sector – otherwise such firms may be unduly constrained, to the detriment of the public at large. A useful test is to examine what the firm would have done absent its market power. Conduct should, in principle, not be an abuse if there is no causal link between the conduct under review and the dominance of the undertaking.

As a final remark, there are little signs of a separate 'public interest' plea similar to the one identified in the two previous chapters. It appears that such a plea can often be subsumed under a different heading. In jurisdictions such as Hong Kong and Singapore, competition law provides ample room for public interest related measures by executive bodies – although this still leaves the question to what extent dominant firms can act in the public interest aside from government compulsion. Instead, jurisdictions such as Australia and the US may subsume such a plea under the heading of commercial freedom. In terms of Australian law, such conduct would not have the requisite causal link with the prevalent market power.

9 CONCLUSION

The prohibition of anti-competitive unilateral conduct by companies with market power is clearly not absolute. Jurisdictions across the globe have accepted that such conduct is only prohibited in the absence of a justification. But despite its apparent importance, there seems to be little cross-border dialogue on this topic. In order to obtain a better understanding of how such justifications are interpreted across the globe, this chapter has examined a number of jurisdictions: Australia, Canada, Hong Kong, South Africa, Singapore and the United States.

For all the differences between these jurisdictions, there are many similarities as well. Overall, the jurisdictions under review ascribe a comparable role to justifications in their legal assessment of unilateral conduct. Basically such a justification can provide an alternative explanation of the conduct under review, setting aside a finding of an anti-competitive purpose or effect. It is submitted that dominant firms should not *a priori* be precluded from invoking any particular type of justification, as only an in-depth examination of the relevant context can reveal whether a justification should be accepted.

When a dominant company manages to show that its conduct has a net pro-competitive effect, such evidence should constitute a valid justification. Such a justification does not necessarily require a weighing exercise of quantified effects, but rather an examination of whether the practice *tends* to be pro-competitive or not. Jurisdictions that are particularly effects-focused, such as Australia and the US, are likely to require the plaintiff to firmly base its case in economic price theory.

In addition, conduct may also be justified on grounds other than efficiency. Often such behaviour is simply considered 'reasonable' within its specific context. This may be because the dominant company seeks to comply with a legal requirement. It also includes conduct that can be subsumed under 'commercial freedom', reflecting the idea that companies with market power still have a degree of leeway to freely decide their business behaviour (also referred to as 'competition on the merits'). An instructive, although not determinative, assessment to explore the boundaries of commercial freedom is by examining whether the company would also have engaged in the practice under review absent its market power.

It is submitted that the comparative analysis has revealed ample common ground for further contemplation on the issue of justifications of *prima facie* anti-competitive unilateral conduct, which would benefit cross-border legal certainty and consistency. The concept of justifications of *prima facie* anti-competitive unilateral conduct is simply too important to be left ignored.