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# **Objective Justification and Prima Facie Anti- Competitive Unilateral Conduct of Article 102 TFEU**

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## **Abstract**

This dissertation considers that the prohibition of anti-competitive unilateral conduct by dominant undertakings is not absolute, but allows for derogation. The ECJ has accepted and used the objective justification plea in order to legitimate prima facie abusive conducts that fulfill the demanded requirements. This thesis contains a detailed examination of the concept of ‘objective justification’, focusing in particular on its scope and the applicable legal conditions. An analysis also of the notions of abuse and dominance is included, because their precise definition is important for the better understanding of the term objective justification. This thesis submits that is very important to tackle with the formalistic approach and adopt the effect- based approach in the examination of Article 102 TFEU and of objective justifications. There is the need for a clear definition regarding the term objective justification, which will enhance the legal certainty. As far as the subdivision of the different types of objective justifications is concerned, this thesis accepts the following subdivision of objective justifications: companies with market power should be allowed to engage in (i) legitimate business behaviour (either as part of their commercial freedom or in case of objective necessity), (ii) efficient conduct with a positive welfare effect and (ii) conduct that promotes a relevant public interest. Finally, this thesis considers whether environmental protection factors must be approved as an objective justification under Article 102 TFEU and whether they play any role in European Competition Law in general, and whether they should play a role.

Keywords: objective justification, abuse, dominant position, efficiency, environmental policy.

Michalou Anna  
23/01/2016

Dedicated to the memory of my grandfather Nikolaos Michalos (1940-2014), who was always motivating me to achieve my goals.

## **Preface**

This dissertation was written as part of the LLM in Transnational and European Commercial Law, Mediation, Arbitration and Energy Law at the International Hellenic University. I was interested in the examination of the objective justifications under Article 102 TFEU because I wanted to deepen my knowledge in the effect-based analysis and the economic analysis applied in European Competition Law, which is also promoted by the European Commission and is becoming more and more gradually approved by the ECJ.

The main difficulty that I faced during my thesis was the fact that there is no specific definition of the term objective justification and my research based on case by case reasearch of the european jurisprudence. This was also the beauty of this research, because through studying the ECJ's rulings, I had the chance to deepen my knowledge in the European Competition Law, to understand better the main objectives that the ECJ and the Commission have concerning Article 102 TFEU and present the main interpretative legal issues and the conflicts and even the inconsistencies in some rulings in my scientific work.

I would first like to thank my thesis advisor Prof. Dr. Pavlos E. Masouros for helping me to choose the subject of my thesis and for supporting me by answering all my questions about my research or writing. I would also like to acknowledge Prof. Dr. em. Athanassios Kaissis for the very good organization and the high quality of our master program. Finally, I must express my very profound gratitude to my parents for providing me with unfailing support and continuous encouragement throughout my years of study and through the process of researching and writing this thesis. This accomplishment would not have been possible without them. Thank you.

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## **Introduction**

Few legal rules are absolute. Practically all prohibitions allow for derogation under certain circumstances. The scope and meaning of such derogations or justifications will often determine whether or not a prohibition applies. The same also applies in competition law and arises the question whether in *prima facie* anticompetitive agreements there is the possibility of application of a justification. Similarly, a merger that appears to lessen competition at first sight may nonetheless be cleared because of its expected efficiencies. As a result justifications and efficiencies play an important role as far as the debates on the appropriate scope of competition law are concerned. All the above mentioned will be examined in the case of unilateral conduct by companies with market power. This thesis will examine how the term “objective justifications” appears and applies when a dominant firm has a dominant position. In such cases a company with a dominant position can only abuse its dominant position contrary to Art. 102 TFEU, if there is no objective justification. All the EU member states have adopted this terminology and recognized that it is possible to have a justification for unilateral anticompetitive conduct.

Specifically, in the first chapter of this thesis is held a systematic analysis of the objectives of Article 102 TFEU, of the definitions of abuse and dominance along with the question what is and what should be the appropriate scope of the concept of objective justification within the framework of Article 102 TFEU, the utility of the examination of the objective justifications under Article 102 TFEU and the two-tier approach. The second Chapter of this thesis contains a detailed examination of the concept of “objective justification” focusing in particular on its scope of application and the legal conditions. This thesis’s aim is to prove that we must not follow a formalistic approach of Article 102 TFEU and that there is the need to examine thoroughly this concept of “objective justification” in order to improve legal certainty. The third chapter of this thesis handles with the question whether the protection of the environment can be entailed in the public interests that are approved as objective justifications and whether competition law should take into consideration environmental and social goals.

## **Article 102 TFEU: ABUSE, DOMINANT POSITION AND OBJECTIVE JUSTIFICATIONS**

### *The objectives of Article 102 TFEU*

Article 102 TFEU deals with the unilateral conduct of undertakings which have a dominant position in the market and as a result substantial market power. Article 102 prohibits one or more undertakings (collective dominance) which have a dominant position in the market or a substantial part of it to abuse their position and have a negative effect on trade between member states. The term undertaking has the same meaning as in Art.101 TFEU and the meaning of the effect is described in more detail by the Commission's Guidelines and the decisions of the European Court of Justice.

However, there is still a fundamental gap in our understanding of Article 102 TFEU. It is widely accepted that an abuse under Article 102 TFEU will only exist only when there is no objective justification<sup>1</sup>. The ECJ and the Commission has not yet clarified the scope and the operation of the concept of objective justification of an abuse of dominant position and as a result there is a low level of legal certainty and predictability concerning this legal term. In addition, from a close examination of the case law concerning objective justifications the Court's perception of this legal term seems to be very narrow and to be related to objective factors and to public policy that are beyond the control of the undertaking.

The most difficult part to interpret concerning article 102 TFEU is the term of dominant position and of abuse which must be clearly defined and discerned. The holding of a dominant position itself it's not something that is definitely prohibited and anti-competitive. Article 102 TFEU is infringed only when we have an abuse of the dominant position. Many times the two terms have been confused and even the ECJ on the impulse of the formalistic approach that the ordo-liberalism European competition law school adopts led to false conclusions and results. The way which the Commission and the EU Courts have interpreted Art. 102 TFEU has been extremely controversial.

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<sup>1</sup> See e.g. Case C-457/10 P, *AstraZeneca v. Commission* [2012] ECR I-0000, para. 130; Case C-260/89 *ERT* [1991] ECR I-2925, para 37; Case 311/84 *CBEM v. CLT and IPB* ('*Telemarketing*') [1985] ECR 3261, para. 26. See, further, the Opinion of AG Polares Maduro in Case C-109/03 *KPN v. OPTA* [2004] ECR I-11273, para. 53-54; and the Opinion of AG Cosmas in Case C-344/98 *Masterfoods v. HB Ice Cream* [2000] ECR I-11369, para. 101.

The adoption of a very strict formalistic approach in the application of Art.102 TFEU focused only on the form of the conduct and the drawing presumptions from that rather than to analyse the actual effects on the market. We came to the paradox result in many cases to protect the competitors (and not always the most competent ones) and not the competition itself and as a result the consumers.

The EU Commission put the consumers' welfare as the first priority of the free competitive internal market and tried to change this approach by promoting a new more effect-based approach which also takes into consideration the economic analysis of the law. In 2003 the EU Commission introduced a review of the application of Art.102 TFEU on exclusionary abuses with the intention to modernize the application of Art. 102 TFEU having as the main objective the consumers' welfare. The review resulted in a DG Comp Staff Discussion Paper in 2005 and culminated in the Official Publication in February 2009 of Commission Guidance on its enforcement priorities in applying Art.102 TFEU to abusive exclusionary conduct (The Guidance Paper)<sup>2</sup>. This Guidance Paper sets out all the principles which will guide the Commission in deciding when to intervene and aims to enhance predictability and legal certainty in the application of Art.102 TFEU.

### ***The definition of the terms: "Dominant Position" and Abuse***

This above mentioned change to a more effect-based approach shows the necessity to firstly clearly define and distinct the terms dominant position and abuse before starting to analyse and understand the scope and application of objective justifications under Art. 102 TFEU. In addition, for the interpretation of Art.102 TFEU we must also take into consideration the relationship of the Art.102 TFEU with the Article 101 TFEU.

The notion of dominant position under Art. 102 TFEU according to the ECJ case law is established on the market power that an undertaking has in the relative market. According to the case law, an undertaking has a dominant position in the market, if it has the economic strength to hinder effective competition and to behave independently

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<sup>2</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009.

of its competitors, customers and consumers<sup>3</sup>. As a counterbalance to this substantial market power, the dominant firm has the ‘special responsibility’ according to ECJ’s rulings “not to impair the undistorted competition”<sup>4</sup>. The rationale that lies behind this special responsibility is that competition is already weakened by the presence in the market of a dominant firm and as a result if competition is further distorted the conduct leads to the infringement of Art. 102 TFEU and the consumer’s welfare cannot be achieved<sup>5</sup>. This rationale behind ECJ’s rulings has led and can also in the future lead to very restrictive and distortive results concerning the dominant undertaking. For example, it may prevent a dominant undertaking from providing a discount that “tends to remove or restrict a customer’s freedom to choose its sources of supply”<sup>6</sup>. In this case, it is disputable if we want a competition policy that aims to protect competitors<sup>7</sup> (even the inefficient ones who don’t show innovative and qualitative skills) from the expansive power of the dominant undertaking or the competition itself by allowing the dominant firm to expand, the market to regulate itself and to enhance consumers’ welfare<sup>8</sup>.

In order to define dominant position under Art. 102 TFEU we must follow two stages of examination. Firstly, we must define the relevant market in which we will put the question whether the market power that has a firm makes it dominant by using the SNNIP test and the “hypothetical monopolist” approach. Secondly, we must define

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<sup>3</sup> Case C-322/81 *Michelin v. Commission* (‘Michelin I’) [1983] ECR 3461. See also Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para. 38. Case T-219/99 *British Airways plc v Commission* [2003] ECR II- 5917, [2004] 4 CMLR 1008.

<sup>4</sup> *Michelin I*, loc. cit, para 7. Case 322/81, *Nederlandsche Banden-Industrie Michelin NV v. Commission*, [1983] ECR 3461, para.57.

<sup>5</sup> Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, para 182.

<sup>6</sup> *Michelin C-322/81*, loc. cit, para 73. Similarly, Case 77/77 *BP v. Commission* [1978] ECR 1513, para 32.

<sup>7</sup> Liza Lovdahl Gormsen, “Article 82 EC: Where are we coming from and where are we going to?”, *The Competition Law Review*, Volume 2, Issue 2, March 2006, pp.9-11.

<sup>8</sup> See criticism to ordoliberalism and the debate on “Protection of competitors or protection of competition?”: Kallaugher and Sher ‘Rebates Revisited: Anti-Competition Effects and Exclusionary Abuse Under Article 82’ (2004) 25 ECLR 263; Venit ‘Article 82: The Last Frontier– Fighting Fire with Fire’ (2005) 28 *Fordham International Law Journal* 1157; Ahlborn and Padilla ‘From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law’ in *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008, eds Ehlermann and Marquis); Bork, *The Antitrust Paradox* (The Free Press, 1993).

what dominant position is by not only referring to the market share<sup>9</sup>. We must take into consideration all the factors that may be concerned with market power and may function as indicators of market power. For this reason, there are three criteria set out in para 12 of the Commission's Guidance on the Commission's Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings ('Guidance on Article 102 Enforcement Priorities') which are relevant to any assessment of market power. Summarizing Para 12<sup>10</sup>, we must take into consideration any constraints imposed by the actual competitors, by the potential competitors and by the bargaining strength of the undertaking's customers. These criteria prove that market shares figures can not provide information concerning the influence of the potential competitors who are not already in the market and the bargaining strength of the consumers. As a result, the market shares figures can only function as only one indicator for the market power.

As far as the term of abuse is concerned, it must become clear that only the procession of a dominant position by an undertaking is not itself an offense but the abuse of this position infringes the Art.102 TFEU. The difficulty is that Art. 102 does not give a definition of the notion of abuse but only some examples of conducts that constitute an abuse and they are not an exhaustive list. The ECJ's rulings on the term abuse are guided by the definition of abuse given in the Case Hoffmann La Roche<sup>11</sup>. By reading this definition for the notion of abuse in Hoffmann La Roche it becomes clear that the Court connected the notion of abuse with the impact that a conduct have upon the market structure by hindering the degree of the existing competition or the growth of that competition<sup>12</sup>. For the first time in this case the notion of abuse is structured around the concept of "normal competition" which later is referred in the case law as "competition on the merits"<sup>13</sup>.

From the Hoffman La Roche definition of abuse results that the Court stresses as a fundamental part of Art 102 TFEU the special obligation that a company has "not to

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<sup>9</sup> Richard Whish and David Bailey, "Competition Law", Oxford University Press, Seventh Edition, 2012, pp. 179-181.

<sup>10</sup> Ibid, pp.42-45.

<sup>11</sup> Case 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities (1979), ECR 461, para. 91.

<sup>12</sup> Ibid, para 91.

<sup>13</sup> Case 62/86 Akzo Chemie BV v. Commission [1991] ECR I-3359, para 70; Case T-228/97 Irish Sugar v. Commission [1999] ECR II-2969, para 111; Case T-203/01 Michelin v. Commission, para 97.

allow its conduct to impair genuine undistorted competition”<sup>14</sup> and secondly the court looks at the potential rather than the actual effect of the conduct on the structure of the market. Third, the notion of abuse is an objective concept. This means that the concepts of abuse and dominance are independent requirements of Art. 102 TFEU and they do not depend on the subjective intentions of the dominant undertaking to weaken competition or to affect their competitors. As a result, the definition of the abuse in the Hoffmann La Roche can not be assumed as an all-encompassing definition of what means abuse. It introduces the notion of completion on the merits and the normal competition, the special responsibility of the dominant firm and the objective character of the abuse but does not give a specific answer how all these abstract notions are interpreted and connected together. This lead the court to examine and decide every cease on its merits and not always following the same strict line on its rulings<sup>15</sup>. This also stresses the necessity to give a precise definition of the scope and the meaning of the objective justifications under Article 102 TFEU because they act as a counterbalance to the expanding interpretation of the term abuse. As more clearly defined and precise is the term objective justification the more restricted will be the term abuse and the less aggressive the enforcement policy under the Article 102 TFEU<sup>16</sup>.

It is very important, in order to understand what type of behavior constitutes an abuse, to discern between the exploitative and exclusionary abuses. Article 102 does not define these two categories of abuses and only in case law we can see interpretative approaches of them. An exploitative abuse is where the dominant undertaking obtains a benefit by placing an unfair burden on its customers and consumers, which is only possible because there is no alternative undertakings to which they can turn for supply<sup>17</sup>. On the other hand, exclusionary abuses restrict competition by the foreclosure

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<sup>14</sup> Paul-John Loewenthal, 'The Defence of “Objective Justification” in the Application of Article 82 EC', *World Competition*, Volume 28, Issue 4, (2005), Kluwer Law International, p. 455.

<sup>15</sup> Richard Wish, loc. cit, pp.197-198.

<sup>16</sup> Vijver, Tjarda Desiderius Oscar van der, “Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond”, PhD Thesis, Europa Institute, Faculty of Law, Leiden University, 2014, p.52 and 111, <http://hdl.handle.net/1887/29593> (accessed 11 November 2015).

<sup>17</sup> Paul-John Loewenthal , op. cit , p.457.

of the competitors and by altering the structure and the dynamics of the market<sup>18</sup>. The understanding of this distinction is very important for the understanding of the notion of abuse under Art. 102 TFEU. In addition, the rationale to examine both types of abuses under Art. 102 TFEU lays on the absence of the requirement that there is an “object or effect” of distorting competition in the provision unlike Art. 101 TFEU. This would exclude the exploitative abuses from the application of 102 TFEU since they do not have as their object or effect the distortion of competition. Although most of the cases considered under Art.102 TFEU were dealt with exclusionary abuses, the drafters of the Treaty wanted also exploitative abuses to be prohibited and as a result the provision 102 TFEU will apply equally to exploitative abuses<sup>19</sup>.

### ***The use of ‘objective justification’ within Article 102 TFEU and the two-tier approach***

From the Hoffman La Roche Definition stand out two elements. A conduct is characterized as an abuse: 1) when it hinders the maintenance or growth of competition in the relevant market and 2) when it comes as a result of methods different than “normal competition” in products and services<sup>20</sup>. This is the famous two- tier approach in European Competition Law introduced by the Professor Ulmer, who applied a two-step approach in order to identify conducts that hinder competition and constitute an abuse under Art.102 TFEU. According to this theory we have an abuse when the conduct affects significantly the opportunities of the competitors in the market and when this conduct is anticompetitive and not competition on the merits<sup>21</sup>. A similar approach we also find in the American Law and specifically in the second Chapter of the Sherman Act. These two stages of the two-tier approach were formulated for exclusionary practices, which were dealt in most of the cases of EU Antitrust law. However, the second part of the two-tier analysis can be interpreted in a broader way in order to cover also the exploitative abuses.

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<sup>18</sup> Eleanor M. Fox, “What is the harm to Competition? Exclusionary Practices and Anti-Competitive Effect”, *Antitrust Law Journal*, Vol.70, 2012, p. 371.

<sup>19</sup> Paul-John Loewenthal, loc. cit, p.457.

<sup>20</sup> *Ibid*, p.458.

<sup>21</sup> Peter Ulmer, ‘Schranken zulässigen Wettbewerbs marktbeherrschender Unternehmen’, Nomos Verlagsgesellschaft, Baden-Baden, 1977.

The establishment of the above mentioned two-tier analysis in Art.102 TFEU can be proven misleading. The two tests of whether a conduct restricts competition and whether this conduct can be exempted from Art.102 TFEU resembles with the analysis applied on Art. 101 TFEU. The ECJ has referred in many of its early cases the term of objective justification and in its recent cases as a factor that must be taken into consideration and that justifies an abuse. What is made clear in recent case law is that we don't have any direct exemption from Article 102 TFEU but we can have an objective justification that legitimates a prima facie abuse<sup>22</sup>.

It is interesting to analyze that the ECJ held in Ahmed Saeed and Atlantic Container that Article 102 TFEU does not allow for any exemptions to the prohibition it lays down<sup>23</sup>. However, in my opinion these cases show that if an abuse is established, Art. 102 TFEU applies and there is no exemption. This does not exclude the possibility to have a prima facie abuse that can be justified by an objective justification. Thus the presence of an objective justification must be regarded as an element to take into account when examining that a particular conduct constitutes an abuse<sup>24</sup>. Under this approach the objective justification can be compared to the “efficiency defence” that Commission uses in the merger control<sup>25</sup>. As the objective justification, the “efficiency defence” functions as a factor that the Commission must take into consideration when it decides the appraisal of mergers<sup>26</sup>.

The above mentioned analysis also proves the differences between the two- tier approach followed in Article 101 and that followed in Art. 102 TFEU. If an agreement falls under 101 TFEU is prohibited, unless it is an exemption according to Article 101(3) TFEU. On the contrary, under Article 102 TFEU a conduct that prohibits

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<sup>22</sup> Vijver, Tjarda Desiderius Oscar van der, “Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond”, PhD Thesis, Europa Institute, Faculty of Law, Leiden University,2014, pp.107-109, <http://hdl.handle.net/1887/29593> (accessed 11 November 2015).

<sup>23</sup> Case 66/86 Ahmed Saeed [1989] ECR 803, para 32. See also the Opinion of AG Lenz in Ahmed Saeed, para 41. Lenz rejected an ‘exemption’, since ‘abuses cannot be approved’. See also Joined Cases T-191/98, T-212/98 to T-214/98 Atlantic Container Line and Others v Commission (‘TACA’) [2003] ECR II-3275, para 1112.

<sup>24</sup> Opinion of AG Jacobs, Case C-53/03, Synetairismos Farmakopeion Aitolias & Akarnanias v. Glaxosmithkline A EVE, European Court Reports [2005] ECR I-4609, para 72.

<sup>25</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004) OJ C31/5 para. 76-88.

<sup>26</sup> Damien Gerrard, Merger Control Policy: How to give Meaningful Consideration to Efficiency Claims, (2003) 40 CMLRev 1367, p.1369.

competition must be prohibited, unless there is an objective justification, which can be accepted by the ECJ. In my opinion, we must have an abuse in order to have a reason to examine the existence of an objective justification and on the contrary to AG Jacob's opinion that "the use of the word 'abuse' necessarily connotes a negative conclusion has been reached"<sup>27</sup>, the establishment of a prima facie abuse must be seen as a provisional stage during the examination of the Article 102 TFEU. If there is an objective justification under this relevant case, we won't have a violation of Article 102 TFEU and as a result the existence of a prima facie abuse does not necessarily mean that Article 102 is already violated. In addition, the case law proves that a bifurcation between the establishment of a prima facie abuse and the objective justification is needed for the effective examination of Article 102 TFEU<sup>28</sup>.

A very early example in case law that supports also this two-tier approach is the 1989 *Tournier* ruling. This case concerned the fees laid down by Sacem, the organization that held a monopoly on the management of copyrights in France. The ECJ held that if Sacem's tariffs were appreciably higher than those charged in other Member States, such a difference is 'indicative' of an abuse<sup>29</sup>. The Court also held that the undertaking in question has the burden to justify this difference by reference to "objective dissimilarities" between the situation in the specific Member State in contrast to other Member States. Another more recent example that confirms the importance of the two tier approach is *Microsoft Case*<sup>30</sup>, in which the Court held that must first be examined if there are 'special circumstances' that give rise to the duty of supply. If only there are, in that case has the examination of an objective justification a meaning and 'then [it must be considered] whether the justification put forward by Microsoft [...] might prevail over those exceptional circumstances. Also in the cases *British Airways* and *Post Denmark* we find also the acceptance by the ECJ of this bifurcation. As a result, we can notice the implementation of a very similar with Article 101 and 101(3)

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<sup>27</sup> Opinion of AG Jacobs, *op. cit.*

<sup>28</sup> See for more details in: Vijver, Tjarda Desiderius Oscar van der, "Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond", PhD Thesis, Europa Institute, Faculty of Law, Leiden University, pp.109-111; Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, para. 709; *British Airways* (ECJ), [2007] ECR I-2331, para. 106; Case C-209/10 *Post Denmark v. Konkurrenserådet* [2012] ECR I-000, para. 42; Case 66/86 *Ahmed Saeed* [1989] ECR 803, para. 32.

<sup>29</sup> Case 395/87 *Ministère Public v. Tournier* [1989] ECR 2521, para 38.

<sup>30</sup> Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, para 709.

approach concerning Article 102 TFEU. By taking into consideration this two-tier approach, in this thesis the term “plea” will be used instead of defence because in my opinion the existence of a prima facie abuse does not mean that Article 102 TFEU has been already violated<sup>31</sup>.

### ***The utility of studying the objective justifications under Article 102 TFEU***

Before starting the examination of the scope and types of the objective justifications, it is of high importance to understand how significantly the clear definition and application of objective justifications will affect the application of Article 102 TFEU and as a result the protection of competition and consumers’ welfare, the main objectives of this provision and of competition law in general.

The ECJ through its case law didn’t give an in-depth analysis of objective justifications. However, the Court restricts its analysis on the basis of each case analysis by taking into consideration the specific facts of each case and does not try to connect the repetitive factors and facts faced in case law in order to create a well-structured and clear definition of objective justifications. In my opinion, the formulation of a clear definition of the notion objective justification and a consistent plea can enhance the legal certainty<sup>32</sup>. Precisely, this will give more certainty to the companies and will also work as a compliance test which will help them to recognize and prevent from abusive conducts. In addition, it will help the Commission and the national Courts and

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<sup>31</sup> See e.g. in favour of this opinion Case C-95/04 P *British Airways v. Commission* [2007] ECR I-2331, para 106; Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, para 709; A. Albers- Llorens, ‘The Role of Objective Justification and Efficiencies in the Application of Article 82 EC’, *Common Market Law Review*, Volume 44, Issue 6, 2007, p. 1747; R. Nazzini, ‘The Wood Began to Move: An Essay on Consumer Welfare, Evidence and Burden of Proof in Article 82 Cases’, *European Law Review*, Vol. 31, no. 4, 2006, p. 518. However, Whish (Richard Whish and David Bailey, “Competition Law”, Oxford University Press, Seventh Edition, 2012, p. 210 et seq.) and Paul-John Loewenthal, (“The Defence of “Objective Justification” in the Application of Article 82 EC’, *World Competition* 28 , Issue 4, (2005) , Kluwer Law International, p. 455) refer to it as a defence.

<sup>32</sup> E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Alphen aan den Rijn: Kluwer Law International 2010), p. 245.

competition authorities to make a quality check resulting to the increase of clarity and legal coherence in abuse analysis<sup>33</sup>.

Concerning the national courts and competition authorities we must take into consideration that after the introduction of the Regulation 1/2003<sup>34</sup> the Commission encouraged the private enforcement and gave to the national courts and competition authorities a decisive role and competences in borderline cases. As a result, in search of clearer and more coherent standards for anticompetitive abuses, a more uniform application of Art.102 TFEU by national courts and authorities will be achieved. Following an effective examination approach, is proposed to first apply the above mentioned two-tier analysis in order to find, if the conduct of an undertaking constitutes an abuse. Secondly, the possible objective justifications that the undertaking can advance must be examined along with common requirements every plea must comply with. Third, we must examine the anticompetitive effect of the plea through the proportionality test<sup>35</sup>.

Another very important reason why to establish a clear definition of the term objective justifications is the relationship between Art.101 TFEU and Art.102 TFEU. A deeper study of the objective justifications and the understanding of their scope will serve also the need for more consistency in the application of Art. 101 and 102 TFEU. There are examples of unsynchronized application these articles concerning practices such as single branding, tying or rebates adopted by a dominant undertaking in which both Articles apply but only one of them was breached<sup>36</sup>. The contradictory outcome occurred at the beginning of the case law concerning objective justifications due to the fact that efficiency gains were not accepted under Article 102 TFEU. By the application of the above mentioned two-tier approach this problem seems to be faced satisfactorily. On the other hand, there are also writers that mention the danger of overlap between the two provisions by transferring the applied methodology of Art.101 to Art.102 TFEU<sup>37</sup>.

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<sup>33</sup> T.Eilmansberger, 'How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses', *Common Market Law Review*, Volume 42, pp. 129-177, 2005, p.131.

<sup>34</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1.

<sup>35</sup> Paul-John Loewenthal, *op. cit.*, p.456.

<sup>36</sup> Case T-65/98 (Van den Bergh Foods Ltd v Commission) [1998] ECR II-2641.

<sup>37</sup> Ekaterina Rousseva, "The concept of 'Objective Justification' of an abuse of a Dominant Position: Can it help to Modernise to Analysis under Article 82 EC?", *The Competition Law Review*, Volume 2, Issue 2, March 2006, p.32.

In my opinion, we must accept that Articles 101 and 102 apply under different market situations. In practice it is possible to be both Articles applicable concerning a specific conduct but we must also take into consideration that an exemption covered by Art.101 (3) TFEU may not constitute also an objective justification under Art.102 TFEU. In conclusion, it is crucial for legal certainty to clearly define the term objective justification under the provision of Article 102 TFEU and its objectives and not try to make it parallel at any case with Article 101 TFEU by transferring the methodology without critical examination of the similarity of the cases. They are two different provisions with their exceptional characteristics apart their similarities and they must be read and interpreted by respecting the legal consistency and certainty.

In conclusion, by trying to answer the question “what is an objective justification” and “why is it so important to study them” I would also add to the above analyzed arguments, that it is so important for the application of Art. 102 TFEU to achieve an outright distinction between illegal and permissible prima facie behaviour because in many cases this is the main problem that the Court must solve and the discerning line between the two situations is so thin. It is crucial to mention that by taking into consideration and examining all the factors connected to a specific dominant position case helps to avoid the mistakes of a strict formalistic approach of Art.102 TFEU and improves significantly the competition analysis in general.

## **The objective justifications under Article 102 TFEU**

The main aim of this chapter is to present the types of the objective justifications, their general requirements along with the special characteristics and particularities of each category. It must be underlined that the approach to examine and find a concrete definition of the term of objective justification is based on the case law of the ECJ. The rulings of the different cases function as a base in order to categorize and clarify the objectives of the ECJ and the Commission and the scope behind the term objective justification. Due to the fact that the ECJ follows the effect-based approach indicated also by the Treaty and Art.102 TFEU the method followed in this case is the inductive reasoning from the specific to general. The main difficulty is that all the cases concerning a specific category e.g. predatory must be carefully studied in order to entail all the factors in the general definition that will be finally formed. In addition, there is always the fact that one special factor or situation has not been entailed because it is impossible in an effect based approach to consider ex ante all the cases that may occur.

As a result it is very difficult to create a concrete definition of the term objective justification. On the other hand, there are some basic requirements arising from the ECJ's rulings that must be satisfied in any case that we have an objective justification of a prima facie abusive conduct. It was thought better to first elaborate on the special requirements that every objective justification must follow and then proceed with presentation of the different types of objective justifications enhanced by case law examples.

### ***Basic requirements of an objective justification***

A thorough survey of the case-law allow us to extract three basic requirements that must be satisfied in every case in order to have an objectively justified prima facie abusive conduct. In detail, an objective justification must pursue a legitimate aim, be reasonable and proportionate to the aim sought. These three requirements were very successfully summarized in the opinion of Advocate General Kirschner in the case of Tetra Park I<sup>38</sup>. Kirschner said that a common feature shared by the examples of abusive

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<sup>38</sup> Opinion of AG Kirschner, Case T-51/89, Tetra Pak Rausing SA v. Commission, (1990) ECR II-309.

conducts mentioned in Art.102 TFEU, is that the conduct they refer to “pursues the legitimate end of making profits through disproportionate means”<sup>39</sup>.

Firstly, to understand which aim is legitimate we must remember the main objectives of Article 102 TFEU. The provision 102 TFEU has as main aim the protection of consumer welfare and the competition process<sup>40</sup>. As a result, a dominant undertaking must be allowed to engage in methods of “normal competition” by innovating its products, making the production process more efficient, achieving the best quality at the lowest price etc. as long as these conducts serve the two objectives. In addition, conducts of a dominant undertaking that meet “competition on the merits” are also legitimate under Article 102 TFEU<sup>41</sup>. It’s not permitted for an undertaking to force its competitors out of the market by improving its products and by creating barrier to entries as a consequence of its actions, if the intent was not to foreclose its competitors. When the undertaking’s primary aim is to eliminate its rivals and to exploit the consumers (eliminating intent), its conduct cannot be objectively justified. It can be assumed that the Court must very carefully discern the cases, where there is an eliminatory intent or an actual or potential foreclosure in order to exclude any plea for an objective justification<sup>42</sup>.

Secondly, as far as the “reasonable” character of the conduct is concerned, it is an objective that must be satisfied in almost every case under the examination of ECJ. Its application is identified with the very famous from Article 30 TFEU case law “rule of reason”. The rule of reason was introduced by the American Law with the Sherman Act and it functions like the safety key of balance based on an each case evaluation by taking into considerations all the factors and the potential competitive harm. In other

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<sup>39</sup> Ibid, para. 67.

<sup>40</sup> T.Eilmansberger, ‘How to distinguish good from bad competition under Article 82EC: In search of clearer and more coherent standards for anti-competitive abuses’, *Common Market Law Review*, Volume 42, pp. 129-177,2005, p.132.

<sup>41</sup> T.Eilmansberger, loc. cit, p.140; Duncan Sinclair, “Abuse of Dominance at a Crossroads – Potential Effect, Object and Appreciability under Article 82”, *European Competition Law Review* 491 Volume 25, 2004, p.494; J.Vickers, “Abuse of Market Power”, *The Economic Journal*, Volume 115, Issue 504, pages F244–F261, June 2005, p.504,<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0297.2005.01004.x/abstract> (accessed 21 December 2015) ; Case T- 201/04 Microsoft v. EC Commission [2007] ECR II- 3601.

<sup>42</sup> Luc Gyselen, “Rebates: Competition on the Merits or Exclusionary Practice?”, 8<sup>th</sup> Annual EU Competition Law and Policy Workshop at the European University Institute in Florence on 6 June 2003, available on the European University Website at <http://www.iue.it/RSCAS/Research/Competition/2003%28papers%29.shtml>.

words the rule of reason means that it is necessary to balance the conduct's pro- and anti- competitive effects and where the latter outweigh the former, the conduct will be unlawful<sup>43</sup>. This is the vaguest of the three requirements and a very careful distinction between reasonable and unreasonable is necessary.

Thirdly, a conduct of a dominant undertaking can be objectively justified only when it is proportionate to the aim it seeks to achieve. The principle of proportionality is a core principle used by the ECJ especially in the cases where all the different factors must be balanced in order to decide the legitimacy or not of a conduct. This rule is applied in all free market cases and especially under Article 28 and 30 TFEU. As far as the application of proportionality rule under Article 102 TFEU is concerned, the conduct of the dominant undertaking must not limit competition more than necessary<sup>44</sup>. The aim of the undertaking company must be legitimate and suitable under the proportionality test.

The proportionality test entails many different elements that must be examined and satisfied. The first one, the legitimacy, means to show a wider benefit to the market and not only to the undertaking itself<sup>45</sup> and it is followed by the examination of suitability, which assesses whether the conduct is suitable to achieve the legitimate aim or not. The suitability works here as a first examination before the necessity test and when the conduct proves to be unsuitable there is no reason to approve also the legitimacy of the conduct. The necessity is a crucial requirement of the proportionality rule and the ECJ seems to put a lot of weight on it. According to the necessity test, a dominant firm must use the least anti-competitive means to reach its professed goal. From the United Brands Case the value of necessity test for the objective justifications under Article 102 TFEU became apparent. In the famous cases Tetra Park II, Microsoft, Post Denmark the ECJ gave much emphasis on the necessity test.

The proportionality test is only completed when we apply the proportionality test *stricto sensu*, under which we “assesses whether there is an equitable balance between the means to achieve a professed objective, and the (potential) impact on the

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<sup>43</sup> Richard Whish and David Bailey, “Competition Law”, Oxford University Press, Seventh Edition, 2012, pp.134-136.

<sup>44</sup> See Cases: United Brands Company and United Brands Continental BV v. Commission Case 27/76 [1978] ECR 207 and Tetra Pak Rausing SA ( Tetra Pak I) v. Commission T-51/89 [1990] ECR II-309.

<sup>45</sup> Case T-66/01 ICI v. Commission [2010] ECR II-2631, para 306.

market”<sup>46</sup>. The proportionality *stricto sensu* can be proven very important in a case of an objective justification because it balances the pro-competitive and anti-competitive effects and the general effect of the conduct on the market. All the above mentioned individual requirements must be satisfied successively because for example there is no reason to apply the proportionality test, if we don’t have a legitimate and reasonable aim. As a result, an objective justification can not be justified, unless all these special requirements are satisfied.

### *The types of the objective justifications*

Former Director General Lowe of the DG Competition at the 30<sup>th</sup> Annual Conference on International Antitrust Law and Policy stated that according to the European case-law we have three types of “objective justifications”<sup>47</sup>. Firstly, a dominant undertaking can argue that its conduct constitute “legitimate business behaviour” and therefore is objectively justified. Secondly, it can also argue that its behaviour serves a “legitimate public interest objective”. Finally, it can also use the argument that the conduct is objectively justified due to the “efficiency defence”, which means that the produced efficiency gains outweigh the anti-competitive effects of the conduct. It must also be mentioned that there are some writers that adopt a more narrow approach and accept only two categories of objective justifications based on the 2012 Post Denmark judgement<sup>48</sup>. More specifically in the Post Denmark the ECJ stated that “a dominant undertaking may demonstrate that its conduct is objectively necessary or has a beneficial effect on efficiency”<sup>49</sup>. This legal opinion is also supported by the

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<sup>46</sup> Vijver, Tjarda Desiderius Oscar van der, “Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond”, PhD Thesis, Europa Institute, Faculty of Law, Leiden University, 2014, p.147, <http://hdl.handle.net/1887/29593> (accessed 11 November 2015).

<sup>47</sup> Philip Lowe, DG Competition’s Review of the Policy on Abuse of Dominance, in: B.E. Hawk, (Ed.), *International Antitrust and Policy: Annual Proceedings of the Fordham Corporate Law Institute 2003*, Juris Publishing, New York, 2004, p.170-171.

<sup>48</sup> Case C-209/10 *Post Danmark v Konkurrencerådet*, op. cit, para. 41.

<sup>49</sup>Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331, para. 86; Case C-52/09 *TeliaSonera* [2011] ECR I-527, para. 76.

Commission's 2008 guidance paper<sup>50</sup>, which also accepts two categories. This thesis accept the first legal opinion and the above mentioned three categories will be more analyzed and clarified by a thorough and to the point presentation of the most decisive cases in the interpretation of the objective justifications under Art.102 TFEU.

### **Legitimate commercial conduct/ business behaviour**

The legitimate commercial conduct/ business behaviour recognized as an objective justification entails two different categories of expression. First, it encompasses the right that a dominant undertaking has to conduct under its commercial freedom and also competition on the merits. Secondly, we can also have a legitimate commercial conduct/business behaviour caused by an objective necessity.

Beginning with the case that a dominant undertaking substantiates its legitimate commercial conduct/business behaviour by bringing the argument of competition on the merits<sup>51</sup>, there is no reason why this conduct could be abusive under Article 102 TFEU. Concretely, judgements BP and Deutsche Telekom confirm that the dominant undertakings abuse their dominant position only in the case they have recourse to conduct other than competition on the merits<sup>52</sup>. One can consider competition on the merits under two different ways. On the one hand, one can follow an effect-based

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<sup>50</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, p. 7–20.

<sup>51</sup> Paul-John Loewenthal, 'The Defence of "Objective Justification" in the Application of Article 82 EC', *World Competition* 28 , Issue 4, (2005) ,Kluwer Law International, p. 459. There are some writers that do not accept competition on the merits as an objective justification under Article 102 TFEU but they do consider that a competition's distortion begins 'when the eliminatory conduct is not based on the merits'. See: T.Eilmansberger, 'How to distinguish good from bad competition under Article 82 EC : In search of clearer and more coherent standards for anti-competitive abuses', op. cit, p.133; H.W. Friederiszick and L. Gratzà, 'Dominant and Efficient- On the Relevance of Efficiencies in Abuse of Dominance Cases', in: OECD Policy Roundtables, *The Role of Efficiency Claims in Antitrust Proceedings 2012*, (DAF/COMP(2012)23), p.38.

<sup>52</sup> Case T- 65/89 BPB Industries and British Gypsum v Commission [1993] ECR II-389 para 94: 'Article [102] of the Treaty prohibits a dominant undertaking from strengthening its position by having recourse to means other than those falling within competition based on merits'. In other words, this means that a dominant undertaking can strengthen its position when her actions are competition on the merits. See also: Case C-280/08 P Deutsche Telekom v. Commission [2010] ECR I-9555, para. 177; AstraZeneca v. Commission [2012] ECR I-0000, para. 130.

analysis and if the conduct proves to be beneficial on efficiency, the conduct can be characterized ex-post competition on the merits<sup>53</sup>. On the other hand, there is the possibility that a firm competes in the boundaries of its commercial freedom and this is competition on the merits. In this second case, we don't need to follow an effect-based analysis but to follow a contextual interpretation of what a normal conduct under the commercial freedom of the company is. In many cases, the limit is the eliminating intent of a company to foreclose and damage its competitors. But only the fact that a dominant undertaking strengthen its position or achieved its dominance by competing on the merits or that some of its competitors left the market, it's not a legitimate reason to accuse that company of anti-competitive behaviour and an abuse of dominance.

There is also the case when a dominant undertaking display “the defence of legitimate commercial interests”<sup>54</sup>. Every dominant undertaking has the right emerging from its fundamental and important right of commercial freedom to take all the reasonable and proportionate steps in order to protect its commercial interests<sup>55</sup>. The Case United Brands gives the most appropriate in my opinion approach of this defence. Namely, the case states that “[t]he fact [that] an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked”<sup>56</sup>. On the other hand, there are some cases of the ECJ such as the British Airways<sup>57</sup>, the Solvay and even the BPB judgement, that narrow down the scope of the commercial freedom in a way they almost nullify the commercial freedom itself. Specifically, the General Court's ruling in the BPB Case narrows very much the justification that a dominant undertaking can use by referring to each commercial freedom and the Court stated that the conduct can not be justified if it was “intended or likely to affect the structure of a market”<sup>58</sup>. In my opinion, the restriction of the commercial freedom that also a dominant undertaking has, may even have as a result the distortion of competition, enhance anti-competitive effects and endanger the consumers' welfare. It's

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<sup>53</sup> Case C-52/09 TeliaSonera [2011] ECR I-527, para. 81; Case C-209/10 Post Danmark v Konkurrenserådet, op. cit, para.41.

<sup>54</sup> Case 27/26, United Brands Co and United Brands Continental BV v. Commission, [1978] ECR 207, para. 189.

<sup>55</sup> A. Albors-Llorens, ‘The Role of Objective Justification and Efficiencies in the Application of Article 82 EC’, op. cit, p. 1741.

<sup>56</sup> Case 27/76 United Brands v Commission [1978] ECR 207, para 189.

<sup>57</sup> British Airways v. Commission [2007] ECR I-2331 , para 243;

<sup>58</sup> Case T-65/89 BPB Industries and British Gypsum v. Commission [1993] ECR II-389 , para. 117-118. See, for a similarly stringent approach, Case T-203/01 Michelin v. Commission (‘Michelin II’) [2003] ECR II-4071, para. 239-241.

totally wrong to see every attempt of the dominant undertaking to protect its commercial position as an attempt to strengthen its dominance. Otherwise, the dominant firms will have no incentive for innovation and improvement of their products and prices resulting to negative effects on competition and on the functioning of the market.

As it was mentioned above, the objective justification of the legitimate business behaviour applies also in the case where a dominant undertaking is forced to act under such a way due to an objective necessity<sup>59</sup>. According to the Commission's guidance for the interpretation of Art.102 TFEU, the conduct of the undertaking must be "objectively justified" and this means that the conduct is justified by "factors external to the undertaking". Namely, the objective necessity can function as an objective justification in the case for example of force majeure or in a state of state compulsion in which the dominant undertaking didn't have any other chance to act differently<sup>60</sup>. The objective necessity justification is also accepted in the case that an undertaking acts in such a way due to technical or commercial considerations. In such a case there is big similarity with the first category of legitimate business behaviour as long as it also seems to emerge from the commercial freedom of the undertaking. However, it is of high importance to keep this distinction between the commercial freedom and the objective necessity, because in the first one the dominant undertaking has a degree of freedom, whereas in the case of objective necessity the dominant undertaking could not have act differently.

A characteristic example of objective necessity justification is the Telemarketing case<sup>61</sup>. The ECJ in this case told that in this case the refusal to supply can be justified by technical and commercial reasons concerning the nature of television. In addition, in a more recent case the ECJ follows the same ruling and specifically in Telekomunikacja Polska<sup>62</sup> the Court stated that the objective necessity justification is always based on external to the undertaking's conduct factors and must also comply with proportionality test. The objective necessity justification under the category of legitimate business behaviour was very often used in case-law concerning the refusal to deal. It worths mentioning that the ECJ accepted to grant the justification in case where the dominant

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<sup>59</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, para 28.

<sup>60</sup> Vijver, Tjarda Desiderius Oscar van der, op. cit, p.118.

<sup>61</sup> Case 311/84 CBEM v. CLT and IPB ('Télémarting') [1985] ECR 3261, para 26-27.

<sup>62</sup> COMP/39,525, Telekomunikacja Polska 22 June 2011, para. 874, on appeal Case T-486/11, ruling 17 December 2015, judgement pending.

undertaking reserved an ancillary activity due to commercial and technical reasons on a neighbouring market on which it had a dominant position<sup>63</sup>. Furthermore, in the famous case of the port of Rødby<sup>64</sup> the Commission discussed that there could be also natural limitations and concluded that in that case the reservation of an ancillary service(port facility) by a sole undertaking and the refusal to grant access to other competitors can not be accepted without any objective justification or technical or commercial constraints.

It is also interesting to entail in this analysis some examples of the cases where we have a state's intervention that does not allow the dominant undertaking to act by exercising its commercial freedom but forces it to a specific conduct. First, this is obvious in a case of force majeure in which the rationale is that an abuse demands the autonomous conduct of the undertaking and the freedom of choice. The UK Aberdeen Journals<sup>65</sup> Case follows exactly this rationale. Namely, in the UK the Office of Fair Trading (OFT) examined below average cost prices in the advertisement space in journals. The UK Aberdeen Journals was examined for below the average variable cost prices but in this case the OFT accepted the objective justification that the Aberdeen Journals that period had extremely high costs due to a threat of industrial action and there was no intend to use predatory pricing for damaging its competitors.

A crucial question that must be also examined is what happens in the case where the objective necessity emerges from state's compulsion? The examination must start by answering what degree of state's compulsion the undertaking faces and how leeway has itself. Article 102 TFEU requires that undertakings make the most of their leeway in order to prevent a restriction of competition<sup>66</sup>. The plea will not succeed, if the conduct is simply supported by the national law. On the contrary, the situation is different when

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<sup>63</sup> Case 18/88 RTT v. GB-Inno-BM [1991] ECR I-5941, para 18.

<sup>64</sup> Commission decision 94/119/EC, Port of Rødby, OJ [1994] L 55/52.

<sup>65</sup> See the OFT decision of 25 September 2002, Aberdeen Journals (remitted case), Case CA98/14/2002, upheld by the CAT in Aberdeen Journals v. Director General of Fair Trading [2003] CAT 11.

<sup>66</sup> Vijver, Tjarda Desiderius Oscar van der, "Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond", op. cit, p.120. Case T-271/03 Deutsche Telekom v. Commission [2008] ECR II-477, para 107 and 121; Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck v. Commission [1980] ECR 3125, para. 130-131; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 Stichting Sigarettenindustrie and Others v Commission [1985] ECR 3831, paragraphs 27-29; Joined Cases C-359/95 P and C-379/95 P Commission and France v. Ladbrooke Racing [1997] ECR I-6265, para. 34-35; Case T-513/93 Consiglio nazionale degli spedizionieri doganali v. Commission ECR II-1810, para 61.

there are national measures that don't allow an autonomous decision and conduct and especially in the case where these measures are not obviously infringing the European law<sup>67</sup>. In the case where the national law is incompatible with the EU law the undertaking must not implement it as long as the EU primary law is superior to national law. In *Ladbroke* case the Court stated that national law does not apply if it impedes free competition completely<sup>68</sup>. There are two very important arguments that support this ruling of the court. Firstly, the Article 102 TFEU forbids as abusive only conducts that come from the dominant undertaking and therefore it does not apply when the conduct is imposed by the state. Secondly, Article 102 TFEU regulates conducts and not measures taken by the state<sup>69</sup>. Article 106 TFEU is the one that regulates measures and specifically exclusionary rights given to undertakings by the state. To sum up, the relatively old case of *BP*<sup>70</sup> deserves reading because it is very enlightening for understanding all these distinction of legitimate business behaviour and its boundaries. The ECJ said that the refusal of BP Petroleum to supply a Deutsch Independent central buying organization, ABG, was objectively justified on the basis of lack of capacity to continue to supply.

## **Efficiencies**

The efficiency plea was assumed very controversial and debatable between scholars, as long as there is no explicit exception in the provision 102 TFEU and. even the ECJ seemed not to accept it as an objective justification in the early case-law. The efficiencies found prosperous ground to be accepted as objective justifications on the Commission's 2009 Guidance Paper<sup>71</sup>. That happened because with this Guidance the

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<sup>67</sup> Case C-280/08 P *Deutsche Telekom v. Commission* [2010] ECR I-9555, para 81; E. Blomme, 'State Action as a Defence Against 81 and 82 EC', *World Competition*, Volume 30, Issue 2, pp. 243–261, Kluwer Law International, 2007, p. 243; Whish, *op. cit.*, p. 135.

<sup>68</sup> *Ladbroke Racing*, *op. cit.*, para. 33-34.

<sup>69</sup> See e.g. Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* [2013] ECLI:EU:C:2013:81, para 54.

<sup>70</sup> *BP v The Commission*, Case 77/77 [1978] ECR 1513.

<sup>71</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, para 28. For a view supporting the effects- based approach, see e.g. Competition Law Forum Article 82 Review Group, 'The Reform of Article 82:

Commission chooses to follow an effects-based approach instead of the former form-based approach. The Guidance supports an economic analysis concerning abuse cases and it complies with the basis of efficiency plea which is the link between economic efficiency and consumer's welfare<sup>72</sup>. In addition, the Guidance Paper entails the efficiency defence in its body and also provides for four cumulative requirements that must be fulfilled in order to accept the plea<sup>73</sup>.

In early cases of the ECJ such as the Hoffmann-La Roche<sup>74</sup>, the Michelin I<sup>75</sup> and Michelin II<sup>76</sup> there is the first degree of hope that the efficiency plea will be recognized as an objective justification by the Court. The British Airways Case shows for the first time with more certainty that we can apply an efficiency balancing test under Article 102 TFEU<sup>77</sup>. In this case the Court confirmed for the first time that there is an efficiency plea and this pro efficiency ruling is said to have been achieved after a long debate between the judges<sup>78</sup>. Namely, in British Airways the Court stated that even where there is an 'exclusionary effect', such an effect 'may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer'<sup>79</sup>. This ruling showed that if a dominant undertaking prevails in the market against its competitors due to its superior efficiency, this is not itself an abusive conduct and if all the legal requirements regarding efficiency are fulfilled, the conduct is objectively justified. It must also be mentioned that this case was criticized<sup>80</sup> for not complying precisely with the Guidance because British airways Case requires that the efficiencies "also benefit

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Recommendations on Key Policy Objectives', (2005) European Competition Journal 179, p.180-182.

<sup>72</sup> Vijver, Tjarda Desiderius Oscar van der, "Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond", Europa Institute, Faculty of Law, Leiden University, p.126.

<sup>73</sup> Guidance Paper, loc. cit, para. 30.

<sup>74</sup> Case 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities (1979), ECR 461, para 90.

<sup>75</sup> Case 322/81 Michelin v. Commission ('Michelin I') [1983] ECR 3461. para. 85.

<sup>76</sup> Case T-203/01 Michelin v. Commission ('Michelin II') [2003] ECR II-4071, para 59.

<sup>77</sup> Alison Jones and Brenda Sufrin, EU Competition Law- Text Cases and Materials, Oxford University Press, Fifth Edition, 2014, p. 390; British Airways v. Commission [2007] ECR I-2331, para 69.

<sup>78</sup> See the joined Cases: T-191/98, T-212/98 to T-214/98 Atlantic Container Line and Others v. Commission [2003] ECR II-3275, para 1112. In these cases only months earlier the Court stated that no efficiency plea can be accepted as an objective justification.

<sup>79</sup> British Airways v. Commission [2007] ECR I-2331, para 69.

<sup>80</sup> R.Nazzini, The Foundations of European Union Competition Law, The Objectives and Principles of Article 102 TFEU, Oxford University Press, 2011, pp.306-309.

consumers”, whereas the Guidance requires the net effect on consumer welfare must be at least neutral.

The conditions regarding efficiencies laid down in Paragraph 30 of the Commission’s Guidance were more satisfactory adopted by the Post Denmark case. This case held that: ‘it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition’<sup>81</sup>. This ruling sets a more precise legal framework in which the objective justification of efficiencies can apply.

This case also shows that we must apply a balancing test between the negative and positive effects of the conduct and not only on consumers’ welfare but on the competition process broadly. This approach resembles the application of Article 101(3) which also talks about the benefit of consumer and efficiency. For one more time the need for consistency with Article 101(3) leads this defence to be built on the model of Article 101(3) TFEU. Although, this approach may enhance consistency between Articles 101 and 102 TFEU, there are arguments that claim that this is a clear transposition of Article 101(3) TFEU in Article 102 TFEU and that a provision designed purely for negotiated agreements between undertakings is not suitable for ex-post application to the unilateral conduct of dominant undertakings where the theory of harm is far more difficult to prove<sup>82</sup>. In my opinion, the problem is not to accept that we must take efficiencies into account, when we examine a prima facie abuse case under Article 102 TFEU, because it is not only demanded by the need for consistency between the Articles 101 and 102 TFEU, but also by the paragraph 30 of the Commission’s Guidance Paper and the general effect-based analysis followed by the ECJ and the Commission. On the contrary, the main problem is to define what efficiencies are and

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<sup>81</sup> Case C-209/10 *Post Denmark v. Konkurrencerådet* [2012] ECR I-000, para 42.

<sup>82</sup> Alison Jones and Brenda Sufrin, *EU Competition Law- Text Cases and Materials*, Oxford University Press, Fifth Edition, 2014, p. 391; R. Nazzini, *The Foundations of European Union Competition Law, The Objectives and Principles of Article 102 TFEU*, Oxford University Press, 2011, pp.304-309; D.Walbroeck, “The Assessment of Efficiencies under Article 102 TFEU and the Commission’s Guidance Paper” in Etro and Kokkoris (eds.), *Competition Law and the Enforcement of Article 102*, Oxford University Press, 2010, Chap.3, p.115.

which precise requirements must be fulfilled and at what stage of our analysis they must be taken into account.

The difficulty with efficiency plea is that it is a manifold term that includes different perspectives. To illustrate these perspectives, we can have allocative efficiency (output maximization), productive efficiency (cost maximization) and dynamic efficiency (innovation maximization). In order to perceive correctly these terms and to make the right choice when a case is examined, there is the need of understanding their objectives and to take into consideration all the factors by balancing and by examining whether the conduct has a net beneficial effect on the efficiency<sup>83</sup>. In practice, an abusive conduct almost always entails a loss in allocative efficiency and arises the question whether this loss can be covered by productive and dynamic efficiencies<sup>84</sup>. For example, in the case *British Airways* the ECJ examined the productive efficiencies by trying to see ways that minimize the costs<sup>85</sup>. On the other hand, in *Microsoft Case*<sup>86</sup> the ECJ examined the incentives for innovation and as a result the dynamic efficiencies. By a systematic examination of the relevant case law it comes out that in the cases where we face the refusal to deal that allocative efficiency is reduced as the output is reduced and the prices become higher but simultaneously we gain in dynamic efficiencies, because the incentive to invest is boosted. Characteristic examples we can find in case that we have the refusal to give the license of an IP right<sup>87</sup>. Namely, in the leading case *Magill* the ECJ established that three conditions should be met in order for a refusal to license to be abusive, one of which is the absence of objective justification for the refusal<sup>88</sup>. The following also famous cases: *IMS* and *Microsoft* made more concrete all these conditions concerning objective justifications based on the efficiency plea.

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<sup>83</sup> Vijver, Tjarda Desiderius Oscar van der, “Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond”, PhD Thesis, Europa Institute, Faculty of Law, Leiden University, 2014, p.147, <http://hdl.handle.net/1887/29593> (accessed 11 November 2015), p.128-129.

<sup>84</sup> *Ibid.* p.129.

<sup>85</sup> *British Airways* (General Court), *op. cit.*, para. 267 and 284-285.

<sup>86</sup> Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3601, para 709.

<sup>87</sup> ECJ, *Joined Cases C-241/91 P and C-242/91 P, Radio Telefis Eireann & Independent Television Publication Limited v EC Commission* (“*Magill*”), 6 April 1995, [1995] ECR I-743 ; ECJ, *Case C-481/01, IMS Health v EC Commission*, 11 April 2002, [2001] ECR I-5039; CFI, *Case T-201/04, Microsoft Corp. v EC Commission*, 17 September 2007, ECR [2007] II-3601, (copyright protection for interoperability information).

<sup>88</sup> Ekaterina Rousseva, “The concept of ‘Objective Justification’ of an abuse of a Dominant Position: Can it help to Modernise to Analysis under Article 82 EC?”, *The Competition Law Review*, Volume 2, Issue 2, March 2006, p.37.

The examination of the efficiency may seem simple and the process quite precise, but on the other side it entails many interpretative difficulties even in defining which category of efficiency we have<sup>89</sup>. We must take into consideration that there is a kind of conflict of interests between the different perspectives of efficiencies. To examine it more precisely, the productive efficiencies allow a more stable and predictable process of examination and as a result there are more easily quantified. On the other hand, the dynamics efficiencies due to their character always entail uncertain benefits in the future<sup>90</sup>. As a result, if we want a system based on reliable and quantified effects, only productive efficiencies should be accepted as an objective justification under Art.102 TFEU. However, it must not be ignored that the incentives of innovation are proven to be more beneficial to consumers' welfare. Commission in case law seems to encourage also dynamic efficiencies by showing that is a mistake to be excluded from Art.102 TFEU and there must apply a well-organized balancing test. This balancing test must be based both on "magnitude" of the effects and on the "likelihood" with which they are to arise<sup>91</sup>. This approach is not only the very best solution in those situations but it also underlines the main reason why efficiencies must be included in the objective justifications of Art.102 TFEU. Because in all these cases the conduct of the dominant undertaking has some anti-competitive effects that are finally legitimized by the fact that they are weighed by the pro-competitive effects and as a result don't endanger consumers' welfare.<sup>92</sup>

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<sup>89</sup> K. Tosza, 'Efficiencies in Art. 82 EU: An illusionary defence?' (2009) *Concurrences: Law & Economics* 35, p. 35-36.

<sup>90</sup> *Ibid.*

<sup>91</sup> Vijver, Tjarda Desiderius Oscar van der, "Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond", PhD Thesis, Europa Institute, Faculty of Law, Leiden University, 2014, p.130.

<sup>92</sup> Ekaterina Rousseva, "The concept of 'Objective Justification' of an abuse of a Dominant Position: Can it help to Modernise to Analysis under Article 82 EC?", *The Competition Law Review*, Volume 2, Issue 2, March 2006, p. 380-387. Rousseva argued that efficiency plea shall not be part of the objective justifications under Article 102 TFEU. She focused her argumentation on the question she raised on the subject: "Why a dominant firm must justify its efficient behaviour? Why is such a conduct not legitimate in and of itself?".

## **Public Interest**

The defence that a dominant undertaking is pursuing a “legitimate public interest objective” is the third category of objective justifications under Article 102 TFEU. However, in practice and especially at the beginning of the relevant case law seems that both the Commission and the ECJ are very reluctant to approve this justification following strictly their effect-based analysis<sup>93</sup>. The public interest defence should be taken into consideration every time a prima facie abuse is examined under Article 102 TFEU. However, the skeptics against this approach usually state that sometimes public interest is concerned with non-economic values. In my opinion, the distinction between pure economic and non-economic values regarding public interest is very difficult and sometimes not feasible and therefore can be misleading in this case and lead us to wrong results.

Specifically, in theory there are cases where we evaluate values that seem non-economic, under economic terms<sup>94</sup>. For example, if a company offers a service that have some negatives externalities to the environment but it is very important for the society of the consumers, we would balance the benefits of this conduct and the effect on the environment. If the benefits outweigh the environmental negative externalities by enhancing consumer welfare, we will approve the conduct of this undertaking by enforcing additional protecting measures for the environment in order to minimize the degree of pollution. In that case, we resort to the application of efficiency balancing test that was analyzed above and with this cost-benefit analysis we evaluate under economic terms values that are at the beginning assumed non-economic. The main problem here is not the economic or non-economic character of these values, because in theory is most of the times possible to resort to this efficiency balancing test, but the main difficulty is to calculate in practice precisely these values and their effects. The problem can become very clear with an example concerning again the environment. A survey that examines the harm of a conduct on the environment in order to be accurate and complete must also examine the effects of this conduct and the impact on the future generations. But

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<sup>93</sup> Paul-John Loewenthal, 'The Defence of “Objective Justification” in the Application of Article 82 EC', *World Competition* 28, Issue 4, (2005), Kluwer Law International, p.464.

<sup>94</sup> Vijver, Tjarda Desiderius Oscar van der, “Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond”, Europa Institute, Faculty of Law, Leiden University, pp.133-134.

can we calculate with accuracy this future harm?<sup>95</sup> There are no sufficient data provided for an all-inclusive balancing in this case<sup>96</sup>. As a result, we can efficiently evaluate all the present data but we cannot be sure about the future data and our examination may be proved inaccurate in the future.

Another significant argument against the approval of public interests as objective justifications under Article 102 TFEU is the existence of values which, from an ethical point of view, we do not want to translate them into economic terms. This may be the strongest argument of those who don't agree with the approval of the public interests as objective justifications. And in addition, they state that we can not measure everything on the basis of how beneficial is for the welfare and they debate also on the nature of the wealth and if it constitutes a value<sup>97</sup>. Even if we accept this fact that exist also values with an ethical content and they can not all have as an objective the welfare<sup>98</sup>, in my opinion, we should not forbid dominant undertakings to bring public interests as an objective justification and Article 102 TFEU should entail these considerations for examination in a case of prima facie abuse, even if the basic objective of competition is not public interest. I would analyze thoroughly my arguments in order to prove this necessity.

Firstly, The ECJ has consistently held that the competition rules must be interpreted in light of the principles and objectives of the EU<sup>99</sup>. Indeed, the ECJ stated that “the competition rules are essential for the accomplishment of the tasks entrusted to the EU”<sup>100</sup>. These tasks are laid down in Article 3(3) TEU and Article 9 TFEU and they

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<sup>95</sup> C. Townley, ‘Inter-Generational Impacts in Competition Analysis: remembering those not yet born’, *European Competition Law Review*, Volume 11, 2011, p. 580.

<sup>96</sup> Vijver, Tjarda Desiderius Oscar van der, loc. cit. p.133.

<sup>97</sup> C. Townley, ‘Is Anything more Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community lawyer’, (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 345; R.M. Dworking, ‘Is Wealth A Value?’, (1980) 9 *J. Legal Stud.* 191; R.A. Posner, ‘The Value of Wealth: A Comment on Dworkin and Kronman’, (1980) 9 *J. Legal Stud.* 243.

<sup>98</sup> Kingston, Suzanne Elizabeth Joy, ‘The role of environmental protection in EC competition law and policy’, PhD Thesis, p.211, <https://openaccess.leidenuniv.nl/handle/1887/13497> (accessed 21 November 2015). Faculty of Law, Leiden University, 2009. Kingston and other commentators don't agree that we must have a separate category of objective justification for the public interest. They state that we must include the public interest justification under the objective necessity justification.

<sup>99</sup> See e.g. Case 6/72 *Continental Can v. Commission* [1973] ECR 215, para 25. See also Kingston, loc. cit, p.209-210.

<sup>100</sup> Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 36.

go beyond consumers' welfare and entail objectives that concern public interests. Article 9 TFEU provides that, in defining and implementing its policies and activities, the EU should take into account requirements linked for example to "the promotion of a high level of employment, the guarantee of adequate social protection, and a high level of protection of human health". Article 3(3) TEU provides that the EU shall work for, inter alia, 'sustainable development', 'social progress' and 'a high level of protection and improvement of the quality of the environment'. All these objectives influence the application of competition and the recent and famous case *Preussen Elektra*<sup>101</sup> proves this influence and the changing approach of ECJ on the subject. In *Preussen Elektra* the ECJ found that these restrictions can be justified by the aim of the regime which is the environmental protection and the specific characteristics of the EU electricity market at that time. Specifically, the Court stated that the increased use of renewables of energy sources is a central part of the EU's commitment to tackle climate change. In addition, this is also beneficial for the environment. The message conveyed by this judgment is clear: the Court was, is and probably will remain deferential towards the protection of public interests which are important for the EU itself as well, in particular as regards combatting climate change. Another recent case, the *Kanal 5* follows the same approach. The ECJ held that an objective justification within the meaning of Art. 102 TFEU 'may arise, in particular, from the task and method of financing public service undertakings'<sup>102</sup>.

Secondly, another reason that proves that we must entail public interests in the examination of a prima facie abuse under Article 102 TFEU is the need for a harmonized interpretation of the Articles 101 and 102 TFEU. In order to secure coherence and legal certainty in European competition we must take into consideration the connections between the two different provisions. As a result, public interests are taken into consideration in Article 101 TFEU and it will be a harm to the coherence and legal certainty if we exclude them by Article 102 TFEU. Thirdly, in the two well-known Article 102 cases *Hilti* and *Tetra Park*<sup>103</sup> the ECJ examined a justification plea that an exclusionary practice was necessary for the protection of public health and safety, which constitute both public interests. The Court rejected this plea because in this case

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<sup>101</sup> Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para 76.

<sup>102</sup> Case C-52/07 *Kanal 5 and TV 4 v STIM* [2008] ECR I-9275, para. 47.

<sup>103</sup> Case T-30/89 *Hilti v Commission* [1990] ECR II-163, para. 102 et seq ; Case T-83/91 *Tetra Pak v. Commission* ('*Tetra Pak II*') [1994] ECR II-755, para. 115.

public health was already protected by a government body and by various regulation. However, this rejection by the Court does not mean a rejection of public interests as a matter of law under Article 102 TFEU but was based on the facts and on the contrary this case constitutes the base for the approval of public interests as objective justification for Article 102 TFEU. The above briefly debate on the approval of public interests remains still open and very relevant due to the new environmental policy measures that raised many legal matters concerning competition law and regulatory policy. This subject will be briefly analyzed in the following chapter with emphasis on the application of Article 102 and its objective justifications.

## **Environmental Protection and Competition Law**

### ***Relevance of environmental protection considerations to the notion of objective justification under Article 102 TFEU***

The introduction of new environmental policy has raised many legal problems in the competition law field because almost all of the times the environmental policy is contradictory to competition policy. This thesis will examine the interrelation between the requirements of the Article 102 TFEU concerning especially its objective justifications and the environmental protection factors. The main question and problem that occurs in this case is whether the protection of the environment should function as an objective justification under Article 102 TFEU, under which conditions and generally at what extent can regulatory policy intervene and limit competition law. The environmental protection factor as an objective justification is of course a public interest and the examination of its approval under Article 102 TFEU will be based on the third category of objective justifications, i.e. the public interest objective, which was in Chapter 2 analysed.

As it was in the first chapter well analyzed, the ECJ and the Commission especially after the publication of the Commission's Guidance Paper follow an effect-based analysis for the examination of Article 102 TFEU by taking into consideration in each case all the economics factors. The environmental protection which is a non-economic value can be in theory interpreted under economic terms as it was argued in Chapter 2 in more details. Namely, if a dominant undertaking is engaged in a restrictive conduct aimed at improving environmental protection, this is (or should be) relevant to whether such conduct qualifies as an exclusionary abuse<sup>104</sup>. According to the efficiency balancing test ( in Chapter 2 analysed) the implications of a dominant undertaking's behaviour must be taken into account at an economic level in assessing the impact of this prima facie abusive conduct on the efficiency and on consumer welfare. The restrictive effects on competition must be taken into account in the balancing of pro-competitive and anti-competitive effects of the environmental protective conduct. In addition, as in every case of objective justification, all the general requirements of

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<sup>104</sup> Suzanne Elizabeth Joy Kingston, "The Role of Environmental Protection in EC Competition Law and Policy", Doctoral Thesis, Faculty of Law, Leiden University, 2009-02-17, p.210.

objective justifications must apply also here and especially the proportionality test. As a result, if we assume that in a market case we have lower prices concerning an environmental friendly product with the objective of environment's protection and this is the suitable way and there is no less restrictive way of achieving this aim, this conduct must not be seen as abusive behaviour and infringement under Article 102 TFEU. Under this approach, we accept the environmental protection as an objective justification under Article 102 TFEU and we apply the efficiencies balancing test complying with the effect-based analysis and respecting the proportionality principle.

There are two very recent cases that faced the interrelation between the environmental policies. One of them is the *Deutsches System Deutschland DSD* case<sup>105</sup>. Namely, the DSD charged a fee for all the packaging bearing its "Green Dot" logo even in the cases that it was clear that the customer does not use DSD packaging and its service<sup>106</sup>. That case is very important because it does not only show that the Court takes into consideration the environmental factors during the examination of an objective justification under Article 102 TFEU but it is mainly important for showing that the successful promotion of an environmental policy, the relevant each time environmental sector must be competitive, efficient and innovative<sup>107</sup>. In case *COBAT Italy* had granted the exclusive right (application of Article 106 (2) TFEU) within Italy to a consortium to collect, stock and sell batteries and other waste containing lead, with the goal of achieving a high collection rate. Certain of COBAT's activities, however, went beyond what was necessary to fulfil its task by infringing again the proportionality test.

It is also very interesting to imagine based on the above analysed approach how the ECJ will examine the environmental considerations under the different categories of

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<sup>105</sup> Case T-289/01, *Der Grüne Punkt-Duales System Deutschland GmbH v. Commission* [2007] ECR II-1691, aff'd Case C-385/07 P, *Der Grüne Punkt- Duales System Deutschland GmbH v. Commission* [2009] ECR I-6155. The Commission stated in *DSD* [2001] OJL166/1, para. 111 that an infringement of Article 102 TFEU exists where the price charged for a service is "clearly disproportionate to the cost of supplying it". In this case the conduct of the DSD was characterized as abusive under Article 102 TFEU because it infringed the principle of proportionality.

<sup>106</sup> See for a thorough analysis : Suzanne Elizabeth Joy Kingston, "The Role of Environmental Protection in EC Competition Law and Policy", Doctoral Thesis, Faculty of Law, Leiden University, 2009-02-17, p.227-229; Alison Jones and Brenda Sufrin, *EU Competition Law-Text Cases and Materials*, Oxford University Press, Fifth Edition, 2014, p. 580 and 582.

<sup>107</sup> Suzanne Elizabeth Joy Kingston, *op. cit*, p.249.

abuses. For example, if we take the case of refusal to supply or to grant access to an essential facility, this refusal to an existing customer without an objective justification will be abusive<sup>108</sup>. For instance, in this situation the environmental constraints may be taken into account in examining whether access to the essential facility is indispensable to the requestor's business. In the judgment in Bronner case, the ECJ held that the test of indispensability will depend upon the presence of "technical, legal or even economic obstacles" to the creation of a similar facility by the requestor, if necessary in conjunction with other undertakings<sup>109</sup>. One could here claim that the application of environmental regulations might, for instance, create legal obstacles preventing the building of an additional airport or railway line on a given route. In addition, a dominant undertaking could legitimately refuse to supply, or to grant access to an essential facility, to an undertaking whose practices are objectively extremely environmentally dangerous. Alternatively, a dominant undertaking might refuse to grant access to an essential facility to an existing customer concerning the supply of a certain resource, because of the risk of exhausting or overusing this resource. This would be claimed based on the existing notion of objective justification inherent in judgments such as Commercial Solvents and Bronner<sup>110</sup>. These examples are very usual and important especially in the energy sector where there are essential facilities and the need for access to the network (bottleneck cases).

### ***Environmental and competition policy, do they work in the same way?***

The environmental constraints that a dominant undertaking can take and their approval or not under the Article 102 TFEU raise the very important issue of the interrelation generally between environmental policy and the European competition law. As it was above argued the environmental considerations must be entailed in the examination of objective justifications under Article 102 TFEU, but in order to have a better understanding of this legal issue it is necessary to examine the connection of environmental regulation and competition law in general and put some limits on this interconnection in order to avoid the distortion of competition by the environmental

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<sup>108</sup> Joined Cases 6 and 7/73 Commercial Solvents [1974] ECR 223.

<sup>109</sup> Case C-7/97 Bronner [1998] ECR I-7791, para.44.

<sup>110</sup> Ibid.

regulation. And, further, Art. 11 TFEU sets out the integration of environmental protection into the European Community's policies, including competition policy<sup>111</sup>.

The legal basis for the environmental protection can be found in the constitutional European law, in the Treaties and the right of the protection of the environment is also included in the Charter of Fundamental Rights (Art. 37), which is legally binding (Art. 6 TEU). Specifically, in Article 7 TFEU is laid down the obligation of the European Union (EU) to ensure the consistency between its policies and activities, taking all of its objectives into account. Furthermore, the EU shall work for the sustainable development of Europe based on balanced economic growth, aiming at a high level of protection and improvement of the quality of the environment (Art. 3.3 TEU). All these provisions constitute European constitutional law and they are mandatory. As a result they prove the legitimacy of the environmental objectives and the obligation to be taken into consideration not only under Article 102 TFEU but also in competition law. On the other hand, we must not forget that the internal market is one of the core objectives in EU law (Art.3.3 TFEU) and the fulfillment of the internal market cannot be achieved without competition law (Art. 3(1) b)<sup>112</sup>. Consequently, as long as there is no supremacy between policies, it is crucial to answer the question at which extent is acceptable for the environmental policy to intervene in competition law and to distort it.<sup>113</sup>

The environmental regulation is most of the times contradictory to competition law and the application of it put constraints on free competition. For instance, if we examine the energy markets where the protection of the environment plays an important role we will find many "infringements" of competition, which sometimes are considered legitimate under the objective of environmental protection. This case opens a discussion on the issue whether the clearly discriminating practices of the subsidy system concerning the companies that produce renewable energy could be justified based on legal grounds and by the objective of environmental protection. These special regimes for renewables can be explained by the high cost of investing in renewables and sustaining the energy infrastructure and by the necessity of a reliable planning.

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<sup>111</sup> See for a more detailed analysis: Jose' Carlos Laguna de Paz, "Protecting the Environment without Distorting Competition", *Journal of European Competition Law & Practice*, Vol. 3, No. 3, 2012, p.248.

<sup>112</sup> Case C-487/06 P, *British Aggregates Association v Commission* (British Aggregates Association II [2008] ECR II- 2789, para. 92.

<sup>113</sup> Suzanne Elizabeth Joy Kingston, *op. cit.*, p. 248 et seq.

However, these national subsidy regimes have an effect on intra-EU trade, constitute a violation of competition law and have consequences on cross-border grid load due to national feed-in for renewables and on capacity markets for conventional energy sources. In addition, the environmental state aid also distorts competition in the market by favouring specific companies or group of companies and make it very difficult for the competitors. It is also important to mention that the exclusive rights granted by the state to companies for providing environmental activities (e.g. waste recovery) have a very strong anti-competitive effect on the relevant market.

The above mentioned examples show that the environmental regulation has in its core these so called market-based instruments in order to achieve the protection of the environment. These measures, either they have the form of state aid, special levies, tax or feed-in tariffs, aim to correct the market failures<sup>114</sup> in a cost-effective way by influencing the prices or by quantitative limits on certain activities (emission trading)<sup>115</sup>. This means distortion of competition by favouring some companies in the detriment of others<sup>116</sup>. In addition, it occurs that competition's objectives are the consumers' welfare and the competition itself, meaning the proper function of the market whereas the environmental policy's main objective is the protection of the environment by minimizing the environmental harm. It is very difficult to balance these different objectives but there is no doubt that a trade-off between environmental and competition law must be found.

The regulation policy must aim to limit as far as possible the negative effects on competition. The legislator in order to protect the environment must not forget to take

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<sup>114</sup> According to economic allocation theory, market failure is the failure of a more or less idealized system of price-market institutions to sustain "desirable" activities or to stop "undesirable" activities. In my point of view, Market Failure is the situation in a local economy in which the distribution of goods and services is ineffective. Markets can fail due to many reasons such as externalities, natural monopolies and information failure. It is closely related with networks economies such as energy markets where the anti-competitive effects on the market lead to inefficiencies. See also: K. Gillingham, R. G. Newell, K. Palmer, *Energy Efficiency Economics and Policy*, Discussion Paper, RFF DP 09-13, April 2009, p.9.

<sup>115</sup> Jose' Carlos Laguna de Paz, "Protecting the Environment without Distorting Competition", *Journal of European Competition Law & Practice*, Vol. 3, No. 3, 2012, p.249.

<sup>116</sup> D Wilsher, 'Reducing Carbon Emissions in the Electricity Sector: a Challenge for Competition Policy Too? An Analysis of Experience to Date and Some Suggestions for the future', *The Competition Law Review*, Volume 6, Issue 1, pp 31-49, December 2009, p. 31.

into consideration the function of the whole market and the competition rules. The cost of the distortion of competition must be outweighed by the implementation of the environmental goals based on an economic analysis of the regulatory measures<sup>117</sup>. Every discriminatory measure or justification that is used for the protection of the environment must be legitimate only when it is based on objective and reasonable criteria and it complies with the principle of proportionality and non-discrimination principle. On the other, the environmental factors must be accepted by competition law in a very restrictive way. Competition law must lose its independency and serve the environmental policy<sup>118</sup>. The environmental goals must be protected by competition law only at the extent where the proper functioning of the market is secured. Specifically, the abusive conduct under Article 102 TFEU can be only justified when according to the efficiency balancing test that was in the previous chapter described assures that benefits by the environmental protection outweigh the anti-competitive effect on the market and that it doesn't affect the proper functioning of the market. The criteria must be precise and reasonable and the application of the economic effect-based analysis that is also promoted by the Commission the last years will help to face the legal difficulties that occur in those cases and take the correct decision by securing the protection of competition.

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<sup>117</sup> R Betz, T Sanderson, T Ancev, 'In or out: efficient inclusion of installations in an emissions trading scheme?' (2010) 37 *Journal of Regulatory Economics*, Volume 37, 162–79; K. Talus, *EU Energy Law and Policy*, Oxford University Press, 2013.

<sup>118</sup> Jose´ Carlos Laguna de Paz, loc. cit. p.255.

## Conclusions

The analysis in this Thesis has shed light on the central research question, namely what it means to justify a *prima facie* abusive conduct that would otherwise be contrary to the competition rules, and which is the content and the scope of an objective justification under Article 102 TFEU.

The key lessons that I deduce from this research are the following:

1. The ECJ and the Commission has not yet fully clarified the scope of the concept of objective justification of an abuse of dominant position and as a result there is a low level of legal certainty and predictability concerning this legal term. In addition, from a close examination of the case law concerning objective justifications the Court's perception of this legal term seems to be very narrow and to be related to objective factors and to public policy that are beyond the control of the undertaking. The intensive application of the effect-based analysis especially after the publication of the Commission's Guidance 2005 gave a more clear perception of the provision and I hope that the next years we will have an even more concrete definition of the terms of abuse, dominant position, and objective justifications under the Article 102 TFEU.

2. The way in which justifications function varies, as we showed by the analysis of the requirements and the different types of justifications in Chapter 2, according to the circumstances ( case to case based analysis) such as the degree of dominance, the kind of abuse, the type of the objective justification and the general economic factors in the relevant market. If a conduct is in the framework of legitimate business conduct and meets competition on the merits, must not be characterized as abusive. In addition, if there is a case of objective necessity under the dominant undertaking was not autonomous to act in another way e.g. force majeure, the conduct is objectively justified and as a result legitimate. As far as efficiencies are concerned, the efficiency balancing test must apply and if the benefits compensate consumers for the anti-competitive aspects of the conduct, then the conduct is legitimate. The biggest difference between efficiencies and legitimate business conduct regarding the methodology is that in the case of efficiencies we must always make an intricate analysis on the effects.

In my opinion, the ECJ is still little reluctant in front of the justifications of legitimate business behaviour and efficiencies. The Court shall take more into consideration these two different types of objective justifications and do not characterize abusive a conduct that fulfill all the above mentioned and analyzed requirements by falling in the false formalistic approach of the existence of abuse and dominance.

3.As far as the third category of objective justifications, namely public interests is concerned, the Court seems that was very reluctant and not willing to justify on this basis a prima facie abusive conduct under Article 102 TFEU. In my opinion, this approach seems to change especially due to fact that the protection of the environment, which constitutes a public interest, is nowadays a core objective of the European policies and of the Treaties. It occurs as a necessity nowadays to take into consideration social aspects under the examination of Article 102 TFEU but always at that extent that competition objectives are secured and fulfilled. This thesis shows that the distortion of competition is also at the core of the environmental protection. On the one hand, regulation has to avoid or at least minimize the distortion of competition as much as possible. On the other hand competition law shall take into account environmental goals to a very limited extent otherwise its ability to protect the market and consumers' welfare is reduced.

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