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

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CHAPTER VII CONCLUSION

1 JUSTIFICATIONS AND UNILATERAL CONDUCT LAW: THE GROUNDWORK

This Chapter brings together the main observations from my PhD research. The thesis examines the concept of justifications in EU law (the focal point of the research) as well as the laws of several EU Member States and non-EU jurisdictions. The study shows that all these jurisdictions have accepted the availability of a justification plea for unilateral conduct that their competition laws would otherwise prohibit.

Even though the justification concept is obviously relevant to indicate the boundaries of prohibited unilateral conduct, many questions remain as to its precise scope and to the applicable legal conditions. In addition, there seems to be little international dialogue on this topic. The lack of such a debate entails risks for the quality and the consistency of the application of the justification concept across the globe.

In this PhD thesis I explore how various jurisdictions have dealt with such justifications, and offer suggestions as to how they should be dealt with. The examination seeks to encourage NCAs and courts to draw from experiences in other jurisdictions, in order to achieve more cross-border convergence of the law on unilateral conduct. Perhaps the gap we need to bridge is narrower than we think. Indeed, even though there seems to be little international debate on the topic at the moment, there are striking similarities in the way that jurisdictions deal with justifications.

The issue of justifications vis-à-vis *prima facie* anti-competitive unilateral conduct does not stand in isolation, but is inextricably linked with broader debates in competition law. A key element is how much commercial freedom a jurisdiction wishes to afford to dominant companies. A jurisdiction may have ample faith in market forces and less faith in the ability of regulators and courts to improve market outcomes. Such a jurisdiction is likely to accept a relatively wide range of unilateral practices, in order to avoid the competition-chilling risk that over-enforcement may entail. By contrast, a jurisdiction is likely to opt for a stricter regime if it has a relatively small and closed-off economy, in which self-correcting market mechanisms are less likely to adjust for any anti-competitive practices. For example, companies may dominate an economy not because of their superior efficiency, but because the government has

shielded them from competitive forces for a prolonged period of time. Such imbalances can persist for many years, even after the government has withdrawn its former protection.

The discussion on justifications may also be broadened to include lessons from moral philosophy. Consequentialism assumes that we should focus on effects to establish whether certain conduct has moral worth. Consequentialism can provide a theoretical basis for considering an efficiency plea and a public interest plea, to the extent that these pleas connote that the beneficial effects outweigh the detrimental effects. By contrast, deontology suggests that we should only ascribe moral worth depending on the nature or the intention of the conduct under review. Kantian ethics, more specifically, can provide a dogmatic foundation for legitimate commercial conduct (to the extent that such conduct conforms to the universal law), and public interest (to the extent that such conduct protects human dignity). Furthermore, a deontological perspective that focuses on an actor's intent may provide a theoretical underpinning for a justification based on objective necessity, which implies that there is no anti-competitive intention.

A distinction can be made between reasons on the basis of which unilateral conduct escapes the prohibition altogether, and reasons that function as a genuine justification. This thesis deals with both categories and does not propose any strict delineation between them. In most cases, similar arguments can relate to both stages of the analysis. A discrimination case offers perhaps the best example: the (alleged) explanation for differentiated treatment could be used when determining whether there has been a *prima facie* abuse, or when determining whether a justification applies. A formalistic regime is more likely to consider differentiation as a *prima facie* abuse. In such a regime, the arguments that may have otherwise been treated during the first analytical step, can only be dealt with during the second analytical step – i.e. the examination of a justification. With these comments in mind, the following paragraphs provide an overview of the main findings of the PhD thesis.

2 LESSONS FROM OTHER AREAS OF EU LAW

Chapter II puts the topic of the thesis in a broader EU law perspective. The Chapter examines what lessons can be drawn from other areas of EU law for the understanding of justifications vis-à-vis Article 102 TFEU. It examines the law on the free movement of goods, Article 101 TFEU and merger control.

* Free movement of goods

Article 34 TFEU prohibits State measures that impede the free movement of goods between EU Member States. Domestic measures may, however, escape the prohibition on the basis of several grounds. The first ground is the explicit derogation provided for by Article 36 TFEU. The provision contains mostly 'non-economic' interests that are normally associated with action by the State. However, the case law has clearly shown that non-State actors may also invoke the provision.¹²⁸⁴ It shows that, within EU law, there is no conceptual impossibility for non-State entities to rely on public interest type arguments.

A second ground for removing State measures from the ambit of Article 34 TFEU applies if the conduct under review falls under one of the unwritten 'mandatory requirements'. The ECJ has been willing to consider a wide array of unwritten justifications to compensate for an otherwise overly restrictive prohibition. This suggests that 'objective justification' may have a wide scope, even though Article 102 TFEU does not explicitly mention the concept. Finally, the mandatory requirements test attaches great importance to the surrounding context and is particularly cogent if the measure under review conforms to values protected by the general principles of EU law.

A third ground on the basis of which State measures may escape the application of Article 34 TFEU exists, in short, if the measure does not *truly* impede inter-State trade. The gist is that the Treaty should not prohibit measures that do not materially hamper market access by operators from other Member States. A lesson for Article 102 TFEU is that there must be a sufficiently strong nexus between the relevant conduct and the interest that the Treaty provision seeks to protect (i.e. competition undistorted by unilateral conduct).

* Article 101 TFEU

Article 101(1) TFEU prohibits anti-competitive agreements which may affect trade between Member States. Acknowledging that there may still be reasons to condone such agreements, Article 101(3) TFEU provides a number of conditions for an exemption. I have argued in favour of conceptual consistency

¹²⁸⁴ See para 86 of the *Bosman* judgment, as quoted by *supra* note 142.

between Article 101 TFEU and Article 102 TFEU, and tried to show that Article 101 TFEU contains various lessons for the concept of justifications under Article 102 TFEU.

Article 101(3) TFEU acknowledges that seemingly restrictive conduct by undertakings may have diverging effects. Basically, the examination under Article 101(3) TFEU seeks to examine whether the benefits arising from the agreement can outweigh the harm identified under Article 101(1) TFEU. It is submitted that Article 101(3) TFEU may not only encapsulate efficiencies, but can accommodate non-efficiency considerations as well. An example is the internal market. This is clearly an important objective that can put much weight in the scale of Article 101 TFEU, even though it is not a standard directly based on efficiencies.¹²⁸⁵

As to the conditions of Article 101(3) TFEU, it is clear that benefits must have a wider remit than simply accruing to the undertakings themselves. As regards the condition that the restriction may not eliminate residual competition, it is worthy of note that the Commission proposes a sliding scale approach that takes into account to what extent competition is ‘already weakened’ by the restrictive agreement – clearly in synch with Article 102 TFEU where the degree of residual competition should also be relevant.

Apart from the justification in Article 101(3) TFEU, agreements may also escape the application of Article 101(1) TFEU altogether – even those that have *some* restrictive effect on competition. In some cases the restriction under review was, in its context, simply not grave enough to merit application of Article 101(1) TFEU. In other cases the restriction was considered ‘ancillary’ to otherwise efficient business conduct or legitimate aims pursued by bodies with a distinct regulatory competence. The ECJ thus seems to acknowledge that undertakings should have a certain degree of commercial freedom, taking in the realities of business practice and the relevant context.

* Merger control

¹²⁸⁵ It is true that the internal market objective can often be *associated* with efficiencies, as a well-functioning internal market is likely to lower costs for businesses (productive efficiency) and widen choice and lower prices for consumers (allocative efficiency). However, the internal market goal should primarily be seen as a political objective, which may even take precedence if this would *lower* efficiency – consider a situation of price discrimination between Member States, that may be prohibited even though it could be beneficial from an efficiency perspective.

Merger control has various features that may be transposed to Article 102 TFEU. First, it is clear that efficiencies can be highly relevant when determining whether a merger is anti-competitive or not. The efficiencies should be merger-specific. There is no reason to uphold an efficiency plea in the absence of a clear causal link between the merger and the stated efficiencies. In addition, the efficiencies shall only be accepted if they cannot be achieved through other, less anti-competitive, means.

Second, merger control allows a ‘failing firm’ defence. The plea acknowledges that there must be a connection between the merger and the alleged impediment to competition. The plea can be compared to a situation of objective necessity, as there is no viable alternative that is less anti-competitive.

Third, the Merger Regulation allows Member States to examine public interest concerns that may follow from a merger with a EU dimension. Although such a domestic examination cannot alter the outcome of the Commission’s competition assessment, it does provide an acknowledgment that non-competition interests may be legitimate as well, and can be affected by the outcome of a competition assessment.

3 THE SUBSTANCE OF OBJECTIVE JUSTIFICATION AND ARTICLE 102 TFEU

Chapter III turns to the core of the PhD research, discussing the substance of objective justification within the framework of Article 102 TFEU. According to established ECJ case law, an undertaking does not abuse its dominant position insofar it can rely on an objective justification. The ECJ’s approach makes sense: the negative connotation of ‘abuse’ implies that no justification applies. The absence of an explicit derogation possibility, as found in Article 101 TFEU, does not make this any different. For example, the ECJ’s introduction of unwritten ‘mandatory requirements’ in internal market law show that unwritten derogations may be used in order to narrow the scope of a prohibition that would otherwise have an overly wide scope. The Chapter argues that the concept of objective justification can and should have a key role in the Article 102 TFEU analysis. The concept can draw the provision away from a formalistic application and can infuse competition enforcement with a more context-based approach.

Notwithstanding the relevance of objective justification, however, there are still many uncertainties as to its scope and applicable legal conditions. To provide more clarity in the justification analysis, the Chapter argues in favour of distinguishing between several ‘categories’ of objective justification. The

first category is legitimate business behaviour. Legitimate business behaviour provides a justification for conduct that has an insufficiently strong nexus with the company's dominant position. This category should encompass competition on the merits, as there is no reason why competition law should prohibit pro-competitive conduct.¹²⁸⁶ A dominant undertaking still has a degree of commercial freedom, notwithstanding its 'special responsibility' not to impair effective competition. In addition, legitimate business behavior should include objective necessity, where a dominant undertaking cannot reasonably be expected to act differently. Only autonomous actions by an undertaking should lead to the possibility of a competition law infringement. This criterion is clearly not met in the case of *force majeure* or State compulsion, where factual or legal circumstances require the dominant firm to act in a specific way. A situation of objective necessity may also exist in the case of pressing technical or commercial requirements – even though the dominant firm must then be able to show why it could not have resorted to potentially less anti-competitive alternatives.

Efficiency considerations are a second source of objective justification. If the conduct leads to a positive net welfare effect, it may be objectively justified. The category fits in a context where the Commission is pushing towards a more effects-based approach of competition law. Recent ECJ case law confirms the relevance of efficiencies within Article 102 TFEU. For this purpose, the ECJ has in effect transposed the conditions of Article 101(3) TFEU to Article 102 TFEU. Although perhaps not a perfect fit,¹²⁸⁷ the

¹²⁸⁶ Of course it may be possible that competition on the merits does not arrive at the objective justification stage if it is no *prima facie* abuse in the first place. To my mind, acknowledging that competition on the merits may also be subsumed under an objective justification can function as a 'safety valve' to ensure that such conduct is not prohibited – in particular when the finding of a *prima facie* abuse can be made on relatively formal (i.e. non-context related) grounds. This is not to say that I support a formalistic approach towards abuse: it simply means that, in EU law, a finding of a *prima facie* abuse has often been based on relatively formal grounds with little regard to the surrounding context.

¹²⁸⁷ For example, the examination of less anti-competitive alternatives may be relatively straightforward in terms of Article 101 TFEU: the undertakings concerned can simply refrain from entering into, or prolonging the effect of, the one agreement found to be anti-competitive. By contrast, if unilateral conduct is found to be contrary to Article 102 TFEU, it is often much less clear what the undertaking concerned is still allowed to do. For example, rebates may be abusive if certain conditions have been met – but that does not mean that the dominant firm is completely barred from providing *any* rebates.

transposition does have the advantage of strengthening consistency between the two provisions, and of providing Article 102 TFEU with a tried and tested analytical framework.

The framework may be of use for the many challenges that lie ahead. Although an efficiency-balancing test appears to be straightforward in theory, in practice it is anything but. It is highly complex to establish a reliable and precise quantification of all the relevant effects. Furthermore, there is a risk of a bias in favour of the types of efficiencies that are easier to quantify than others. The Commission and the ECJ should make clear what types of efficiencies they deem relevant and how they decide on a balancing test within the specific circumstances of that case. In my view, there should be a clear balance between the *magnitude* of the effects and the *likelihood* with which they are thought to arise. The context will be important, which also means that efficiencies should not be rejected *a priori* simply because they are invoked by a super-dominant firm.¹²⁸⁸ A separate issue is that a legal test where the result can only be known *ex post* is difficult to reconcile with legal certainty. A more effects-based approach inherently leads to fewer clear-cut rules than a formalistic approach, but this is arguably a price worth paying if it leads to better rules. In addition, the legitimate business behaviour category may be of use in situations where quantification appears difficult, as that category is less demanding in terms of its effects analysis.

A third source encompasses public interest considerations, where a public policy goal can trump the application of Article 102 TFEU. This does not mean that competition law should be the primary means through which public interest is achieved, but rather that Article 102 TFEU should not, *a priori*, reject such considerations as irrelevant. Taking into account public interest objectives is in line with ECJ case law holding that EU law should be interpreted in light of the Union's wider principles and objectives. I think that a public interest plea is particularly persuasive if the relevant conduct protects a vital public interest goal that is clearly protected by the Treaty, and presents only a limited issue for competition. Although the ECJ has rejected the public interest plea in several cases on the facts, I still think that the plea is available as a matter of law.

¹²⁸⁸ Even though, in this PhD, I have argued that the degree of market power should indeed be taken into consideration as relevant context.

Of course, there are no clear-cut lines between the types of objective justification described above. Indeed, they may have considerable overlaps. For example, competition on the merits is likely to be strongly related with conduct that has a net efficient effect. Nevertheless, I believe that the categorisation helps bringing more structure into the analysis of objective justification. The categorisation shows its worth, *inter alia*, when one considers what legal test to apply. For example, an efficiency plea should consider the necessity test, as there is no reason to condone *prima facie* abusive conduct if those efficiencies could have been achieved through different means as well. At the same time, a necessity test is much less useful when examining *force majeure*, as such a plea connotes that the dominant undertaking could not have acted differently in any event. Finally, the chapter also shows that objective justification should be interpreted in line with the type of *prima facie* abuse that is at play. In sum, objective justification can – and should – function as a structured plea that can provide additional context into an abuse of dominance analysis.

4 THE PROCEDURE OF OBJECTIVE JUSTIFICATION AND ARTICLE 102 TFEU

Chapter IV examines various procedural aspects of objective justification within the framework of Article 102 TFEU. The focus is, in particular, on the applicable burden of proof, the evidentiary burden and the standard of proof.

The Commission and NCAs clearly bear the burden to prove an infringement of Article 102 TFEU. However, this does not mean that they bear the evidentiary burden to prove the absence of objective justification. The ECJ has determined that the latter burden will initially be borne by the dominant firm. The evidentiary burden is then able to shift back and forth depending on what type of evidence is being considered. To my mind, this approach makes sense: even though the absence of an objective justification could be seen as a constituent part of the abuse prohibition, it would go too far to require the Commission to examine, *a priori*, every single justification that could hypothetically apply. When contemplating the evidentiary burden, one should look closely at the *legal consequences* of that fact being proven. If the dominant firm has discharged its initial burden of invoking (and showing) an objective justification, it is up to the Commission to provide evidence why the invoked justification should not apply. If the Commission is unable to do so, there is no abuse.

It is submitted that the difficulty in meeting the standard of proof will vary according to the circumstances of the case. The lower the impact of the firm's conduct, the easier it will be to meet the requisite standard for an objective justification plea. In my view, the difficulty in meeting that standard should to a large extent depend on the type of objective justification that the dominant firm wishes to invoke.

It appears that, from the dominant firm's perspective, the standard of proof may be relatively difficult to meet in a plea based on efficiency or public interest. These types of justification require a difficult balancing test that cannot be taken lightly – the loss in competition should be compensated either by clear efficiency gains or benefits to a public interest goal. The standard of proof is perhaps easier to meet if it concerns a plea based on legitimate business conduct. For example, there may be clear evidence that the conduct arises from objective necessity, in the sense that the dominant firm had no alternative way to act. In addition, dominant firms should have the possibility to show that their conduct is legitimate competition on the merits. Such a plea will be particularly persuasive if the dominant company manages to show that the conduct under review was unrelated to its dominance.

Matters become more complex in a private law context. In a stand-alone action, the regular domestic rules on burden and standard of proof apply. The most important demand that currently arises from EU law is that these national rules may not be interpreted in such a way that would disable the *effet utile* of the private enforcement of EU competition law. In a follow-on action, a dominant firm will in principle no longer be able to invoke an objective justification. Its best chance to escape civil liability is by invoking domestic legal conditions that are not part of the objective justification plea, such as lack of foreseeability. However, an objective justification may possibly be invoked if the domestic context is different from the context in which the Commission took its decision; for example if the efficiency analysis would render a different outcome at the domestic level than at the EU level.

5 OBJECTIVE JUSTIFICATION AT THE LEVEL OF EU MEMBER STATES

Chapter V examines how EU Member States have interpreted the concept of 'objective justification' for the purposes of their domestic competition law, focusing in particular on its scope and the applicable legal conditions. The examination discusses cases from France, Germany, Ireland, Luxembourg, the

Netherlands, Spain and the UK. The Chapter uses the same categories of objective justification as were introduced by Chapter III: legitimate business behaviour, efficiency benefits and public interest gains.

Cases at the EU Member State level provide several examples of these types of justifications. The examination of UK competition practice, in particular, has revealed several cases where justifications have played an important role. The UK NCAs and courts should be commended for their efforts to apply the objective justification concept in a structured and well-conceived manner – even though such deliberations may undoubtedly lead to findings that could be at odds with each other. If there are to be inconsistencies, it is better to have them out in the open.

As to the available types of justifications, NCAs and domestic courts have often relied on a notion of legitimate business conduct. Several Member States clearly attach much weight to commercial freedom. The Chapter argues that an analysis of such a justification should pay heed to the relevant nexus between the dominant position and the conduct under review. The more likely it will be that the dominant firm would also have engaged in that conduct *without* being in a dominant position, the easier a justification can be applied. The proportionality test, *stricto sensu*, should provide the key method of legal assessment. By contrast, an indispensability test (that examines whether the objective could have been reached through alternative, less anti-competitive, means) will be less relevant.

Some domestic cases also show the relevance of objective necessity, implying that the dominant company could not have been expected to act differently. The *Aberdeen Journals* case has shown that *force majeure* may be accepted if the *prima facie* abuse follows completely from reasons external to the dominant company. Furthermore, the UK Competition Appeal Tribunal took the position in *Floe* that competition law cannot force undertakings to act against the law.¹²⁸⁹ It is true that such a position is perhaps easier to uphold in a purely domestic setting compared to a situation where national law and the EU competition rules are at odds (considering the differences in the hierarchy of norms).¹²⁹⁰ However, the CAT's approach does have benefits over the position seemingly taken by those ECJ

¹²⁸⁹ *Floe Telecom v Ofcom* [2004] CAT 18; *Floe Telecom v Ofcom* [2006] CAT 17.

¹²⁹⁰ In a purely domestic setting, the generalist rules of competition law can be set aside by more specific rules according to the *lex specialis* adage. However, this reasoning does not apply to the EU competition rules. These rules are enacted in the Treaty and enjoy primacy over EU regulatory measures (enacted in secondary legislation such as Regulations and Directives) and domestic measures.

judgments that suggest that there may still be an infringement even in the presence of clear State compulsion.¹²⁹¹

Another type of justification is the efficiency plea. NCAs and domestic courts should make clear what type of efficiencies they deem relevant, and how they weigh the various pro- and anti-competitive effects. Moreover, the dominant firm must show that the conduct under review is indispensable to achieve the pro-competitive effects. Many domestic cases that have accepted efficiencies, however, simply state in general terms that the conduct will lead to efficiencies, but fail to make an explicit balancing test. There is much room for improvement here.

Finally, surprisingly many domestic cases have relied on public interest – especially if one considers the lack of guidance given by EU law (and, for that matter, the scepticism expressed by many commentators about the viability of such a plea). Such cases confirm that public interest may indeed provide a justification for a *prima facie* abuse. Several domestic cases show the importance to uphold safety and security standards. A public interest plea should make clear what objective the conduct seeks to attain and why it should prevail over competition concerns – so, in other words, why the dominant firm is right to go beyond its legal requirements vis-à-vis a particular public interest. In addition, if the dominant firm engages in conduct that differentiates between its own (downstream) operations and third parties, it should clarify why working towards the public interest should have an adverse impact upon other market participants, while leaving its own downstream activities unaffected.

6 JUSTIFICATIONS IN NON-EU JURISDICTIONS

Chapter VI discusses a number of jurisdictions outside the EU: Australia, Canada, Hong Kong, Singapore, South Africa and the US. All these jurisdictions have accepted that a firm may invoke a justification plea to justify otherwise prohibited unilateral conduct. A justification usually functions as an alternative explanation for the dominant company's allegedly anti-competitive purpose.

¹²⁹¹ See e.g. the case law cited at *supra* note 459.

The countries under review often couch their treatment of justifications in terms of efficiencies. However, this has rarely led courts to engage in a quantification and subsequent balancing of effects. Instead, courts usually assess whether the conduct under review *tends* to distort competition or not. Although it will often prove cumbersome to have a precise and reliable quantification of effects, NCAs and courts should – at the very least – make clear what they consider to be the relevant effects, and what types of efficiencies they deem relevant.

The examination has also shown how several cases in the jurisdictions under review have accepted justifications other than efficiencies. A justification may be applicable if the conduct seeks to comply with a legal requirement. Another possible justification exists if a company operates within the boundaries of its commercial freedom. In such cases the link between a firm's market power and its conduct may simply be sufficiently weak, providing a strong indication that a firm is acting in a way that it would also do absent its market power. The examination has not revealed cases that relied on 'public interest'.

7 KEY LESSONS

The analysis in this PhD has shed light on the central research question, namely what it means to justify unilateral conduct that would otherwise be contrary to the competition rules, and what it should mean. The key lessons that I deduce from this research are as follows:

- Many jurisdictions have acknowledged the importance of justifications of otherwise prohibited unilateral conduct. And rightfully so: justifications are an indispensable part of the analysis whether competition law should condone unilateral conduct or not. The comparative analysis has shown that competition cases around the world have relied on the concept of justifications, primarily as a means to put the conduct under review in its proper context.
- At the same time, the topic remains highly under-theorized. There are relatively few academic studies on the subject – especially comparative work is scarce. In addition, there is relatively little NCA guidance on the topic, which may negatively affect legal certainty and consistency. NCAs should spend more effort on providing guidance, preferably in international forums such as the International Competition Network. I encourage a more widespread reception of case law

and decisional practice from other countries. Hopefully this research can contribute to such a development.

- NCAs and domestic courts should attempt to differentiate between (i) a *prima facie* finding of unilateral conduct that would otherwise be prohibited – and (ii) a justification plea. Admittedly, there is no watertight barrier between these two steps, as arguments that could support a justification plea may already be relevant in the determination whether there has been a *prima facie* violation. For example, in a case on (price) discrimination, should the (alleged) explanation for differentiation be subsumed under a justification, or rather as an element to consider why there was no *prima facie* abuse in the first place? To my mind, jurisdictions that have a more formalistic approach are more likely to consider such explanations as a justification (as the stage of a *prima facie* abuse will be easily met).
- The way in which justifications operate should vary according to the circumstances, such as the degree of dominance, the type of *prima facie* abuse and the type of justification at play. In my view, competition law should not prohibit unilateral conduct in the following circumstances:
 - If the dominant company engages in legitimate commercial conduct. Typically such cases display an insufficiently strong nexus between the practice under review and the company's market power. Legitimate commercial conduct could follow from the following situations:
 - If the practice under review falls within the scope of the dominant firm's commercial freedom; i.e. conduct that can be considered as 'competition on the merits'. Note that this category is particularly relevant in a formalistic abuse regime, as one could wonder whether such conduct should be considered *prima facie* abusive in the first place.
 - If the dominant company is confronted with a situation of 'objective necessity', typically in a situation of *force majeure*. Objective necessity implies that the dominant company has no possibility to act in an alternative way that could have averted the abuse. In other words: there is no autonomous conduct that could be considered an abuse.
 - If the conduct under review produces efficiencies that lead, on balance, to a positive welfare effect. Benefits must be able to compensate consumers for the anti-competitive aspects of the conduct. Although this category is likely to have a substantial overlap with 'competition on the merits', there is a difference in methodology. Competition on the

merits concerns conduct that should be considered legitimate in its specific context, often because there is no relevant nexus with the dominant firm's market power. However, that category does not require an intricate analysis of effects. Efficiency, on the other hand, does require an examination of effects. If that examination shows a positive outcome, the conduct may (with hindsight) be considered justified.

- If the conduct seeks to support a public interest that, in the specific context of the case, ought to override the competition issues. In the EU context, a plea based on public interest should refer to an objective that the EU legal order clearly strives for.
- This leads to the following overview on the concept of objective justification in EU law:

Objective justification			
Legitimate commercial conduct/business behaviour		Efficiency	Public interest
Commercial freedom	Objective necessity		
<i>Competition on the merits</i>	<i>Force majeure; State action</i>	<i>Positive welfare effect</i>	<i>Public interest gain</i>

- Apart from the *legal* reasons to make the categorisation described above, *moral philosophy* contains useful perspectives as to the theoretical basis for these justifications.
 - Consequentialism provides a basis for the acceptance of an efficiency and public interest plea. Using an inclusive interpretation (which I favour), consequentialism can also provide a basis for a plea based on commercial freedom and objective necessity. The justifications examined in this thesis thus have a basis in consequentialism.
 - By contrast, it is more difficult to transpose lessons from deontology. In particular, if one establishes moral worth simply based on the inherent character of particular conduct, there is little room left for a context-driven approach. However, to the extent that one does consider such a transposition to be useful, Kantian ethics can provide a basis for legitimate business behaviour (that conforms to the universal law) and public interest (to the extent that the conduct protects human dignity). Finally, a deontological perspective that focuses on intent can provide a foundation for the plea based on objective necessity.
- An analysis of a justification plea should afford ample weight to the specific context of that case. The legal analysis should normally include the following elements.
 - The conduct should be suitable to attain the prescribed goal.

- The conduct should normally be indispensable to attain the prescribed goal. This is particularly relevant as regards a plea based on efficiency and public interest.
 - The conduct should not have a disproportionate anti-competitive effect. This is especially relevant while examining a plea based on commercial freedom and public interest.
 - Evidence on intent may be relevant for the overall interpretation of evidence, but will normally not be decisive. Evidence on effects can be decisive in specific circumstances, in particular when the dominant undertaking has raised an efficiency plea.
- The evidentiary burden regarding objective justification lies initially with the dominant company, and can shift as soon as it has discharged this burden. The standard of proof should be no different compared to the standard for establishing a *prima facie* abuse.