
THE COMPETITION LAW REVIEW

Volume 2 Issue 2**March 2006****The Concept of ‘Objective Justification’ of an Abuse of a Dominant Position:
Can it help to Modernise the Analysis under Article 82 EC?***Ekaterina Rousseva**

The purpose of the article is to clarify the scope and the operation of the concept of ‘objective justification’ of an abuse of a dominant position and to ascertain whether the concept can be instrumental for modernising the current enforcement policy under Article 82 EC. In particular, the paper examines whether the concept of objective justification can help to narrow down the scope of Article 82 and make its application consistent with the application of the already modernised Article 81EC. For this purpose, the paper critically examines the proposals made in the literature that the concept of objective justification can be employed as a ‘meeting competition justification’ and as an ‘efficiency justification’ for exclusionary conduct of dominant undertakings. A close examination of the case law shows that the Community Courts’ perception of objective justification is very narrow – it relates only to objective factors and public policy considerations which are beyond the control of private firms. The paper shows that meeting competition and efficiency justifications not only do not find support in the case law but their acceptance under Article 82 is obstructed by the way the concept of abuse is interpreted. The paper advocates that the concept of objective justification alone cannot provide a solution to the current problematic application of Article 82 and tentatively suggests alternative ways of thinking about the notion of abuse, and especially of the notion of competition on the merits.

1. INTRODUCTION

The ECJ has on many occasions stated that conduct of a dominant undertaking is abusive unless it is objectively justified. The existence of a concept of objective justification under Article 82 EC seems to be well accepted in the literature and the right of a dominant undertaking to defend itself against allegations of abuse on the grounds of objective justification is hardly questioned. Nevertheless, the concept of objective justification remains one of most vague concepts associated with the application of Article 82. The exact scope, meaning and operation of the concept have never been clarified by the Community courts and remain highly speculative.

The interest in the concept has increased following the Commission’s announced intention to revisit its enforcement policy under Article 82 in order to make it compatible with mainstream economics and to make consumer welfare and allocative

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efficiency an essential goal of the article.¹ Since such a revision implies establishing certain limits to the current overbroad scope of the concept of abuse, the concept of objective justification - traditionally seen as a counterbalance to what otherwise would be a draconian application of Article 82² - is now perceived as a possible remedy. There is an obvious relationship between the scopes of the notion of abuse and the notion of objective justification. Narrowing down the concept of abuse through the application of the concept of objective justification necessarily requires broadening the scope of the justifications. This explains why, with the increasing awareness that Article 82 is applied so aggressively that it catches exclusionary conduct that is not necessarily anticompetitive, the support for an expansion of the justifications, traditionally assumed to be within the scope of the concept of objective justification, also increases.

As pointed out, the scope of objective justification is not entirely clear but it has generally been accepted that the objective justification refers to public policy concerns or other objective factors, such as crisis in the industry, which force undertakings to deviate from their normal course of conduct. Yet, in fact while they are relevant, those types of considerations are rarely needed as justifications – as is evident from the few cases where they have been invoked. Moreover, they are quite remote from the core problem for which a remedy is needed, namely, the absence of sufficient economic analysis and disregard of possible efficiency gains that may derive from an otherwise exclusionary conduct. The concept of objective justification would have been more helpful if it were capable of introducing economic analysis and efficiency considerations into the texture of Article 82. That is why objective justification began to be articulated at times as a ‘meeting competition defence’ or an ‘efficiency justification defence’.

There is an appeal to using the concept with these meanings. However, the question is whether the case law allows the concept to be used in this way and whether such a use fits in the current conceptual framework of Article 82. Does the jurisprudence allow Article 82 to be applied in a manner that is consistent with the already modernised application of Article 81? The present article addresses these questions and draws conclusions as to the advantages and the disadvantages of applying the concept of objective justification in current analytical framework of Article 82. In the first part of this paper I briefly summarise the major problems of the current understanding of the notion of abuse. I limit myself to considering the problems relating to exclusionary abuses only, since those abuses form the major part of the case law and also because, in my view, the modernisation of exploitative abuses requires first of all clarity on the test for exclusionary practices. In the second part of the paper I explain what is normally accepted as an objective justification not only under Article 82 but also in the area of free movement of goods. I also refer to the Treaty justification provided for abuses under the special circumstances of Article 86(2) EC.³ The third part of the paper is a

¹ Speech by Lowe, Director General of the DG Competition ‘DG Competition’s review of the policy on abuse of dominance’ presented at the Thirteenth Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, 23-24/10/2003.

² See Craig & De Búrca, *EU Law*, 3rd ed, Oxford University Press, 2003, p 1030.

³ The provision exempts firms from the application of the competition rules where necessary for the fulfilment of public service obligations.

review of the case law in which the term ‘objective justification’ has been expressly used by the ECJ. The purpose of this part is to ascertain the Court’s perception of the concept of objective justification. On the basis of the case law and taking into account of the way the ‘objective justification’ is used in other areas of law, I reach the conclusion that the Community Courts’ understanding of objective justification is very narrow in scope and refers only to factors which are beyond the control of private undertakings, not only of dominant ones. The concept is based on the principle of proportionality and operates as a derogation from what seems to be a *prima facie* abuse.

In the fourth and the fifth part of the paper I examine the possibility of employing the concept of objective justification as a meeting competition defence and as an efficiency justification. I present the arguments raised in the literature in favour of such a use of the concept, also considering similar concepts used in the US law. Then I proceed with a detailed examination of the EC case law with a view to ascertaining whether it leaves room for interpreting the concept of objective justification as a meeting competition defence and as an efficiency justification. I reach the conclusion that the Community Courts do not perceive objective justification as a justification for conduct that is already found to be exclusionary or discriminatory either on the grounds of meeting competition or on the grounds that the conduct is efficiency enhancing. Nevertheless, I further consider whether, despite the absence of support for such an interpretation in the case law, the concept of objective justification is capable of resolving the current problems under Article 82. An assessment of the case law, however, leads me to the conclusion that the objective justification as a meeting competition defence does not accord with other concepts underpinning Article 82, such as the special responsibility of dominant undertakings. An efficiency justification as an objective justification only provides a partial solution to the problem relating to the absence of an efficiency justification to exclusionary conduct because it fails to provide a full consumer welfare test allowing dominant undertakings’ profit oriented interests to be balanced against consumers’ interests. For this reason, I tentatively suggest alternative ways of thinking about the notion of abuse, and especially of the notion of competition on the merits, which may provide the desired limitation to the current over-inclusive application of Article 82.

2. EXCESSIVE FORMALISM UNDER ARTICLE 82 AND THE NEED TO MAINTAIN CONSISTENCY WITH ARTICLE 81

The interest in the concept of objective justification increases with the awareness that Article 82 is applied in a formalistic way, as a result of which practices that may not necessarily have negative effect on competition are prohibited simply because on their face or by their form fall within a group of practices traditionally condemned under this provision.

2.1. Concepts underlying the formalistic approach in analysing conduct under Article 82

As I have argued elsewhere,⁴ the application of Article 82 has largely been influenced by the ordoliberal school of thought, according to which the goal of competition law is ‘the protection of individual economic freedom of action as a value in itself’.⁵ I have identified several major concepts having their roots in the ordoliberal perception of competition which have shaped the notion of abuse under EC law. The first relates to the identification of an undistorted market structure with competitors’ free access to the market. For the conduct to be abusive under the definition of abuse in *Hoffmann- La Roche*⁶ it has to have an impact upon the market structure by hindering the degree of the existing competition or the growth of that competition.⁷ The rationale is that consumers are better off where there is sufficient degree of competition. However the Community courts have identified such a negative impact on the market structure whenever a competitor’s freedom or access to the market is obstructed, thereby disguising a concern about competitors’ freedom of action with concerns for maintenance of a degree of competition to the consumers’ benefits. The second concept underpinning the notion of abuse is the concept of ‘special responsibility’, which in essence means that dominant undertakings, simply by virtue of the market power they hold, are not allowed to perform certain activities on the market that other non-dominant undertakings are free to perform.⁸ The Community Courts have justified this strict rule towards dominant undertakings with the argument that, in the presence of dominance, the degree of competition is already weakened and therefore any further interference with the market structure is likely to eliminate all competition.⁹ The third concept that influenced the development of the notion of abuse is the concept of ‘normal competition’ mentioned for the first time in the *Hoffmann-La Roche* definition of abuse, and later referred to in the case law as ‘competition on quality’¹⁰ or ‘competition on the merits’.¹¹ While defining ‘abuse’ as conduct which is not competition on the merits or does not comprise methods based on normal competition, the Community Courts have never explained what exactly these terms involve. Nevertheless, they have applied Article 82 in a way which suggests that the terms do not involve conduct that is efficiency enhancing if the conduct also hinders

⁴ Rousseva, ‘Modernising by Eradicating: How the Commission’s New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints’ (2005) 42 CMLRev 587-638.

⁵ Möschel W, ‘Competition Policy from an Ordo Point of View’ in Peacock and Willgerodt (Eds.), *German Neo-Liberals and the Social Market Economy*, Macmillan, 1989 at p 146.

⁶ Case 85/76 [1979] ECR 461.

⁷ Para 91.

⁸ Case 322/81 *Nederlandsche Baden –Industrie Michelin v Commission* [1983] ECR 3461, para 57; see also Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, paras 114-115; Case T-65/89 *BPB Industries v Commission* [1993] ECR II-39, para 67.

⁹ *Hoffmann- La Roche*, op cit n 6, para 120.

¹⁰ Case 62/86 *Akzo Chemie BV v Commission* [1991] ECR I –3359, para 70.

¹¹ Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 111; Case T-203/01 *Michelin v Commission*, para 97.

competitors' access to the market or their ability to compete.¹² This understanding of competition on the merits leaves little room for efficiency considerations in the assessment of conduct under Article 82.

The above concepts have led to an aggressive enforcement policy under Article 82, which identifies exclusionary abuses with exclusion or foreclosure of competitors¹³ without examining the effect upon consumers and which disregards efficiency gains that might derive from such conduct. The current application of Article 82 has drawn significant criticism for being formalistic and inconsistent with mainstream economic theory.

2.2. The need for consistency in the application of Article 81 and Article 82

In contrast to the development of the case law under Article 82, the recent modernisation of the substantive analysis under Article 81 overcame the ordoliberal influence which had long determined how the latter Article was applied. The modernisation enterprise affirmed as an essential objective of Article 81 the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.¹⁴ This led to a reduction of the scope of Article 81 in two ways: first, it introduced economic analysis in the assessment of foreclosure under Article 81(1) and limited the application of the provision to situations where the practice concerned has or is likely to have an appreciable foreclosure effect to the detriment of consumers; second, Article 81(3) allows efficiency gains deriving from practices that fall within the scope of Article 81(1) to be justified, provided that (a) the efficiency gains are a direct consequence of the restrictive practice, (b) the restrictions of competition are indispensable to the attainment of those efficiency gains meaning, they are 'reasonably necessary',¹⁵ (c) sufficient gains are passed on to the consumers, and (d) the practice in question does not eliminate all competition.

Common Objective

The affirmed new objectives and new methodology of analysing allegedly restrictive practices under Article 81 create a discrepancy between the objectives and the analysis under this provision and those under Article 82. This runs contrary to the ECJ's ruling in the *Continental Can* case,¹⁶ according to which Article 81 and Article 82 pursue the same objectives albeit at a different level. If efficiency gains, to the extent they are to the benefit of consumers, is an objective of Article 81 but are ignored under Article 82 the coherence of EC competition policy is clearly undermined.

¹² See Kallaugher and Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82' [2004] ECLR 263 at pp 269-270.

¹³ I use the terms 'exclusion' of competitors and 'foreclosure' interchangeably.

¹⁴ See Guidelines on Vertical Restraints, OJ 2000, C291/1, para 7; Guidelines on the application of Article 81(3) of the Treaty, OJ 2004, C101/97, para 13.

¹⁵ See Guidelines on the application of Article 81(3), op cit n 14, para 78.

¹⁶ Case 6/72 *Continental Can v Commission* [1973] ECR 215, para 25.

Inconsistency in Areas Where Article 81 and Article 82 Overlap

Unsynchronised application of the two provisions is particularly problematic with regard to practices that can be assessed under both provisions.¹⁷ A good example in this respect is vertical restraints.

The case law and the Commission's Notice on Article 81(3) now make it clear that Article 81(3) is available for agreements concluded by dominant undertakings.¹⁸ If a practice such as single branding, tying or rebates, is adopted by a dominant undertaking it can be analysed for breaches of Article 81 or Article 82 or for both. However, absent the possibility of an efficiency justification under Article 82, the outcome of the analysis carried out under the two provisions would be very different. If assessed under Article 81 the practice may benefit from an exemption under Article 81(3) on the grounds that it produces efficiency gains. If the same practice is assessed under Article 82, efficiency gains cannot save it from the prohibition of Article 82, nor can Article 81(3) apply because it cannot exempt abuses.¹⁹ Thus, the same practice having the same exclusionary effect and producing the same efficiency gains, can at least theoretically, be prohibited or allowed depending on the provision under which the case is brought.

The inconsistency becomes palpable if the allegation is brought under the two provisions simultaneously as it happened in *Van den Bergh Foods Ltd v Commission*.²⁰ It is indeed paradoxical that a practice can be justified under Article 81(3), but may be found to breach Article 82 in the same proceedings just because the latter provision does not provide for efficiency justifications. Under the current approach the contradictory outcome can be avoided only if the Commission and the Community Courts close their eyes to the efficiency gains and refuse to take them into account even under Article 81(3). Thus, the danger of not allowing efficiency justifications under Article 82 is not only detrimental to practices considered under this provision but it may also have an undesirable repercussion on the analysis carried out under Article 81.

On the other hand, there is a danger in literally transposing the methodology of Article 81(3) to Article 82, first because this may look like creating an exception under Article 82 in the absence of a Treaty provision to that effect, and secondly because it would lead to an overlap between the two provisions in the area of contractual practices that would make Article 82 redundant.²¹

¹⁷ See Joined cases C-395/96P and C-396/96P *Compagnie Maritime Belge Transports S.A., Compagnie Maritime Belge SA and Dafra-Lines A/S v Commission* [2000] ECR I-1365, para 33.

¹⁸ See Guidelines on the application of Article 81(3), op cit n 14, para 106. See in this respect also Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para 113 (an undertaking does not need to have eliminated all opportunity for competition in order to be in a dominant position); Case 85/76 *Hoffmann-La Roche*, op cit n 6, para 39 and 90; Case T-51/89 *Tetra Pak Rausing SA v Commission* (Tetra Pak I), [1990] ECR II-309, in particular paragraph 28, and Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275, para 939.

¹⁹ *Hoffman-La Roche*, op cit n 6, para 120.

²⁰ Case T-65/98 [1998] ECR II-2641.

²¹ Rousseva, op cit n 4.

Thus, while it is a common desire to have an economics-based analysis under Article 82 in the same way that economics informs the assessment of practices under Article 81, there is no easy and conceptually clear way how this can be done. Views has been expressed according to which the concept of objective justification can be used as mechanism for reducing the scope of Article 82 by allowing dominant undertakings to protect their commercial interest against aggressive competition (meeting competition defence) and by providing justifications based on efficiency gains for exclusionary conduct.

Before considering those possibilities, it is useful to explain what is normally understood by objective justification under Article 82 and how the same term is used in other areas of EC law.

3. WHAT IS AN OBJECTIVE JUSTIFICATION?

3.1. What is normally understood by an objective justification under Article 82?

Major competition law books suggest that that the concept of objective justification has been developed by the Community Courts to distinguish between conduct that constitutes an abuse, and conduct designed to protect the commercial interest of a dominant undertaking.²² It is believed that the concept is built upon the principle of proportionality.²³ As is well known, the proportionality test requires an assessment whether a public or private measure reasonably pursues a legitimate interest at stake, or whether it goes beyond what is reasonably necessary. The principle or proportionality involves at least two tests: a test of 'suitability' which requires that the means employed by a measure be suitable for, or reasonably likely, to achieve an interest or objective worthy of legal protection. The second test i.e. a test of necessity seeks to establish whether the measure is necessary to achieve the objective and whether there are less restrictive means capable of producing the same result. Some authors maintain that the principle also involves in addition a third element: a proportionality test in *stricto sensu*, which must ensure that the measure does not have an excessive effect on the interest in question.²⁴ The application of the principle to Article 82 presupposes that conduct which breaches Article 82 should be allowed as long as it is a suitable, necessary and not excessive means for the attainment of a legitimate objective, which as pointed out above, is considered to be the protection of the dominant undertaking's commercial interest. However, the question is what a legitimate commercial interest of a dominant undertaking is: does this interest mean only a right of a dominant undertaking to survive on the market, i.e., to prevent its inefficient operation, or does it also mean a right to carry out a profit oriented policy? How does the prerogative of a dominant firm

²² See Van Bael & Bellis, *Competition law of the European Community*, 4th ed, Kluwer Law International, 2005, p 907; Whish R, *Competition Law*, 5th ed, Lexis Nexis, 2003, pp 207-208.

²³ Craig & De Búrca, op cit n 2, p 1030.

²⁴ See Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Ellis (ed), *The Principle of Proportionality in the Laws of Europe*, Hart Publishing, 1999; and De Búrca, 'The principle of Proportionality and its Application in EC Law' (1993) 13 YBEL 105.

to protect its interest fit with the essential goal of competition to serve consumers' interests? These are questions on which views diverge.

3.2. What is understood by an objective justification in the area of free movement of goods?

A concept of objective justification has been developed by the ECJ in the area of the free movement of goods. The concept is related to the so-called mandatory requirements, elaborated by the ECJ as a result of the widening of the scope of Article 28 to prohibit not only overtly discriminatory state measures but also indistinctly applicable domestic rules which hinder the free movement of goods. Whereas Article 28 prohibits quantitative restrictions on imports and measures of equivalent effect, Article 30 provides a derogation from that rule. In particular it sets forth an exhaustive list of justifications, which are however to be strictly interpreted²⁵ and which cannot save indistinctly applicable measures that constitute an obstacle to free trade. The solution to the overbroad application of Article 28 was provided for in the well known *Cassis de Dijon* case,²⁶ where the ECJ held that an indistinctly applicable domestic rule which is an obstacle to free movement of goods does not fall under the prohibition of Article 28 if it is necessary to satisfy mandatory requirements relating, for example, to fairness of commercial transactions or the defence of consumers.²⁷ The formulated rule, also known as a 'rule of reason' is based on the principle of proportionality and means that a restriction would be found in breach of Article 28 unless it can be shown that it is objectively justified in the pursuit of a public interest.²⁸ The traditional view is that the mandatory requirements are taken into account in the fabric of Article 28 and are separate from the explicit Treaty exception (Article 30).²⁹ The list of mandatory requirements as they have been progressively identified by the ECJ is non exhaustive,³⁰ but such requirements can justify only measures which are of a non-economic nature.³¹

3.3. What does it mean to apply public policy considerations as an objective justification under Article 82?

It has been suggested that the notion of objective justification under Article 82 bears similarities to the same concept under Article 28 and that public policy considerations can serve as an objective justification.³² Indeed, the fact that public policy

²⁵ As a derogation rule, Article 30 is interpreted strictly, see Case 46/76 *Baubuis v Netherlands* [1977] ECR 5.

²⁶ Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

²⁷ *Ibid*, para 8.

²⁸ Craig & De Búrca, *op cit* n 2, p 638.

²⁹ For a different view, see Oliver, *Free Movement of Goods in the European Community*, (4th ed.), Sweet and Maxwell 2003, pp 216-220.

³⁰ Craig & De Búrca, *op cit* n 2, pp 638 & 659.

³¹ Buendía Sierra, *Exclusive Rights and State Monopolies under EC Law*, Oxford University Press, 1999, p 216; Oliver, 'Competition and Free Movement: Their Place in the Treaty' IALS WG Hart Legal Workshop 12/1/04 at p 9.

³² Craig & De Búrca, *op cit* n 2, p 1030; For references to the concept as a justification on public policy grounds, see Whish, *op cit* n 22, p 208, Lowe, *op cit* n 1, Annotation for CLF Meeting – Article 82, Brussels, 16 March 2005.

considerations may justify restrictions on trade between Member States – which is one of the fundamentals on which the internal market is built upon, suggests that public policy considerations can potentially also override the other pillar of the internal market, i.e., competition.

It should be pointed out that public policy concerns in fact serve as a justification for abuses under Article 86(2) which provides a derogation from the provisions of the Treaty, including the competition rules. However, this exemption only applies to the extent necessary to enable an undertaking entrusted with the provision of services of general economic interest (SGEI) to provide the service. The justification is the need to perform SGEI in the interest of the public. Although the text of the provision refers to services of ‘economic interest’, the objective contemplated in the provision is of a non-economic nature and is comparable to that of other interests enumerated in Article 30 or in the open list of mandatory requirements recognized by the Court.³³ Certainly, this still does not answer the question of whether a non-entrusted undertaking can justify conduct that may breach Article 82 on the grounds that its conduct is objectively justified by the pursuit of a public interest. However, if public policy considerations can constitute an objective justification under Article 82, the principle of proportionality would require some legitimate objective which is not the commercial interest of the dominant undertaking but which does advance the public interest. This implies the sacrifice of an economic value i.e. competition in the interest of consumer welfare for the sake of securing non-economic benefit for consumers.

4. THE COMMUNITY COURTS’ PERCEPTION OF OBJECTIVE JUSTIFICATION UNDER ARTICLE 82.

The possibility of using the concept of objective justification in one way or another for modernising Article 82 is limited by the existing case law. Since the ECJ has never defined expressly the scope of the concept of objective justification, in this part of the paper I review the case law in which the Community Courts have made an express reference to the concept in order to shed light on the judicial perception of the concept of objective justification.

4.1. Objective justification in excessive and discriminatory pricing cases

Although the purpose of the paper is to examine the possibilities of applying the concept of objective justification to exclusionary abuses, the concept has been used in number of exploitative abuse cases, which throw some more light on the scope of the concept. The term ‘objective justification’ appears in the very early case law relating to excessive pricing charged by proprietors of intellectual property rights. For instance, in *Sirena S.r.l v Eda S.r.l. and others*³⁴ the ECJ held that the level of prices charged by a proprietor of a trademark did not necessarily suffice to indicate an abuse of a dominant position but the level of the price, if it was unjustified by any objective criteria and if it

³³ Buendia Sierra, op cit n 31, p 303.

³⁴ Case 40/70 [1971] ECR 69.

was particularly high, might be a determining factor in finding an abuse.³⁵ The ECJ did not specify what would be considered an objective criterion but the meaning emerged from subsequent rulings in discriminatory and excessive pricing cases.

In *United Brands*³⁶ the ECJ did not entirely reject the dominant undertaking's argument that the different prices it charged to distributors in different Member States, alleged to be discriminatory, were objectively justified by the average anticipated market price varying in the different Member States due to the different competitive context and to fluctuating market factors such as the weather, different availability of competing seasonal fruit, holidays, strikes, government measures, current denominations.³⁷ Although, on the merits of the case, the ECJ did not accept this justification, it conceded that differences in transport costs, taxation, customs duties, the wages of the labour force, the conditions of marketing, the differences in the parity of currencies and the density of competition may eventually culminate in different retail selling price levels in different Member States. The ECJ found that UBC was entitled to rely on these factors only to a limited extent because it was not UBC who bore the risk of those factors but rather its distributors who had to confront the risks of the consumers' market.³⁸

In *Ministère Public v Tournier*,³⁹ the ECJ had to decide in a preliminary ruling, whether the royalties charged by a national copyright management society for the performance of works belonging to its repertory in discotheques in France were excessively high compared to the prices charged by other copyright societies in other Member States. The ECJ ruled that, in making comparisons between prices, the existing appreciable differences among Member States should be taken into account, such as the number of people who go to discotheques, climate, social habits and historical traditions, but that Article 82 would be breached if the royalties which the society charged to French discothèques were clearly inequitable and appreciably higher than those charged in other Member States. The ECJ held that Article 82 would not be breached if the copyright – management society in question could justify such a difference by reference to objective and relevant dissimilarities between copyright management in the Member State concerned and copyright management in the other Member State.⁴⁰

The case law indicates that what the Court understands by objective justification for excessive or discriminatory pricing are objective factors, beyond the control of a dominant undertaking which directly affect the cost of the products or services offered. Since in *General Motors Continental v Commission*⁴¹ the ECJ established that prices are excessive and abusive if they have no reasonable relation to the economic value of the

³⁵ Para 17; similar reasoning was adopted in Case 24/67 *Parke Davis v Probel* [1968] ECR 55; and Case 78/70 *Deutsche Grammophon v Metro* [1971] ECR 487.

³⁶ Op cit n 18.

³⁷ Paras 218-220.

³⁸ Paras 228.

³⁹ Case 395/87 [1989] ECR 2521.

⁴⁰ See para 42.

⁴¹ Case 26/75 [1975] ECR 1367.

product supplied,⁴² the purpose of the proof of those objective factors is to show that what might seem *prima facie* an excessive pricing is not because those factors affect the cost and consequently the price charged. The same rationale applies to prices that are *prima facie* discriminatory. The ECJ also makes clear that in any case the justification is subject to the principle of proportionality. The term ‘justify’ in those cases means that a dominant undertaking is allowed to demonstrate that its prices although high compared to those charged in other Member States are not excessive. However, that does not imply that the dominant undertaking is allowed to argue that excessive pricing can be justified on the basis of pro-competitive effects.⁴³

4.2. Objective justification in exclusionary abuses: the example of refusal to deal

The terminology of objective justification appears in a number of exclusionary abuse cases. Most often the term is used in refusal to deal cases. In *Telemarketing*⁴⁴ the ECJ expressly stated that an abuse is committed where, without any objective necessity, a dominant undertaking reserves to itself an ancillary activity which might be carried out by another undertaking as part of its activities on a separate market with the possibility of eliminating all competition from such undertaking. Following *Telemarketing* reference to objective justification can be found in every refusal to deal case, including refusal to license intellectual property rights. Furthermore, in the *Magill*⁴⁵ case 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. The latter conditions have been confirmed in the subsequent case law.⁴⁶ Despite the numerous references to objective justification in refusal to deal cases, the case law throws little light on the precise scope of the justifications. What the Community courts mean by objective justification can be understood only through interpretative reading of the case law.

Factors and considerations that are not Objective Justification

It might be useful first to point out what the ECJ does not consider to be an objective justification for a refusal to deal.

The ruling in *Commercial Solvents*⁴⁷ makes it clear that the desire of a dominant undertaking to expand on a new market cannot justify a refusal to deal if it eliminates an important competitor on a downstream market. The ECJ firmly stated that, ‘an undertaking being in a dominant position as regards the production of raw materials and therefore able to control the supply to manufacturers of derivatives, cannot just because it decide to start manufacturing these derivatives in competition with its former

⁴² Case 27/76 *United Brands*, op cit n 18, para 250.

⁴³ Gyselen, ‘Abuse of Monopoly Power within the Meaning of Article 86 of the EEC Treaty: Recent Developments’ *Fordham Corp L Inst* (B Hawk ed. 1989) 597, p612. Gyselen finds the term ‘justify’ in those cases misleading because he identifies the concept of objective justification with an efficiency justification.

⁴⁴ Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261.

⁴⁵ Case T-69/80 etc. *RTE v Commission* (Magill) [1991] ECR II-485, upheld by the ECJ Cases 241/91P etc. *RTE and ITP v Commission* [1995] ECR I-743.

⁴⁶ See Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, [2004] ECR I-50309. Case COMP/C-3/37.792 *Microsoft*, Commission Decision of 24.03.2004.

⁴⁷ Cases 6, 7/63 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corpn v Commission* [1974] ECR 223.

customers act in such a way as to eliminate their competition'. In those circumstances, the question of whether the refused customer had an urgent need of the supplies or of whether it was possible for it to reorganize its production in good time were irrelevant.⁴⁸ Nor were the possible efficiencies that might have arisen from the vertical integration sought by the dominant undertaking by way of expansion onto the second market capable of justifying the elimination of the competitor.

In *Oscar Bronner*⁴⁹ the ECJ did not follow Advocate General Jacobs' interpretation of objective justification as relating to a balance of conflicting short and long term interests of consumers: on the one hand consumers' long term interests are protected if a dominant undertaking is encouraged to invest in the future by allowing it to retain for its own use facilities or a product it has developed, whereas short term benefits result from increased competition.⁵⁰ Although the ECJ reached the same conclusion as the one proposed by the Advocate General, i.e., that the refusal of a dominant undertaking to give access to its national home delivery newspaper system was not an abuse, it reasoned the case differently, avoiding a discussion of the incentives to invest and on dynamic efficiencies as a possible objective justification of the refusal.⁵¹

Finally, it should be pointed out that, although the ECJ has on many occasions made it clear that a dominant undertaking may be obliged to grant an IP licence only in exceptional circumstances, the case law shows that the mere fact that a dominant firm holds IP does not justify a refusal to license.⁵²

Factors that can serve as an Objective Justification

Two cases give an idea of what an objective justification for a refusal to deal cases can be. In *United Brands*, the Court held that a dominant undertaking could not just stop supplying a long standing customer 'if the orders placed by that customer are in no way out of the ordinary' and if the customer 'abides by regular commercial practice'. Thus, the ECJ suggested that a dominant undertaking could not be held liable for an abuse if the reason for the refusal was customers' inappropriate commercial behaviour, which is beyond the control of the dominant firm.

In *BP v Commission*⁵³ the ECJ suggested that a crisis affecting the entire industry and leading to shortage⁵³ of supply might be a valid reason for a dominant undertaking to substantially reduce the supplies to a non-regular customer. Disagreeing with the Commission, which had maintained that that the dominant undertaking had failed to provide an objective reason for its behaviour, the ECJ considered that the supplier could not be accused of having applied less favourable treatment to a non-regular

⁴⁸ Para 25.

⁴⁹ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG Oscar Br* [1998] ECR I-7791.

⁵⁰ See para 57 and the following of the Opinion.

⁵¹ The ECJ took that view that the requested access was not indispensable for the competitor to compete.

⁵² Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 6211; Joined Cases C-241/91 P and C-242/P *Magill*, op cit n 45; Case C-418/01 *IMS*, op cit n 46; Case COMP/C-3/37.792 *Microsoft*, op cit n 46.

⁵³ Case 77/77 [1978] ECR 1513.

customer than that which it reserved for its traditional customers during a crisis. In addition, according to the ECJ it was important that the dominant undertaking had taken measures to avoid having to cease supplies to the non-regular customer and that the customer in fact managed to stay on the market.

This review of the case law reveals that the Community Courts give a very narrow meaning to the concept of objective justification. First, efficiency gains are not associated with the concept. Secondly, the ECJ seems to include in the notion of objective justification only factors which are beyond the control of the dominant undertaking and which it cannot overcome by any other means, but by adopting conduct which is *prima facie* abusive. Those factors may relate to natural events such as weather, specific cultural habits or a third person's actions. They might be of an economic nature, such as a general crisis in the industry, or of a non-economic nature, such as specific cultural habits. The factors that count as an objective justification are very similar to the circumstances that justify non-fulfilment of a contract such as *force majeure* or a third person's actions that break the chain of causation in contract law. This implies that objective factors or justifications are circumstances which are capable of affecting the undertaking's normal behaviour irrespective of whether the undertaking is dominant or not. Different market conditions in different Member States cause both dominant and non-dominant undertakings to charge different prices. A crisis in the industry may allow a dominant undertaking to refuse supplies but it may also allow non-dominant undertakings to agree on prices.⁵⁴ How does the principle of proportionality enter here? The legitimate commercial interest that is protected is prevention of operation at a loss. The restrictions of competition should be necessary and not an excessive means to operate without losses in spite of the exceptional circumstances beyond the dominant undertaking's control. The establishment of those factors render the conduct non-abusive despite the fact that it can otherwise be defined as an abuse. In all cases, the objective justification is formulated as a negative condition - abuse is found in the absence of an objective justification and it is incumbent on the dominant undertaking to prove positively that such a justification exists.

4.3. Does the ECJ Treat Public Policy Considerations as an Objective Justification?

Consumer health was invoked as a justification in the two seminal tying cases *Hilti*⁵⁵ and *Tetra Pak II*⁵⁶. Hilti attempted to justify its policy of tying sales of cartridge strips to the complement of Hilti nails. Hilti argued that the tying practice was aimed to ensure the safe exploitation of Hilti's product by making sure that consumers used only nails which were compatible with Hilti's cartridges. Hilti was concerned that consumers might be misled by competitor's advertisements presenting their nails as compatible

⁵⁴ For example crisis cartels.

⁵⁵ Case T-30/89 *Hilti AG v Commission* [1990] ECR II-163, and on appeal to the ECJ Case 53/92 P *Hilti AG v Commission* [1994] ECR I-667.

⁵⁶ Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755 and on appeal to the ECJ Case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951.

with Hilti cartridges and claimed that the obstacles it had raised to obstruct the entry of those competitors were justified by its duty of care as a manufacturer.⁵⁷ Similarly, Tetra Pak argued that there were natural and commercial links of the type referred to in Article [82](d) of the Treaty between the machines and the cartons and that segregating aseptic filling machines and aseptic cartons might involve grave risks for public health and serious consequences for Tetra Pak's customers.⁵⁸

In both cases, having established that the tying practices had a strong foreclosure effect, the Community Courts held that it was clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regarded as dangerous or at least inferior in quality to its own products.⁵⁹ In both cases, the Community Courts said that if the real concerns of the dominant undertakings were consumer safety and public health there were other means that this could be ensured. In *Hilti* the Courts suggested that the question should have been referred to the respective competent authorities, vested with power to apply the laws attaching penalties to sales of dangerous products, while in *Tetra Pak* the CFI stated that:

‘the remedy must lie in appropriate legislation or regulations, and not in rules adopted unilaterally by manufacturers, which would amount to prohibiting independent manufacturers from conducting the essential part of their business.’⁶⁰

In addition, in *Tetra Pak* the public health could be ensured by notifying machine users of the technical specifications with which cartons must comply in order to be compatible with those machines.⁶¹

Those cases suggest that public policy considerations cannot justify a practice which, because of its foreclosure effect, amounts to an abuse. From that reasoning it follows that unilateral acts of dominant undertakings are not suitable and necessary means for pursuing an otherwise legitimate objective – the public interest. The question that those cases leave unanswered is whether public policy considerations are as a matter of principle incapable of justifying the conduct of a dominant undertaking which restricts competition or whether the defence failed on the merits because there were other available means for the attainment of the legitimate objective.

A recent ruling under Article 81 suggests that the second proposition may be more appropriate. In *Wouters*⁶² the ECJ held that a regulation adopted by the Dutch Bar association, which prohibited lawyers in the Netherlands from entering into multidisciplinary partnerships with accountants, was restrictive of competition but nevertheless fell outside the scope of Article 81(1). The ECJ concluded that the

⁵⁷ Case T-30/89 *Hilti*, op cit n 55, paras 105-107.

⁵⁸ Case T-83/91 *Tetra Pak*, op cit n 56, para 79.

⁵⁹ Case T-30/89 *Hilti* op cit n 55, para 118; Case T-83/91 *Tetra Pak*, op cit n 56, para 138; Case C-333/94P *Tetra Pak*, op cit n 56, paras 36-37.

⁶⁰ Para 84.

⁶¹ Case T-30/89 *Hilti*, op cit n 55, para 139.

⁶² Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

regulation was necessary to ensure the sound administration of justice and the proper practice of the profession as organised in the Netherlands further concluded that the restrictions of competition did not go beyond what was necessary for this purpose.⁶³ The judgment triggered a lot of commentary: first of all, the case was noteworthy because the need for sound administration precluded the application of Article 81(1) despite the obvious restrictive effect on competition. Secondly, because this consideration did not operate as a justification under Article 81(3), where public policy concerns normally have been taken into account.⁶⁴ Some commentators saw the judgment as providing a mechanism for balancing national interests with competition law through the adoption of a European-style rule of reason modelled on the *Cassis de Dijon* rule of reason in the area of free movement of goods,⁶⁵ while others saw it as a pure conflict case between competition law and non-competition issues and sought to explain it with the theory of the practical concordance (*praktische Konkordanz*), which prescribes a rational balancing of contradictory values by always respecting the principle of proportionality.⁶⁶ Whish suggests that the *Wouters* case reveals conceptual similarity with the case law where restrictions ancillary to a lawful transaction have been held lawful⁶⁷ but in *Wouters* the restriction was ancillary to a regulatory function: guaranteeing sound administration.⁶⁸ Despite possible different conceptualisations of the case, it is indisputable that public policy considerations took precedence over the pure competition concerns and that the sacrifice of the competition concerns were allowed only to the extent necessary to the attainment of a legitimate public interest i.e. subject to the principle of proportionality.

The *Wouters* case has inevitable implications for Article 82. In my view, the case does not resolve a conflict between Article 81 and public policy concerns but a general conflict between competition law and public policy interests.⁶⁹ The fact that the public policy considerations placed the practice outside the ambit of Article 81(1), and were not regarded as factors to be considered under Article 81(3)⁷⁰ suggests that there is no legal obstacle to such considerations justifying conduct which otherwise may breach Article 82. Had the bar association been found to be dominant the same result should have been reached under Article 82 and the public policy concern should have justified the unilateral conduct of the association even though it restricted competition in an otherwise abusive way. Nothing in the judgment prevents the transposition of the reasoning to the assessment of conduct under Article 82.

⁶³ Paras 99-109.

⁶⁴ See Case 26/76 *Metro-SB- Grossmärkte GmbH v Commission (No1)* [1977] ECR 1857, Case T- 17/83 *Matra Hachette v Commission* [1994] ECR II-595; See for further references Jones & Sufrin, *EC Competition Law* (2nd ed) Oxford University Press, 2004, pp 236-240.

⁶⁵ Monti G, 'Article 81 EC and Public Policy' (2002) 39 CMLRev 1057.

⁶⁶ Komninos A, 'Non-Competition concerns Resolution in the Integrated Article 81' presented at the European University Institute 9th EU Competition Law and Policy Workshop in June 2004.

⁶⁷ Whish, *op cit* n 22, pp 120-121.

⁶⁸ *Ibid*, pp 121-122.

⁶⁹ See similar Komninos, *op cit* n 66.

⁷⁰ The rules in question were not notified pursuant to article 4 of Regulation 17/62.

Thus, after the ruling in *Wouters* it might be argued that public policy considerations, although in very rare circumstances and provided that the principle of proportionality is strictly applied may comprise an objective justification.⁷¹ It should be pointed out that private undertakings have an interest in protecting the public interest to the extent this is also in their private interest. For instance, in *Wouters* the sound administration is also in the interest of the bar association because it ensures that clients are satisfied with the services. Thus, if the public and the commercial interests coincide, the application of the principle of proportionality to the attainment of the public interest also serves the commercial interests of the undertaking.

There are similarities between the public policy considerations and the other factors considered above as an objective justification in the sense that both types of considerations apply irrespective of whether the undertakings are dominant or not and both are beyond the control of those undertakings. This review of the case law under Article 82 and the way the concept of objective justification is used by the Community Courts shows that this concept relates to objective factors or considerations which are beyond the control of undertakings and apply irrespective of the particular position of the undertakings or their economic performance.

5. 'MEETING COMPETITION DEFENCE' AS AN OBJECTIVE JUSTIFICATION

5.1. Purpose of the defence

As pointed out in Section 2.1., one of the reasons for the current formalistic enforcement of Article 82 is the special responsibility that dominant undertakings bear not to distort genuine competition. In particular, this responsibility prevents dominant undertakings from responding to aggressive competitors' strategies with conduct which may fall within the categories of abusive conduct. This is irrespective of the fact that the competitors' behaviour may undermine or weaken the dominant position because the responsibility holds as long as the firm in question is dominant (irrespective of the degree of dominance), and because the mere maintenance of a dominant position may in some cases constitute an abuse.

It is a common understanding that the meeting competition defence entitles a dominant undertaking to adapt its market strategy to the changing competitive conditions resulting from the new strategic behaviour of competitors. The changed conditions may take the form of lower prices, better trading terms offered by competitors or new entry. However, the changes should be such that if the dominant undertaking does not change its own policy in response, it will incur losses and/or lose market share. It is argued that introducing a meeting competition defence as an

⁷¹ Advocate General Jacobs in his Opinion in Case C-53/03 *Synetairismos Farmakopoiion Aitolias & Akarnanias (Syfai) and Others v Glaxosmithkline AEEVE* [2005] ECR I-4609 also suggests that public policy considerations, such as pervasive regulation of price and distribution in the pharmaceutical sector and the legal and moral obligations that dominant pharmaceutical undertakings bear, may serve as an objective justification under Article 82. See in particular paras 77-88.

objective justification may give more flexibility to dominant undertakings in changing market conditions.⁷²

To apply meeting competition as an objective justification implies that changes in competitors' strategic behaviour may justify conduct which is *prima facie* abusive. However, the conduct should be suitable necessary and proportionate in the strict sense to the protection of the dominant firm's legitimate aim not to incur losses or lose market share. Views have been expressed that such a justification is particularly needed for certain below cost pricing and selective above cost pricing which according to the current case law are abusive.⁷³

The idea of meeting competition as an objective justification is probably inspired by the statutory meeting competition defence provided for in Section 2(b) Robinson-Patman Act.⁷⁴ It might be useful to throw a bit more light on how this defence operates, because despite the overall desire expressed in the EC literature there is no clear proposal as to how exactly such a defence should function in the EC competition context.

5.2. The meeting competition defence in the Robinson-Patman Act

The meeting competition defence in the Robinson-Patman Act (RPA) is for an allegation of primary or secondary line discrimination and permits a seller to rebut a *prima facie* case of violation under Section 2(a) of the Act by showing that his lower price was made in good faith to meet an equally low price of a competitor. The heart of Section 2(b) is the concept of good faith. As explained by the US Supreme Court:

‘The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. Whether this standard is met depends on the facts and the circumstances of the particular case, not abstract theories or remote conjectures’.⁷⁵

It set out that, according to established case law, ‘good faith’ does not require actual knowledge or certainty about the competitors' prices.⁷⁶ It is sufficient if the supplier receives information from its customers that they have been offered a lower price.

⁷² See Faull & Nikpay (eds), *The EC Law of Competition*, Oxford University Press, 1999, p 172; Donoghue, ‘Over-Regulating Prices: Time for a Rethink on Pricing Abuses under Article 82?’ in Ehlermann, C-D and Atansiu I (eds) *The European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?*, Hart Publishing, Oxford and Portland, Oregon (forthcoming), Gyselen, ‘Abuse of Monopoly Power within the Meaning of Article 86 of the EEC Treaty: Recent Developments’, op cit n 43; Slater and Waelbroeck ‘Meeting Competition: Why it is not an Abuse under Article 82’, research paper in law, College of Europe; Dolmans, ‘The Concept of Abuse under Article 82 EC Profit Sacrifice of Proportionality Test’, paper presented at the Second Annual Conference of the GCLC, Brussels, 16-17 June 2005.

⁷³ See Donoghue, op cit n 72, Slater and Waelbroeck, op cit n 72.

⁷⁴ The act prohibits certain forms of price discrimination, having the effect of (i) substantially to lessen competition or (ii) tending to create a monopoly in any line of commerce, or (iii) injuring, destroying or preventing competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

⁷⁵ *Falls City Indus., Inc. v. Vanco Beverages, Inc.*, 460 U.S.428, 439 (1983).

⁷⁶ *United States v Gypsum Co* 438 U.S. 422, 98 Ct 2864 (1978). The Court has suggested other means by which a seller can evaluate a buyer's claim of a lower competitive offer, see Joseph and Harrop, ‘Proof of the Meeting (2005) 2(2) CompLRev

As a result of criticism charging that the act is protectionist rather than consumer welfare oriented,⁷⁷ the US courts have taken an increasingly restrictive view of liability under the Act for both primary and secondary line injury.⁷⁸ For instance, while initially Section 2(a) could be breached by mere showing that the defendant intended to harm competition or was producing a declining price structure,⁷⁹ in *Brooke Group*⁸⁰ the Supreme Court held that the RPA should be considered consistently with the broader policies of the antitrust laws and that primary line discrimination under the RPA should be aligned with the standard of predatory pricing established under Section 2 of the Sherman Act. In other words, the finding of a breach requires proof of a rival's sales at a price below cost and of likely recoupment. From this it follows that the meeting competition defence operates as a justification for predatory pricing under the RPA provided that the seller can prove that it has cut its prices below cost in order to meet competitive offers which it believed in good faith its competitors were offering. While the case law suggests that the meeting competition defence is a defence for predatory pricing under the RPA the Supreme Court has not spelled out clearly whether it is a defence for predation under Section 2 of the Sherman Act as well. However, given that the standards for the violation under the two Acts have been aligned, it would be inconsistent if the Sherman Act did not incorporate such a defence. It has also been argued that a meeting competition defence should be equally applicable to Sherman Act claims since such evidence would appear to disprove the required intent element of monopolisation and attempted monopolisation claims.⁸¹

Several other characteristics of the defence which have been affirmed through case law are worth mentioning: (i) the defence might be used to justify discriminatory prices offered either to retain existing customers or to gain new customers,⁸² and (ii) the defence is not limited to a customer-by-customer lowering of prices but allows a seller to decrease prices on an area-wide basis if it proceeds with a genuine, reasonable response to prevailing competitive circumstances.⁸³ Finally, another important characteristic of the defence is that one can meet but not 'beat' competition.⁸⁴ Nevertheless, this is not an absolute rule. Since good faith, rather than absolute

Competition Defence: Investigation and Verification of Reported competing Offers' (1993) 62 Antitrust LJ, pp 132-133.

⁷⁷ The act was enacted to protect small, independent retailers from encroachment of big distributors and 'chain-stores', See Calvani T, 'Government Enforcement of the Robinson-Patman Act' (1984) 53 Antitrust LJ 921 at p 923

⁷⁸ *Ibid*, p 925.

⁷⁹ Denger & Herfort, 'Predatory Pricing Claims after Brooke Group' (1994) 62 Antitrust LJ 541.

⁸⁰ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 113 S.Ct.2578 (1993).

⁸¹ Denger & Herfort, *op cit* n 79, p 553.

⁸² *Falls City Indusm., Inc.v Vanco Beveragesm Inc.*, 460 US 428, 446-47(1983) (any distinction between retaining old customers and searching new ones would not only be inconsistent with the language of 2(b) but would be contrary to the principles of competition and would insulate commercial relations from market force, See Joseph and Harrop, *op cit* n 76, p 128.

⁸³ Hovenkamp, *Federal Antitrust Policy. The Law of Competition and its Practice*, West Group, 1999, p 581.

⁸⁴ In *Falls City Indusm., Inc.v Vanco Beveragesm Inc.*, 460 U.S. 428, (1983) the Supreme court held that a price reduction which knowingly undercuts a competitive offer is prohibited.

certainty, is the touchstone of the meeting-competition defence,⁸⁵ a seller who is able to prove that he only incidentally undercut the competitive price may still benefit from the defence.⁸⁶

5.3. The meeting competition defence in EC case law

The origin of the idea of a meeting competition defence in EC competition law is normally traced back to the *United Brands* case, where the ECJ famously said that, ‘the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interest if they were attacked’.⁸⁷ The Commission has on many occasions recognised in principle the right of a dominant undertaking to invoke the meeting competition defence.⁸⁸ Recently in *Atlantic Container* the CFI held that the sole purpose of justifications permitted in the case law under Article 82 was to enable the dominant undertaking to show that ‘the purpose of those practices is reasonably to protect its commercial interests in the face of action taken by certain third parties and that they do not therefore in fact constitute an abuse’.⁸⁹

However, a close study of the case law shows that, although dominant undertakings are entitled to protect their commercial interest, the meeting competition defence is not an available defence for otherwise abusive conduct. Since abuse is normally identified with the exclusion of competitors, once conduct is found to have an exclusionary effect or intent it is considered abusive irrespective of the fact that it has been undertaken in response to competition or not.

The meeting competition defence has been invoked in refusal to deal cases, predatory pricing, loyalty rebates and selective price cuts but in none of the cases has it served as an objective justification for the alleged abusive conduct.

Meeting competition defence in refusal to deal cases

UBC was accused of abusing its dominant position by ceasing supplies of its branded bananas to one of its most important distributors. UBC argued that this distributor had become an exclusive distributor of a competitor and had neglected UBC’s brand while deliberately pushing sales of the competitor’s branded bananas. In these circumstances, UBC felt that its behaviour was:

‘fully justified by the fact that if a firm is directly attacked by its main competitor who has succeeded in making one of that firm’s most important long standing customers his exclusive distributor for the whole of the country, that firm in its

⁸⁵ *Great Atlantic & Pacific Tea Co v FTC*, 440 U.S. 69 (1979), at p 83.

⁸⁶ See further on this point Springer U, ‘Meeting Competition’: Justification of Price Discrimination under E.C. and U.S. Antitrust Law’ [1997] ECLR 251 at p 256.

⁸⁷ Para 189.

⁸⁸ See for example *ESC/AKZO: interim measures*, OJ 1983, L252.13, para 4; *Eurofix-Bauco v Hilti*, OJ 1988, L65/19 (annex); and *Napier Brown Sugar*, para 31. See Article 3(1) of the Digital Settlement, reprinted in Dolmans and Pickering, ‘The Digital Undertaking’ [1998] ECLR 108.

⁸⁹ See Joined Cases T-191/98, T-212/98 and T-214/98, *Atlantic Container*, op cit n 18, para 1114.

own interest and that of competition has no option but to fight back or else disappear from this national market'.⁹⁰

The ECJ disagreed and held that the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party. Nevertheless, the ECJ said it was necessary to ascertain whether the discontinuance of supplies was justified.⁹¹ The reasoning that followed this statement is worth citing in full:

'Although it is true, as the applicant points out, that the fact that an undertaking is in a dominant position cannot *disentitle it from protecting its own commercial interests if they are attacked* and that such an undertaking must be conceded the right to *take such reasonable steps* as it deems appropriate to protect its said interest, such behaviour cannot be countenanced *if its actual purpose* is to strengthen this dominant position and abuse it. Even if a possibility of a counterattack is *acceptable that attack must still be proportionate* to the threat taking into account the economic strength of the undertakings confronting each other. The sanction consisting of a refusal to supply by an undertaking in a dominant position was in excess of what might, if such a situation were to arise, reasonably be contemplated as a sanction for conduct similar to that for which UBC blamed Oelesen'.⁹²

In this case, the 'attacking' conduct of the competitor consisted of taking away a dominant undertaking's distributor. It was not an illegal act but a normal means of competing. Although the ECJ suggests that a dominant undertaking may react to such a change in some way it made it clear that the reaction could not amount to an abuse i.e., disproportionate conduct. Thus, meeting competition defence is not an available defence for abusive conduct.

However, the ECJ seems to have had difficulties explaining why the refusal to deal amounted to an abuse. Unlike the preceding refusal to deal case, *Commercial Solvents*, where the refusal to deal was condemned because the dominant undertaking had refusing supplies to its customers with a view to expanding on a new market and risked eliminating all competition on a downstream market, in *United Brands* this was not the case. It seems that the ECJ felt it necessary to refer to a 'purpose to eliminate' in order to find the conduct abusive. Thus, the Court presumed that the UBC could not have been unaware that its action would have a deterring effect on other distributors dissuading them from actively promoting competing brands of bananas.

In *BBI/Boosey&Hawkes: Interim Measures*,⁹³ Boosey and Hawkes was accused of abusing its dominant position by ceasing to supply of brass band instruments to one of its major distributors, who, together with a company previously providing repair services to B & H, had set up a new undertaking with the intent to produce such instruments in competition with B & H.

⁹⁰ Para 177.

⁹¹ Paras 182-183.

⁹² Paras 189-191, emphasis added.

⁹³ Commission Decision 87/500, OJ 1987, L286.

The Commission was not persuaded by B&H's explanation that the reason for the refusal to supply was that the complainants were bad payers and disloyal traders and found that B&H conduct was part of a plan to prevent the entry of a competitor.⁹⁴ Following the reasoning in *United Brands*, the Commission emphasised that a dominant undertaking may only take reasonable steps to protect its commercial interests, which should be fair and proportionate to the threat but that the fact that a customer of a dominant undertaking becomes associated with a competitor or a potential competitor of that manufacturer, 'does not normally entitle a dominant producer to withdraw *immediately* or to take reprisal against that customer'.⁹⁵ Although there was no obligation on a dominant undertaking to subsidise competition against itself the refusal in this case went beyond a legitimate defence.

Conclusion on refusal to deal cases

United Brands and *BBI/Boosey & Hawkes* indicate that meeting competition is not a defence for refusal to deal where the refusal has an exclusionary intent or effect. In both cases the finding of intent facilitated the case for an abuse and precluded the application of the defence. If the aggressive conduct of the dominant firm's rival is not illegal under the competition rules, and if the response is proportionate to the threat, then in any case the response should not amount to an abuse. Indeed, in order to conform to the principle of proportionality, the response should at least be of the same nature as the rival's 'attack'. However, if so, one may wonder what is the point of recognising a dominant firm's right to protect its commercial interests if the protection may not amount to an abuse? To react without abusing is a right which cannot be questioned and does not need a defence. In this respect the recognition of the right to protect its commercial interest is a vacuous formulation. The meeting competition defence might have made sense if the intent were a necessary element of the finding of an abuse and the fact that the conduct in response to an attack might be used to defeat the presumed intent. However in the cases discussed, the finding of intent actually made the defence impossible.

Meeting competition defence in predatory pricing cases.

*Akzo*⁹⁶ is a seminal judgment in which the ECJ established a criterion of legitimacy for below-cost pricing based on the costs and the strategy of the dominant undertaking.⁹⁷ This involves two tests. According to the first test, pricing below average variable costs is abusive because a dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices. Secondly, pricing below average total cost but above average variable cost is abusive if the strategy is found to be a part of a plan for eliminating a competitor.⁹⁸ The reason is that such prices can drive from the market undertakings which are as efficient as the

⁹⁴ Para 19.

⁹⁵ *Ibid*, emphasis added.

⁹⁶ Case C-62/86, *op cit* n 10.

⁹⁷ Para 74.

⁹⁸ Paras 71-72.

dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them. In both tests intent to eliminate a competitor plays a role. However, in the first test the intent is presumed, while in the second it needs to be proved.

Akzo was accused of having embarked upon various predatory strategies aimed at excluding a smaller competitor, ECS. In reply to the Commission's allegations Akzo tried to invoke a meeting competition in defence.

Unreasonably low prices

One of the accusations was of maintaining prices below average total cost for a prolonged period of time.⁹⁹ Akzo argued that it aimed at gaining new customers in order to reduce a considerable fall in its profit margin caused by the competitor's offers. The ECJ did not accept this argument because the fact that Akzo's prices went below the prices charged by the competitor revealed that, 'Akzo's intention was not solely to win the order which would have induced it to reduce its prices only to the extent necessary for this purpose'.¹⁰⁰ Thus, a reduction in prices to the level of the competitor's prices, without undercutting them, indicates that there is no intent to eliminate a competitor (provided that there is no other evidence of intent) and therefore the conduct is not abusive. The question of whether a dominant undertaking aligns its prices to meet competition is relevant only to demonstrate absence of intent to eliminate. Thus, the meeting competition defence is not a defence to abusive predatory pricing but only an indication that one of the necessary preconditions for the finding of a predatory abuse is not present. This assertion may be proved by considering the ECJ's assessment of the other predatory strategies for which Akzo was condemned.

Selective prices

Akzo was also accused of having made selective quotations to ECS's competitors which were below its average total costs, while offering its own regular customers prices substantially higher and above its average total cost.¹⁰¹ Akzo argued that the lower prices were offered to customers because those customers had received better offers from Akzo's competitors.¹⁰² The ECJ said that by adopting this pricing strategy, AKZO was able to offset losses resulting from the sales to customers of ECS against profits made on the sales to its own customers. This behaviour thus demonstrated that, 'Akzo's intention was not to pursue a general policy of favourable prices but to adopt a strategy that could damage ECS'.¹⁰³

The selective price cuts below average total costs, coupled with the possibility of offsetting losses (which in the case of dominance will normally be presumed) was an indication of an anticompetitive intent and therefore fulfilled the second *Akzo* test for

⁹⁹ Para 101.

¹⁰⁰ Paras 102, 107.

¹⁰¹ Para 110, 114.

¹⁰² Para 112.

¹⁰³ Para 115.

abuse. In this case the ECJ did not consider whether Akzo was meeting or beating competition, because the ECJ inferred intent from the selectivity of Akzo's price cuts. Thus, when intent can be proved, the question of whether the conduct is a response to competition becomes irrelevant because an abuse is already established.

Bait prices

The same conclusion can be drawn from an analysis of the 'bait pricing' strategy. Akzo was offering products of better quality to its competitor's customers at an advantageous price while not offering those advantages to its own customers. The ECJ pointed to two facts proving the abusive nature of the conduct: the fact that it made the product more attractive for its competitor's customers than for its own customers and the fact that the product prices were particularly advantageous, since, as Akzo had conceded, in some cases they did not cover its average variable costs. Under these circumstances, the ECJ stated that the competitor's competitive prices, 'cannot justify the fact that Akzo offered this product at unreasonably low prices having regard to the structure of its costs'.¹⁰⁴

The reasoning is not sufficiently clear, but it seems that the Akzo's occasional pricing below average variable costs implied an intent to eliminate a competitor and therefore the first predatory test was fulfilled. Under these circumstances, the question whether the conduct was in response to competition and whether or not the prices undercut or not competitor's prices was irrelevant.

Maintenance of prices at an artificially low level over a prolonged period in the absence of competitors' challenging competitors' offers

Having established that Akzo had charged prices below average total cost and above average variable cost in the absence of any competing quotations during the period, the ECJ held that, '[b]y maintaining prices below its average total costs over a prolonged period without any objective justification, Akzo was thus able to damage ECS by dissuading it from making inroads into its customers'.¹⁰⁵

How can this statement be interpreted given that, according to the second *Akzo* test, below total cost pricing is not an abuse if it is not a part of a plan to eliminate a competitor? Although the ECJ did not clearly spell this out, in my view, the ECJ inferred an eliminatory intent from the fact that the pricing below total cost was not triggered by competitive offers and therefore did not have a logical explanation. The absence of any other explanation actually indicated that the practice was aimed at eliminating a competitor. Thus, as suggested earlier, the question of whether the conduct is a response to a competitive offer is relevant to the extent it may prove or disprove the presence of an intent to eliminate.

From the *Akzo* judgment it can be concluded that meeting competition is not a defence to predatory pricing. Once one of the two *Akzo* tests is fulfilled, the question whether the pricing strategy is in response to competition becomes irrelevant. The question of

¹⁰⁴ Paras 129-130.

¹⁰⁵ Para 146.

whether pricing below a certain level of cost is in response to competition becomes relevant only where there is no other evidence that the strategy involved is aimed at eliminating a competitor. In such a case, undercutting competitors is a clear indication of intent and therefore of abuse, while aligning prices with competitors' prices disproves the presence of eliminatory intent and consequently defeats the claim that the conduct is abusive.

Unavailability of meeting competition for loyalty rebates

The question whether responding to increased competition may be a justification for granting loyalty rebates arose in *BPB Industries*.¹⁰⁶ BG was accused of abusing its dominant position in the supply of plasterboard in Northern Ireland by launching a policy of encouraging merchants to deal exclusively with its plasterboard and penalizing merchants who were dealing with imported plasterboard as well. This involved granting rebates to merchants buying all their requirements from BG, withdrawing rebates from merchants who were dealing also with imported from other producers of plasterboard and retrospectively paying rebates to merchants who had agreed to cancel further imports.

BG claimed that its position in Northern Ireland was threatened by cheap imports of plasterboard from Spain, which involved unfair trading, and that it had been asked by merchants dealing with its product to protect them from those cheap imports. BG argued that its policy could not be an abuse because it was a response to a threat and was aimed at protecting BG's legitimate interests.¹⁰⁷

Although the CFI reaffirmed that a dominant undertaking could not be disentitled from protecting its own commercial interests if they are attacked,¹⁰⁸ the court held that it was not appropriate for a dominant undertaking to take, on its own initiative, measures intended as retaliation against commercial practices which it considers unlawful or unfair. It was therefore, 'irrelevant whether the measures ... were adopted in response to "appeal" prices applied by certain competitors'.¹⁰⁹ In the CFI's view the only important issue was whether, through recourse to methods different from those governing normal competition in products based on traders' performance, the conduct at issue *was intended* or likely to affect the structure of the market.¹¹⁰

The CFI concluded that, by virtue of its discriminatory nature, the BG's practice was clearly intended to dissuade merchants from dealing with imported plasterboard and thus further entrenched BG's market position.¹¹¹

¹⁰⁶ Case T-65/89 *BPB Industries v Commission* [1993] ECR II-39

¹⁰⁷ Paras 110-111.

¹⁰⁸ Para 117.

¹⁰⁹ Para 118.

¹¹⁰ *Ibid.*

¹¹¹ Para 119.

The rebates applied were not below cost but the discriminatory nature of the practice was sufficient to prove an intent to eliminate and therefore an abuse. This made the 'meeting competition' an irrelevant issue.

Meeting competition defence for above-cost selective price cuts

In order to meet competition from imports of sugar from Northern Ireland or from its own re-imported sugar, Irish Sugar¹¹² was granting special allowances to selected customers (established along the borders with Northern Ireland). Irish Sugar pointed to a combination of three factors characterising the situation which forced it to adopt the challenged practice: (i) the growing difference between prices charged in the Irish and UK market, which allowed importers to compete with lower prices; (ii) illegal trade, which was an additional competitive pressure; and (iii) losses incurred by Irish Sugar during the period. In view of this situation and given its limited financial resources, Irish Sugar explained that it was unable to cut prices on a national scale but only to cut them where it was challenged by competitors.¹¹³

The CFI stated, that in the particular circumstances, neither the pricing policy of other operators, nor Irish Sugar's own financial situation, nor the defensive nature of its conduct, nor the alleged existence of illegal trade, could justify those rebates.¹¹⁴

The CFI explained that the influence of the pricing policy of operators active principally on a neighbouring market, or on another national market, is of the very essence of a common market. According to the CFI, anything which restricts that influence must be regarded as an obstacle to the achievement of that common market and prejudicial to the objective of undistorted competition and to the interests of consumers. The CFI emphasised that such conduct is abusive irrespective of the fact that the rebates did not go below certain cost levels. The dominant undertaking could not rely on the insufficiency of its financial resources because:

'the circumstances in which an undertaking in a dominant position may be led to react to the limited competition which exists on the market, especially where that undertaking holds more than 88% of the market as in this case, form part of the competitive process which Article 86 is precisely designed to protect'.

Finally, the CFI expressly stated that defensive nature of the practice complained of in this case could not alter the fact that it constituted an abuse.¹¹⁵

In this case, in addition to the exclusionary effect the goal of market integration was at stake and the CFI did not hesitate to find an abuse. As a facilitating argument, the CFI referred to the Irish Sugar's extremely strong dominant position. What is important is that the CFI explicitly stated that aggressive competition on the part of competitors was just a normal course of market behaviour and it would not trigger any different standard of liability of a dominant undertaking.

¹¹² Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969.

¹¹³ Para 175.

¹¹⁴ See para 185.

¹¹⁵ Paras 185-187.

In *Compagnie Maritime Belge Transports SA v Commission*¹¹⁶ members of CEWAL – a liner conference in the maritime transport sector enjoying an extraordinarily strong collective dominant position amounting to 90% of the market - were accused of having abused this position by adopting a practice of fighting ships against their only competitor G&C. CEWAL argued that the adopted practice did not infringe Article 82, mainly because the rates it charged, although low, were not below cost and therefore escaped AKZO test; and secondly because the lowering of the charges was in response to the price war initiated by C&G and pressure from customers who were seeking rates similar to those offered by G&C.

Confirming the Commission's finding of an abuse, the CFI focused on the purpose of the adopted practice to eliminate a competitor. The CFI found that the Commission had established to a sufficient legal standard that the practice was undertaken in order to eliminate a competitor by relying on documents showing CEWAL's intention to 'get rid of' the independent shipping operator.¹¹⁷ The CFI held that the argument that the adopted practice was a reaction to the competition from G&C was not acceptable since the practice was not reasonable and proportionate.¹¹⁸ The ECJ held:

It follows that, where a liner conference in a dominant position selectively cuts its prices *in order deliberately to match* those of a competitor, it derives a dual benefit. First, it eliminates the principal and possibly the only, means of competition open to the competing undertaking. Second, it can continue to require its users to pay higher prices for the services which are not threatened by that competition'.¹¹⁹

The ruling makes clear that even conduct which aligns the dominant undertaking's prices with those of competitor one can be an abuse if the reduction of the price is deliberately applied with the view to eliminating the only competitor. The Community Courts had difficulties explaining why above cost price cutting constituted an abuse and again relied on 'intent to eliminate' to help prove the abuse. Having established that the pricing strategy was abusive that (i) meant it was a disproportionate response, and (ii) the question whether the conduct was in response to competition was irrelevant.

Some conclusions from the case law

The foregoing review of the case law indicates that meeting competition is not a defence to the charge of abusive conduct, be it refusal to deal, predation, loyalty rebates or selective price-cutting. Since an abuse is identified on the basis of effect or intent to exclude a competitor or competitors, it is obvious that meeting competition is not a defence for conduct that excludes or is intended to exclude.

The case law attaches very little relevance to the fact that the dominant undertaking's conduct is a response to aggressive competition. The only two situations in which this could be relevant is in the context of the second *Akzo* test for predation: (i) where the

¹¹⁶ Cases T-24, 26, 28/93 [1996] ECR II-1201, upheld on appeal, Case C-395/96P [2000] ECR I-1365.

¹¹⁷ Para 147.

¹¹⁸ Para 148.

¹¹⁹ Paras 117-119.

meeting competition defence demonstrated the absence of exclusionary intent and hence the absence of abuse; (ii) where in below average total cost pricing, the absence of competitors' better price offers indicated an exclusionary intent. Thus, only in the predatory pricing cases did the question of whether the conduct was a response to competition or not, have any relevance for proving or disproving exclusionary intent. And even in those cases, the meeting competition defence did not operate as a justification for such an intent if it was already established.

The EC approach is different from the American meeting competition defence based on the concept of good faith. This concept has almost no relevance in the EC jurisprudence, at least in the sense it is used by the US courts. First, where it has been used in the EC law context by the Commission, it has not been used to show belief that competitors offer lower prices but rather certainty that the conduct will not harm competitors.¹²⁰ While the goods faith is capable of negating intent to exclude, in EC law, once intent to eliminate is found, the dominant firm's beliefs about competitors' prices is irrelevant. Second, under US law, selective price cuts to particular customers or to a large group of customers is not problematic as long as good faith can be proved, while in EC law selectivity, is an indication of an eliminatory intent and thus of an abuse. Third, proving good faith in US law is much easier than defending oneself against allegations of eliminatory intent under EC law. Despite the fact that abuse is considered to be an objective concept, the Community Courts have relied quite heavily on intent and have presumed that it is inherent to various types of conduct. This has the *de facto* effect of shifting the burden of proof on dominant undertakings to defend themselves against a finding of intent. This shifting of the burden actually made the meeting competition argument in *Akzo* look like a defence, while in fact it should have been an element of the proof of the abuse.

From the above it follows that the right of a dominant undertaking to defend itself when it is attacked, or in other words the right to invoke the meeting competition defence is a sham. If this right does not entitle a dominant undertaking to behave in a way which would be deemed an abuse were it not for the fact that it is trying to meet competition from other undertakings, a right to behave in an appropriate and non-abusive way is senseless because there is no need for a defence for legal conduct.

Why is the meeting competition defence as an objective justification unhelpful?

In my view, there are several reasons why the Community Courts did not accept meeting competition as an objective justification in the current framework of Article 82. First, exclusion of competitors is equated with an abuse. Secondly, having a meeting competition defence as an objective justification for an exclusionary conduct implies

¹²⁰ For example, in *Digital Undertaking*, the Commission allowed deviation from the regular prices of the company by providing non-standard reductions from the list of prices or enhancement of such services in order to meet comparable services offerings of competitors. However this was admissible provided that an internal review process designed to verify that the proposed allowances were offered in good faith as a proportionate response to real or (based upon information from the customer or other reliable sources) reasonably anticipated competitive offerings and that would not result in foreclosure or distortion of competition.

that the exclusionary conduct must be a suitable necessary and proportionate (*stricto sensu*) means of protecting of the commercial interests of the dominant undertaking, which is the right to prevent losses and a weakening of the market position already held.

However, it is doubtful whether prevention of losses could be a legitimate interest under the current understanding of the notion of abuse. The special responsibility applies as long as one is dominant, i.e., unless the attacking conduct makes a dominant undertaking lose so much market share that it loses its dominant position. Thus, the need to maintain one's dominant position not only cannot be a legitimate interest but is also an abuse.

Second, if the attacking conduct is an illegal act, the dominant undertaking is not entitled to defend itself by adopting abusive behaviour.¹²¹ On the other hand, if the attacking conduct is a legal action it is difficult to explain why a dominant undertaking needs a special defence against competition which does not harm the market or the consumers. In addition, if the dominant undertaking's conduct in response should be proportionate, the response should be of the same nature as the attacking conduct.

Can a refusal to deal with a distributor be a suitable means for protecting oneself from aggressive competition in the form of better trading conditions offered by a competitor to the same distributor? I doubt this. In general, very few practices falling within the traditional list of abuses can be a suitable and necessary means of responding to a threat which is nothing but aggressive competition. Refusal to deal can never be a suitable response because the attacking conduct can never be an abusive refusal to deal. Tying and exclusive dealing against rebates can in general be performed by non-dominant undertakings and therefore one may argue that dominant undertakings should be able to adopt the same conduct in response. However, this possibility has been precluded by the statement that practices that are legal if performed by non-dominant undertakings might be an abuse if performed by dominant undertakings because of their special responsibility¹²² and by the ruling that a tying practice which is standard practice according to commercial usage may still be an abuse if performed by a dominant undertaking.¹²³

The only remaining practices which can be a suitable and necessary response are pricing strategies. Lowering prices may be a suitable and necessary response to a low pricing strategy. However, the question here is whether the response is excessive, i.e., whether the dominant undertaking does not cut its prices too low or whether it lowers all its prices or only to some of the customers. Although the *Azko* judgment can be criticised for its flexible use of the notion of exclusionary intent, the predatory pricing test based on a presumption of exclusion of an efficient competitor is sensible from an economic point of view and not impossible to apply from a legal point of view.

¹²¹The Community courts have consistently held that it is for the public authorities and not private undertakings to ensure compliance with legal requirements. See Case T-30/89 *Hilti*, op cit n 55, para 118; Case T-228/97 *Irish Sugar v Commission*, op cit n 112, para 192.

¹²²Case T-65/89 *BPB Industries*, op cit n 106, para 67.

¹²³Case T-83/91 *Tetra Pak*, op cit n 56, para 73.

Problematic, however, are the cases where the reduction in price in response to competition remained above the cost of the dominant undertakings and did not undercut the competitors' prices. The predominant view, which I also share, is that it is wrong to easily find such conduct abusive. However, I would submit that the meeting competition defence is not an appropriate solution for saving these practices from the prohibition of Article 82 because the only reason why such practices are adopted is precisely to meet competition. The question should be whether selective price cutting, and even above-cost pricing, is capable of eliminating an efficient competitor – which was the reason why *Akzo* prohibited below cost pricing. Only where the eliminated competitor is as efficient as the dominant undertaking would harm to consumers inevitably occur. Another relevant question might be whether, as hinted in both *Irish Sugar* and *Compagnie Maritime Belge Transports*, special circumstances, such as the fact that the dominant undertaking is a quasi monopolist or the fact that undertakings holding a collective dominant position are able to share short-term losses, makes the elimination of an efficient competitor more likely, or whether economies of scale are important in the relevant market and make it difficult for efficient but small competitors to compete. However, these are questions unrelated to the meeting competition defence.

From the above it follows that accepting a meeting competition defence as an objective justification cannot alone resolve the problems with the current overbroad application of Article 82. As long as abuse is identified with exclusion of competitors or the intent to exclude competitors, and so long as the special responsibility applies irrespective of the fact that the dominant position is weakened, the meeting competition defence cannot sensibly fit within the logic of Article 82.

6. AN EFFICIENCY JUSTIFICATION

6.1. Views on the possibility of having an efficiency objective justification under Article 82

As already explained in Section 2, there are strong reasons for introducing efficiency considerations in the assessment of exclusionary conduct under Article 82, and views have been expressed that this can be done through the use of the concept of objective justification.¹²⁴ Advocate General Jacobs has given support to this idea on several occasions.¹²⁵ In the *Microsoft* decision,¹²⁶ the Commission did not dispute that efficiency considerations may be seen as a type of objective justification case but rejected those arguments on the merits. It is argued that, in the absence of an exonerating provision modelled on Article 81(3) under Article 82, the concept of objective justification can be applied to enable dominant undertakings to prove that, despite the foreclosure effect on competition, the conduct brings about efficiencies which outweigh the negative

¹²⁴ Gyselen L, 'Rebates: Competition on the Merits or Exclusionary Practices?' in Ehlermann, C-D and Atansiu I (eds), *The European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?*, Hart Publishing, Oxford and Portland, Oregon (forthcoming); and Lang, 'Anti-competitive Non-pricing Abuses under European and National Antitrust law' in B. Hawk (ed) [2003] *Fordham Corp L Inst* 235, pp 272-3.

¹²⁵ See Opinion in Case C-7/97 *Oscar Bronner*, op cit n 49 and Opinion in Case C-53/03 *Synetairismos Farmakopoiou Aitolias*, op cit n 71.

¹²⁶ Op cit n 46.

effects on competition. One of the proponents of such an approach is Gyselen, who argues that the underlying thought behind the efficiency justification is that:

‘dominant undertakings are free to expand their market share at the expense of their competitors as long as they compete on the merits (which means that their market behaviour has an “objective justification”)¹²⁷

He proposes that the assessment of a dominant undertaking’s conduct under Article 82 should be carried out in two stages, ‘similar to the two–tier assessment of agreements between several companies under Article 81’. In Gyselen’s view, the fact that Article 82 – unlike Article 81- lacks an explicit legal basis for objective justification is immaterial, ‘since the purpose of Article 82 cannot be to deprive dominant undertakings of the possibility to outcompete their rivals with lawful means’.¹²⁸ He suggests that, similar to the analysis under Article 81(3), the efficiencies should be quantifiable and verifiable and that the dominant undertaking should meet the proportionality test, i.e., the conduct should be a proportionate means to achieve the legitimate aim – the efficiencies. According to Gyselen the hardest question is how to circumscribe the proportionality test: according to a ‘softer’ version, a real balancing exercise would have to be performed between the efficiency and the negative effect on competition, while a ‘stricter’ version, would require that a dominant undertaking to prove that it could not do business without the alleged restraint of competition.¹²⁹

Along with the arguments in favour of the use of the concept of objective justification as an efficiency justification, there is also an awareness of the difficulties of taking such an approach. The concerns are that the concept of objective justification has been used by the Community Courts rather narrowly, allowing only cost-based justifications but not justifications related, for example, to the need to provide appropriate incentive structures or to overcome externalities such as the free rider problem, and that, even if widened out the objective justification concept is not ideal since it does not contain an explicit balancing role, or an explicit indispensability test or customer benefit test.¹³⁰ There is a procedural problem as well – it is questionable whether Article 2 of Regulation 1/2003¹³¹ which provides for undertakings to bear the burden of proving benefits under Article 81(3) but says nothing about possible benefits under Article 82, does allow dominant undertaking to prove that its conduct is beneficial.

Given those difficulties, it might be useful to take a quick look at how the American counterpart of Article 82, Section 2 of the Sherman Act (prohibiting monopolisation and attempts to monopolise) accommodates efficiency justifications for exclusionary conduct.

¹²⁷ Gyselen, op cit n 124, p5.

¹²⁸ See p 4.

¹²⁹ The latter version is supported by Advocate General Cosmas (Opinion in Case 344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369).

¹³⁰ Fletcher A, ‘The reform of Article 82: recommendations on key policy objectives’ Speech at the Competition Law Forum in Brussels.

¹³¹ Council Regulation 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJ 2003, L1/1.

6.2. The American treatment of efficiency justifications

In the famous *Grinnel* case¹³² the Supreme Court defined actual monopolisation as, ‘the wilful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product’. The jurisprudence and the abundant literature prove that the distinguishing between the wilful acquisition and growth owing to superior production is an arduous task that can be solved differently depending on the economic school of thought to which the interpreter belongs.¹³³ Nevertheless, growth as a consequence of a superior product has generally been associated with growth based on efficient operations. This was spelled out more clearly in the *Aspen Skiing* case, where the Supreme Court held that conduct is predatory and does not constitute competition on the merits if it excludes or attempts to exclude a rival on a basis other than efficiency.¹³⁴ Thus, the American understanding of ‘competition on the merits’ includes efficiency-enhancing conduct irrespective of the fact that the conduct might at the same time be exclusionary. In this respect, the notion of competition on the merits is clearly wider than the European understanding of the same concept.¹³⁵

The dichotomy found in the definition of monopolisation has brought about the perception that Section 2 is based on a rule of reason analysis that allows efficiency gains to outweigh negative effects on competition. However, the courts have generally avoided balancing such effects and have preferred either to find that the conduct is actually not exclusionary or to find that there are no real efficiency gains. Only recently in *Microsoft*¹³⁶ did the Court expressly state that Section 2 requires a rule of reason analysis. It then established a four-step test for determining whether there is a breach of Section 2, which involves the following inquiry: (i) does the exclusionary conduct have an anticompetitive effect, meaning ‘harm to competitive process and thereby to consumers’; (ii) has the plaintiff shown that the monopolist’s conduct indeed has the requisite anticompetitive effect; (iii) if an anticompetitive effect is established, can the defendant justify its conduct by proving that it is a form of competition on the merits because it involves greater efficiency or enhances consumer appeal; and (iv) if defendant gives sufficient justification for its conduct, that it is to say that the conduct is on the merits, the burden of proof is shifted back to the plaintiff who must demonstrate that the anticompetitive harm outweighs the pro-competitive benefits.

Although there are similarities with the rule of reason analysis under Articles 81(1) and 81(3)¹³⁷ the test prescribed under Section 2 of the Sherman Act is different in several important respects. First, while the US test requires efficiency sufficient to outweigh the

¹³² *United States v Grinnel Corp.*, 384 U.S. 563 (1966).

¹³³ The analysis and the outcome prescribed by representatives of Harvard and Chicago School of thought are very different. See for example Kovacic and Shapiro, ‘Antitrust Policy: A Century of Economic and Legal Thinking’ 14(1) *Journal of Economic Perspectives*, Winter 2000, pp43-60.

¹³⁴ *Aspen Skiing Co v Aspen Highland Skiing Corporation*, 472 U.S. 585 (1985).

¹³⁵ See Kallaugher and Sher, *op cit* n 12.

¹³⁶ *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

¹³⁷ The CFI suggested that Articles 81(1) and 81(3) involve a rule a reason, see Case T- 112/99 *Métropole Télévision (M6) v Commission* [2001] ECR II-2459.

anticompetitive effect it does not contain a strict requirement according to which a fair share of those efficiencies must be passed on to consumers. This allows a more flexible and more general estimation of the positive effects of the efficiencies. Secondly, while under Article 81(3) the efficiencies must outweigh the negative effects and while this must be proved by the defendant undertakings, under the Section 2 test the formulation is the opposite: the efficiency defence will not succeed only if the anticompetitive effects outweigh the positive effects and this must be proved by the plaintiff. Thus, under Section 2 the efficiency justification does not really require the same fine-tuned balancing exercise that one finds in Article 81(1)-81(3). Moreover, the allocation of the burden of proof under Section 2 makes it much easier for a defendant in the US than it is for a firm in the EC seeking to rely on Article 81(3).

This is an important observation because the fact that the Section 2 test differs in those respects from the efficiency test under Article 81 indicates that such a Section 2-like test would not be fully appropriate for Article 82. This is because, whatever test for efficiency is adopted under Article 82, it should be designed to achieve the same objectives as those under Article 81 and thus may not ignore the requirement that consumers must enjoy a fair share of the efficiency gains, nor can the test be more lenient than the one under Article 81(3). Thus, the American approach to efficiency justifications, although insightful and perhaps easier to apply, cannot be transposed to Article 82.

6.3. The Community Courts' Attitude towards Efficiency Justifications

Despite the strong arguments in favour of objective efficiency justifications under Article 82, the Community Courts have never used the concept of objective justification as an efficiency justification. Although often referring to 'economic justification' the Courts have never approved conduct that has been found to have an exclusionary or discriminatory effect on the basis that it produces efficiency gains.

That said efficiency considerations are not entirely absent from the analysis under Article 82. Efficiency arguments can be found in the case law on rebates and in several specific cases relating to restrictive practices adopted by dominant associations. This part of the paper examines those cases with a view to elucidating what relevance the Community Courts attach to efficiencies under Article 82.

Efficiencies as a basis for legality of quantity rebates linked exclusively to the volume of purchase

Rebates based on the volume of purchase have traditionally been considered lawful under Article 82. In *Suiker Unie*¹³⁸ and in *Hoffman-La Roche*¹³⁹ the ECJ distinguished quantity rebates, from fidelity rebates, emphasising the legality of the former and the exclusionary effect of the latter. The reason for the different treatment was that, unlike quantity rebates exclusively linked to the volume of purchases, fidelity rebates granted

¹³⁸ Case 40/73 [1975] ECR 1663.

¹³⁹ Op cit n 6.

against exclusive purchasing are not based on an 'economic transaction' which justifies the burden or benefit they carry for the parties.¹⁴⁰

That said, it should be pointed out that the Community Courts have taken a very strict view of what quantity rebates are. In *Michelin I*¹⁴¹ the ECJ made it clear that a rebates system which is characterised by the use of sales targets does not amount to a mere quantity discount linked solely to the volume of goods purchased.¹⁴² Target rebates, although related to quantities, were not deemed economically justified, because:

'any system under which discounts are granted according to the quantities sold during the relatively long reference period has the inherent effect, at the end of that period of increasing pressure on the buyer'.¹⁴³

The economic rationale for the legality of quantity rebates was spelled out recently in *Portugal v Commission*.¹⁴⁴ The case concerned an abuse of a dominant position in the market for aircraft and take-off services through the application of a system of landing charges involving preferential discounts based on frequency of landing. The defendant maintained that the challenged discount system amounted to quantity discounts and further maintained that it produced efficiencies gains: the frequency or intensity of the use of such costly facilities as regards both their initial cost and their maintenance was decisive in the conduct of a strategic policy of (re)investment in the development of such airport facilities; it also had a bearing on the final cost of writing off investments.

Both the Commission and the ECJ affirmed that dominant undertakings were entitled to grant quantity discounts and that, 'it is of the very essence of a system of quantity discounts that larger purchasers of a product or users of a service enjoy lower average unit prices'.¹⁴⁵ The ECJ explained that the mere fact that the result of quantity discounts was that some customers enjoyed, in respect of specific quantities, a proportionally higher average reduction than others in relation to the difference in their respective volumes of purchase was inherent in this type of system and did not mean that the system was discriminatory. Nevertheless, if the discount system allowed only some trading parties to benefit from it and if the economic advantage they obtained was not justified by any economies of scale for the supplier, the system would be indeed discriminatory.¹⁴⁶ The latter was the reason why the ECJ did not accept that the discount system in the case was purely quantitative.

In this case, the ECJ affirmed that the legality of quantitative rebates is based on efficiencies arising from cost savings but established conditions that should be met in order for a rebate system to be deemed quantitative. The ruling suggests that the system: (i) should be a genuine incentive for an increased purchase or use of a service

¹⁴⁰ Para 90.

¹⁴¹ Op cit n 8.

¹⁴² Paras 71-72

¹⁴³ Para 81.

¹⁴⁴ Case C-163/99 [2001] ECR I-2613.

¹⁴⁵ Para 51.

¹⁴⁶ Para 52.

and should reflect genuine cost savings; (ii) be based on a gradual and proportionate increase of purchases or use of a service; and (iii) should not be designed in such a way that only large undertakings can benefit from it.

In *Michelin II*,¹⁴⁷ the CFI affirmed that quantity rebates reflected gains in economies of scale and that a rebate system in which the rate of the discount increased according to the volume purchased did not infringe Article 82 EC. However, the CFI went on to say that this would be the case unless the criteria and rules for granting the rebate revealed that the system was not based on an economically justified countervailing advantage but tended, following the example of a loyalty and target rebate, to prevent customers from obtaining their supplies from competitors. Such a system, in the CFI's view, had the characteristics of a loyalty inducing discount system.¹⁴⁸ With this statement, the CFI in fact introduced an exception to, or an additional requirement for the legality of quantitative rebates: the system should not have a foreclosure effect.

The above review of the case law shows that the reason why quantitative rebates were considered legal, at least in the beginning, was that they reflect genuine cost savings. The basis for the legality was the efficiency gains presumed to be inherent to this form of pricing. Thus, efficiency did not operate as a justification. However, the Community Courts began to circumscribe the notion of quantity rebates and the rule that emerged shows that a rebate system which does not increase proportionately with the volume of purchases, or which has a discriminatory or exclusionary effect cannot qualify as a genuine quantity rebate and will not benefit from the presumption of legality.

Can efficiency gains justify rebate systems which have exclusionary effect?

To achieve a rational competition policy as regards dominant firms, efficiency justifications are needed particularly for rebates that may have both foreclosure and efficiency enhancing effects. However, the case law leaves little room for such justifications.

In *Michelin I*, having found that rebates conditional upon reaching sales targets had the effect of hindering competitors' access to the market, the ECJ stated that neither the wish to sell more nor the wish to spread production more evenly could justify such a scheme¹⁴⁹ thereby precluding any justifications based on allocative or productive efficiency.

In *Irish Sugar Plc*, a discount system rewarding merchants depending on their geographical location was found to be discriminatory and exclusionary by effect. While admitting that the conduct of a dominant undertaking, in order to be legal, should be based on criteria of economic efficiency and should be consistent with the interests of consumers¹⁵⁰ the CFI refused to accept that the discount system in question could

¹⁴⁷ Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission (Michelin II)* [2003] ECR II-4071.

¹⁴⁸ Para 95.

¹⁴⁹ *Ibid.*

¹⁵⁰ Para 189

possibly have economic justifications, because as the Commission had found, the system was not based on objective economic justifications such as the quantities purchased by the customer, marketing and transport costs or any promotional, warehousing, servicing or other functions which the relevant customer might have performed.

In *British Airway*¹⁵¹ and in *Michelin II*,¹⁵² the CFI demonstrated a readiness to accept efficiency justifications for loyalty inducing rebates, but in none of the cases did it do so. In *British Airways* the CFI upheld the Commission's decision finding that a discount scheme rewarding travel agencies for reaching certain individualised volume targets during a certain reference period and calculated on the basis of the customers' total incremental sales were fidelity-building and exclusionary by effect. Nonetheless, the CFI said that a finding that a rebate scheme had fidelity-building effect did not exclude the need to ascertain whether the scheme was based on economically justified considerations.¹⁵³ However, the CFI rejected the justifications offered by BA by relying on the same arguments it used to explain why the system was loyalty-enhancing and exclusionary. The scheme was fidelity-enhancing mainly because of its progressive nature with a very noticeable effect at the margin, which made the rate of the discounts capable of rising exponentially from one reference period to another.¹⁵⁴ This also turned out to be the reason why the scheme could not be economically justified. The CFI held that a retrospective application of increased discount rates bore no objective relation to the sale of additional tickets; it reflected a price disproportionate to the productivity gain of BA from the extra tickets sold and could not be based on efficiency gains or cost savings.¹⁵⁵

Similarly, in *Michelin II* although it found that the rebates scheme had loyalty-inducing characteristics, the CFI went to consider, 'whether in spite of appearances, the quantity rebate system applied by the applicant is based on countervailing advantage which may be economically justified'.¹⁵⁶ For this purpose the CFI considered it necessary to examine whether the dominant undertaking had established that the quantity rebates, were based on objective economic reasons.¹⁵⁷ However, the CFI found the arguments of the dominant undertaking in this respect to be too general and, 'insufficient to provide economic reasons to explain specifically the discount rates chosen for the various steps in the rebate system'. Its reasoning reveals that what the CFI means by economic justifications is pure cost savings resulting from proportionate increases in the volume of purchase. A rebate system which limited the dealers' choice and made access to the market more difficult for competitors was not based on any

¹⁵¹ Case T- 219/99 *British Airways plc v Commission* [2003] ECR II-5917.

¹⁵² Op cit n 147.

¹⁵³ Para 271.

¹⁵⁴ Para 272.

¹⁵⁵ Para 291.

¹⁵⁶ Para 98.

¹⁵⁷ Para 107.

countervailing advantage which might be economically justified.¹⁵⁸ Thus, the finding of loyalty inducing characteristics precluded the acceptance of any economic justifications.

The foregoing review of the case law on rebates reveals that the Community Courts do accept efficiency considerations but only in terms of direct cost savings, which can be found in genuine quantity rebates.¹⁵⁹ Where the system involves retrospective rewards or where it is designed for particular customers or to encourage loyalty in some other way, it cannot be defined as quantitative and cannot be economically justified. Even where the Community Courts seemingly showed a readiness to consider efficiency gains for rebates with loyalty enhancing characteristics, such gains were not accepted as economic justifications because the claimed efficiencies were not transaction-specific cost savings. The reasoning of the Community Courts seems circular. While seeking to establish whether a loyalty rebates system can be economically justified, the CFI strangely looks for efficiency justification typical for genuine volume rebates, although the finding that the system is not a genuine quantity rebate already excludes the possibility of finding this type of efficiencies. In short, efficiencies do not operate as a justification for rebates having a foreclosure effect.

Efficiency considerations in the assessment of restrictions imposed by dominant associations

In several preliminary ruling cases, the ECJ suggested that restrictions of competition resulting from conditions imposed by dominant associations upon their members or customers would not be abusive, despite the incidence of foreclosure effects, as long as those restrictions were necessary for the fulfilment of the legitimate objectives of the associations.

In *Belgische Radio en Televisie v SV SABAM and NV Fonior*,¹⁶⁰ an association enjoying a *de facto* monopoly for the management of copyrights demanded a global assignment of all copyrights (future and present) without drawing any distinction between specific categories of such rights, thereby severely limiting the freedom of its members to dispose of their rights. In *Ministère Public v Tournier*¹⁶¹ a dominant association managing copyrights granted a global licence for the entire repertoire of its members while refusing to give authorisation for public performance of musical works limited to particular categories of music. Since the association charged a flat royalty, the practice had the effect of tying the categories of music for which there was no demand to the popular categories of musical work. In *Gottrup-Klim Grovareforeninger v Dansk Landburgs Grovareselskab AmbA*¹⁶² a co-operative purchasing association forbade its members from also being members of competing associations, thus requiring exclusive membership. In these three cases the imposed restrictions directly affected the

¹⁵⁸ Para 110.

¹⁵⁹ See Kallaugher, 'Rebates Revisited (Again) – The Continuing Article 82 Debate', paper presented at the Second Annual Conference of the GCLC, Brussels, 16-17 June 2005.

¹⁶⁰ Case 127/73 [1973] ECR 313.

¹⁶¹ Case 395/87 [1989] ECR 2521.

¹⁶² Case C-250/92 [1994] ECR I-5641.

association members' market freedom or the users of their services but they also foreclosed competing associations from a customer or a membership base.

In each three cases the ECJ followed an identical line of reasoning built on the principle of proportionality. First the ECJ established that the association in question pursued a legitimate objective - to protect its members' interest in an effective way or at a necessary scale. In *Gottrup-Klim* the Court even suggested that the association pursued a pro-competitive objective, holding that:

'the activities of cooperative purchasing associations may, depending on the size of their membership constitute a significant counterweight to the contractual power of large producers and make way for more effective competition'.¹⁶³

Any restrictions of competition which were necessary and proportionate to the attainment of those objectives fell outside the scope of both Article 81 and 82 but restrictions that exceeded what was necessary were illegal.

The reasoning is similar to the application of the objective justification on public policy grounds. In general the activities of the associations were in the public interest because they provided services available to undertakings or citizens who needed the special protection provided by the associations. However in all three cases the ECJ referred to an economic or pro-competitive dimension of the legitimate objective. The achievement of the objective was associated with: (i) effective operation of the association,¹⁶⁴ (ii) avoiding increases in costs,¹⁶⁵ or (iii) the ability to exercise competitive pressure.¹⁶⁶ This economic dimension of the objective may give the impression that those cases were based on a rule of reason analysis, which involves a balancing between the restrictive effect and efficiencies. Under a rule of reason analysis the stronger the restrictive effect is, the greater the efficiency gains should be in order to outweigh the negative effects. Had this been the case, it could have been said that the cases endorse an efficiency-based objective justification. However, a closer look at the cases shows that the reasoning is not based on such a trade off. The legitimacy is tied to an invariable standard, namely whether the conduct goes beyond what is necessary for the appropriate performance of the principal activity. The appropriate performance seems to imply only a minimum efficient scale of operation but does not imply a profit-oriented policy leading to an increase in efficiency gains. Thus, although the efficient performance was a relevant consideration, it was relevant to the extent it coincided with the public interest pursued by the associations.

The logic followed in those cases is more reminiscent of the approach towards ancillary restraints under Article 81(1), i.e. restrictions which are necessary for the implementation of a lawful transaction subject to the principle of proportionality. In fact, in those cases the restrictions imposed by the associations were assessed under Article 81 in addition to Article 82 and they were found to be outside the scope of

¹⁶³ Para 32.

¹⁶⁴ Case 127/73 *SABAM*, op cit n 160, para 8.

¹⁶⁵ Case 395/87 *Tournier*, op cit n 161, para 31.

¹⁶⁶ Case 250/92 *Gottrup-Klim*, op cit n 162, para 32.

Article 81(1) rather than justified under Article 81(3). This is another indication that the legitimate purpose was not the creation of efficiencies but was rather the need to guaranteeing the fulfilment of a legitimate objective. The only difference with respect to the typical ancillary restraints analysis is that, while ancillary restraints are not subject to an economic assessment and the lawfulness of the transaction is determined *in abstracto*,¹⁶⁷ in the cases described, the lawfulness of the transactions was determined according to an economic criterion – efficient operation. Nevertheless, the legitimate objective did not go further than the minimum efficient scale of operation. In this respect, those cases cannot be rationalised with a rule or reason or with efficiency justifications.

Is there an efficiency defence under Article 86(2)?

Article 86(2) is the only provision in the Treaty which provides for a justification for abuses of a dominant position by undertakings entrusted with the operation of SGEI under the specific stipulated conditions. It is useful to consider the extent to which efficiency considerations are relevant in applying this justification and whether the approach can be instructive for the elaboration of a defence based on efficiency considerations that might justify the conduct of ‘non –entrusted’ undertakings.

To recall, Article 86(2) provides for a derogation from the Treaty provisions, and in particular from the competition rules, where the derogation is necessary to ensure the performance of SGEI. It can be invoked by undertakings entrusted with the operation of SGEI or by Member states where, for example, the adoption of state measures creates a situation in which undertakings are led to or cannot avoid committing an abuse.¹⁶⁸ Briefly, the rationale for the derogation is that SGEI are services in the public interest but, for economic reasons (i.e. non-profitability) they might not be provided if they were left to the private sector.¹⁶⁹ By entrusting the tasks of performing SGEI, the State confers not only responsibility on undertakings to provide the SGEI but also provides them with certain economic advantages in order to motivate them to undertake the non-profitable service. These benefits normally take the form of exclusive rights in a profitable sector of the market meant to compensate for the operation of the service in the non-profitable sector. In view of the public interest at stake, Article 86(2) allows restriction of competition, including abuses by way of exercising exclusive rights, to the extent this is necessary to enable the entrusted undertaking to perform the SGIE. As pointed out in Section 3.3 above, the objectives contemplated in the provision are of a non-economic nature and the provision is based on the principle of proportionality.¹⁷⁰

¹⁶⁷ See Case T-112/99 *Métropole*, op cit n 137.

¹⁶⁸ Case C-18/88 *Régie des Télégraphes et des Téléphones v GB-Inno-BM SA* [1991] ECR I-5941, para 20; Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, paras 26-29, Case C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-4449, para 33; Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volksbuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I-4075, para 61; Case C-340/99, *TNT Traco SpA v Poste Italiane SpA and Others* [2001] ECR I-4109, para 44.

¹⁶⁹ Case C-203/96 *Dusseldrop* [1998] ECR I-4075.

¹⁷⁰ See Soriano LM, ‘How Proportionate Should Anti-competitive State Intervention Be’ (2003) 28(1) EL Rev 112-123.

Initially, both the Commission and the ECJ applied the principle of proportionality under Article 86(2) in a strict manner focusing on whether the economic viability of the undertaking performing the service would be affected.¹⁷¹ According to the this original approach, in order for the derogation to apply, it was not sufficient for the operation of the treaty provisions to render the performance of the particular SGEI task more difficult, but the performance of the task indeed had to be rendered technically and economically infeasible.¹⁷²

However, in the subsequent case law, the ECJ began reading the exception rule more generously, making the justification available when the application of the competition rules would put the performance of the entrusted task in jeopardy ‘from an economic point of view’¹⁷³ or when it is necessary to ensure economic stability.¹⁷⁴ In the famous *Corbeau* case¹⁷⁵ the ECJ held that Article 86(2) is available where a restriction on competition (or even the exclusion of all competition) is necessary in order to allow the holder of the exclusive rights to perform its tasks of general interest and in particular to have the benefit of economically acceptable conditions.¹⁷⁶ Subsequently, the ECJ affirmed that the derogation under Article 86(2) does not require that the Treaty rules prevent the performance of the service to an extent that the survival of the undertaking itself is threatened¹⁷⁷ but it requires taking into consideration:

- the economic conditions in which the undertakings operates, in particular the costs which it has to bear;¹⁷⁸ or
- whether the undertaking would be able to recoup investment made in relation to its commitment to provide SGEI¹⁷⁹; or
- to provide services as competitive as those provided by private undertakings operating in the profitable sector of the market.¹⁸⁰

In *Firma Ambulanz Glöckner v Landkreis Südwestpfalz*¹⁸¹ the question was whether Article 86(2) could justify a national law that protected the providers of an emergency ambulance service by granting them exclusive rights on the non-emergency sector of the market. This would have led to a breach of Article 86(1) in conjunction with Article

¹⁷¹ See Szyszczak, ‘Public Service Provision in Competitive Markets’ (2001) 20 Yearbook of European Law 35, at p48; see Case 155/73 *Sacchi* [1974] ECR 409, see also Case 311/84 *CBEM* [1985] ECR 3261, C-18/88 *RTT* [1991] ECR I-5980, para 22.

¹⁷² See Commission Decision 82/371 *Naveva –Anseau*, OJ 1982, L167/48M, see Wyatt & Dashwood, *European Union Law*, Sweet & Maxwell, 2000, p 722.

¹⁷³ Case 41/83 *Italian Republic v Commission* [1985] ECR 888 (British Telecommunications), para 33.

¹⁷⁴ Case 66/86 *Ahmed Saeed* [1989] ECR 803, paras 54-57.

¹⁷⁵ Case C-320/91 [1993] ECR I-2533.

¹⁷⁶ Para 16.

¹⁷⁷ Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para 43; see also Case C-67/96 *Albany International* [1999] ECR I-5751, para 107.

¹⁷⁸ Case C-393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477.

¹⁷⁹ Case 209/98 *Entreprenorforeningens Affalds/Miljøsektor (FFAD) v Københavns Kommune* [2000] ECR I-3743.

¹⁸⁰ See C-67/96 *Albany*, op cit n 177, para 110.

¹⁸¹ Case 475/99 [2001] ECR I-8089.

82. The ECJ expressed concerns that, in the absence of the exclusive rights, the degree of economic viability of the service on the emergency sector would be affected and the quality and reliability of that service would be jeopardised. The ECJ relied on Advocate General Jacobs' Opinion, according to which the derogation would only fail to apply if it were established that the undertakings entrusted with the operation of the public ambulance service were manifestly unable to satisfy demand for emergency ambulance services and for patient transport at all times. The ECJ instructed the national court to determine whether the entrusted undertakings would be able to satisfy demand and fulfil not only their statutory obligation to provide the public emergency ambulance services in all situations but also to offer efficient patient transport service.¹⁸² Advocate General Jacobs did not hesitate to say in his Opinion that the objective of Article 86(2) is the efficient provision of SGEI.¹⁸³

This brief overview of the case law shows that the interpretation of Article 86(2) has developed towards widening the scope of the justification provision and it has become available not only for restrictions of competition which are necessary to allow an entrusted undertaking to survive on the market but to enable it to provide efficient SGEI. The objective of Article 86(2) to ensure the provision of the SGEI although the SGEI themselves are to be of a non-economic nature, is subject to an economic evaluation by the requirement that the SGEI be provided in an economically acceptable conditions and in an efficient way. Thus, efficiency considerations play a role under Article 86(2) as part of a legitimate goal in the public interest, but efficiencies considerations are not a justification for the restrictions of competition. There is an obvious similarity between the logic followed under Article 86(2) and in the cases under Article 82 relating to the activities of associations. In both situations, the legitimate objective pursued by the dominant undertakings is of a non-economic nature but its fulfilment requires an efficient performance and in both situations the efficient performance coincides with the public interest.

The explicit rejection of efficiency as a justification for exclusionary conduct

The fact that the existing case law has not so far relied on efficiencies as a justification for exclusionary conduct does not preclude further speculation as to how efficiency justifications can be made operational under Article 82. However, the ruling in the *Atlantic Container* case¹⁸⁴ seems to preclude the possibility by making it clear that the notion of objective justification does not pertain to any benefits accruing from the conduct of a dominant undertaking that restricts competition.

In *Atlantic Container*, clauses contained in an agreement concluded by shipping companies that were members of a liner conference were found to be contrary to Articles 81 and 82 as an abuse of a collective dominant position. The members of the conference tried to argue that the restrictions in the challenged agreement were objectively justified because they were necessary for the proper and efficient operation

¹⁸² Para 64.

¹⁸³ Para 188 of the Opinion.

¹⁸⁴ Joined Cases T-191/98, T-212/98 and T-214/98, *Atlantic Container Line*, op cit n 18.

of the liner conference, for the maintenance of the stability of uniform and common freight rates qualifying for block exemptions for improving administrative efficiency and for preserving the integrity of the conference service contracts.¹⁸⁵

The CFI held that the fact that the restrictions fell under a block exemption did not mean that they could not be in breach of Article 82. It then held that:

‘... because Article [82] of the Treaty does not provide for any exemption, abusive practices are prohibited regardless of the advantages which may accrue to the perpetrators of such practices or to third parties’.¹⁸⁶

The CFI interpreted the alleged advantages of the restrictions of the agreement as nothing but a request for an exemption from Article 82 and refused to accept them, pointing out such justifications could not create an exemption from the application of Article 82.

Thus, the CFI in principle rejected the possibility of a dominant undertaking to claim advantages in the form of efficiencies under Article 82. It seems that, because there was no public benefit that could be directly associated with the need to improve administrative efficiency and the integrity of the conference service contracts, the CFI refused to accept that relevance of any advantages in the form of efficiencies.

The review of the case law set forth above shows that efficiency considerations are not entirely alien to Article 82 but that nevertheless they do not operate as an efficiency justification for conduct restrictive of competition. Economic justifications were referred to in the rebate cases, but those justifications were only transaction specific cost savings typical for genuine volume rebates. Although the word ‘justifications’ was used the cost efficiencies were presumed rather than ascertained as a result of an economic assessment. The Community Courts demonstrated a readiness to consider efficiency justifications for fidelity-enhancing rebates but did not do so because there was no mechanism under Article 82 allowing for the efficiencies, once established to be passed on to consumers. The concept of objective justification, even if understood as an efficiency justification does not provide this mechanism. In other words, the objective justification does not contemplate the pursuit of two contemporaneous goals: efficiency gains and consumer welfare. Taking consumer welfare into account requires introduction of an additional objective, which does not always coincide with the commercial interest of the dominant undertaking. In the cases relating to the restrictions imposed by associations, and also in the cases under Article 86(2) the public policy objective had an economic dimension. The non-economic interest and the economic interest coincided, which explains why the concept of objective justification could apply. However, as shown, the economic interest did not mean an efficiency enhancing policy but rather concerned the minimum efficient performance necessary to guarantee the provision of a service. Thus, the objective justification was not applied as an efficiency justification. The ruling in the *Atlantic Container* case seems to close the

¹⁸⁵ Para 1111.

¹⁸⁶ Para 1112.

door to the possibility of efficiency gains being claimed under Article 82 as an objective justification for restrictive practices.

Is there an alternative solution to an efficiency-based objective justification?

As argued in Section 2, consistency in application of Articles 81 and 82 requires that efficiency gains be given due relevance in the assessment of exclusionary conduct under Article 82. However, the review of the case law shows that the notion of objective justification has never been used as an efficiency justification, while the *Atlantic Container* judgment makes the adoption of such a justification unlikely in future. Even in the absence of the explicit ruling against efficiency justifications under Article 82, I doubt whether the concept of the objective justification is capable of introducing efficiency considerations under Article 82 in a desirable way. First, the Community Courts include in the notion of objective justification only factors that are beyond the control of undertakings and unrelated to the economic performance of particular undertakings. Secondly, allowing an efficiency justification as an objective justification implies that efficiency gains should be accepted as a legitimate goal justifying restrictions necessary and proportionate to the attainment of those efficiencies but it does not help it to achieve consistency in the application of Article 82 and 81. This is because Article 81 requires, in addition to the establishment of efficiency gains, that a fair share of them be passed on to consumers. However, this does not mean that the logic behind the concept of objective justification cannot be used to inform an alternative solution to the current problem under Article 82.

In my view, a much more elegant way of introducing efficiency considerations in the analysis of exclusionary conduct under Article 82 would be to re-read the classical definition of abuse and particularly to reconsider the meaning of ‘normal competition’ or ‘competition on the merits’ in a way which accommodates the two concerns: efficiency gains and consumer welfare. This interpretation of the concept of competition on the merits would bring it closer to the American understanding of the same concept but would also limit it to practices which are beneficial to consumers.

According to the definition of abuse in *Hoffmann-La Roche*, abuse consists of two cumulative elements: (i) an effect on the competitive structure brought about by exclusion of competitors; and (ii) that effect must be caused through methods which are not based on normal competition. Thus, neither the effect alone, nor the particular method of behaviour alone is sufficient to trigger the application of Article 82. Once an exclusionary effect is established, the question of whether the conduct is based on competition on the merits becomes crucial.

As discussed at the beginning of this article, one of the reasons for the current formalistic application of Article 82 is the narrow interpretation of competition on the merits. The Community Courts have never defined this term but have referred to it also as ‘competition based on traders’ performance’ and methods based on quality, which might be construed as implying some form of efficiency gains. Advocate General Kirschner in his opinion in *Tetra Pak I*¹⁸⁷ suggested that methods not based on normal

¹⁸⁷ Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309.

competition means the pursuit of the legitimate aim of profit maximisation through disproportionate means. In his view dominant undertaking ‘may act in a profit oriented way’ and ‘strive through its efforts to improve its market position and pursue its legitimate interests’ but in so doing it may employ only such methods as are necessary to pursue this legitimate aims and may not act in a way which limits competition more than necessary.¹⁸⁸ This interpretation of normal competition incorporates the notion of efficiencies as an economic justification but further limits it by the requirement that maintaining some degree of competition should still remain a valid concern. The Advocate General did not elaborate on what should be understood by ‘necessary for normal competition’. However, a normal competition certainly cannot be competition which ignores what benefits go to consumers.

Support for this interpretation may be found in *Irish Sugar*, where the CFI said that the conduct of a dominant undertaking, in order to be legal, should not only be based on criteria of economic efficiency but should also be consistent with the interests of consumers.¹⁸⁹

Thus, in my view, the case law does not preclude the adoption of a new understanding of competition on the merits that embraces efficiency- enhancing conduct as long as the efficiencies can be passed on to consumers in the way the latter condition is interpreted under Article 81(3).

Under such an interpretation of ‘normal competition’, the test for exclusionary abuses would be as follows. First it should be established whether the conduct has or is likely to have an effect on the market structure by excluding competitors. If and only if such an effect is identified, the analysis should proceed with the inquiry as to whether those effects are brought about by conduct that is based on normal competition. The latter makes it necessary to ascertain whether: the conduct creates efficiencies; the conduct restricts competition only to the extent necessary and proportionate to the attainment of those efficiencies; and the efficiencies are to the benefit of consumers.

The advantages of such a re-conceptualisation of the notion of competition on the merits is that it involves the same inquiry and reaches the same aim as the analysis under Article 81(1)-81(3), but confines the inquiry within the concept of abuse without creating an exception to Article 82 – something that the CFI was afraid of in *Atlantic Container*. Certainly, this approach, as any other approach seeking to introduce efficiency considerations in the assessment of exclusionary conduct implies, some deviation from the existing case law. However, in my view the deviation in this proposed approach does not amount to a direct conflict with the existing case law because it is constructed upon a reconsideration of a concept that the case law has never defined.

A last question that needs to be elucidated is the question relating to the burden of proof. Is Article 2 of Regulation 1/2003 an obstacle to the application of the redefined

¹⁸⁸ Opinion of Advocate General Kirschner in Case T-51/89 *Tetra Pak I*, *ibid*, para 68.

¹⁸⁹ Para 189.

concept of normal competition in the absence of an explicit rule allowing dominant undertakings to prove benefits under Article 82?

In my view the fact that Article 2 speaks only about the burden of proof of the alleged abuse and not about the burden of proving benefits does not preclude the possibility of a dominant undertaking to prove that its conduct is efficiency oriented and does not restrict competition more than necessary for the attainment of this goal and that the efficiencies can be passed onto consumers. While Article 2 is silent on this issue, recital 5 of the Regulation suggests that benefits can be claimed under both Article 81 and 82 and that, under both provisions, the benefits should be proved by the interested parties. In order to avoid a discussion on the relevance of recitals and their consistencies with main provisions in a regulation – a discussion which goes beyond the scope of the present paper - I would prefer to rely on several general principles relating to the burden of proof.

According to the general rule on the burden of proof, expressed in the maxim *ei incumbit probatio qui dicit, non qui negat*, it is for the party who asserts a proposition of fact to prove it; a party does not bear the burden of proving purely negative facts.¹⁹⁰ A negative fact shifts the burden of proof to the party having interest in the corresponding positive fact. According to the definition of abuse in *Hoffman-La Roche* the party alleging the abuse should prove two facts: one positive – exclusionary effect, and one negative – that the conduct is not competition on the merits. According to the general rule on the burden of proof, the corresponding positive fact - i.e., that the conduct is based on competition on the merits - should be on the dominant undertaking.

Actually, the same general rule on the burden of proof informs the application of the objective justification of abuses where the courts have accepted it. The formulation used in the case law is that conduct is abusive ‘unless objectively justified’ or ‘in the absence of objective justification’. The negative formulation has the effect of shifting the burden of proof of the presence of such a justification on the dominant undertaking. Finally, it should be borne in mind that the burden of proof is almost never attributed to one party only. Normally, parties are expected to prove those facts which are within their sphere of knowledge and competence. This is the rationale guiding the distribution of the burden of proof in the absence of an explicit provision to this effect in Article 86(2) justifications and the justifications under Article 28. Needless to say, dominant undertakings themselves are the parties best placed to furnish information about possible efficiency arising from their conduct.

7. CONCLUSION

The desire to align the application of Article 82 with mainstream economics and to make it consistent with the application of Article 82 has encouraged many to seek a solution in a concept which has been little explored under Article 82 but which seemed a suitable instrument for narrowing down the overbroad scope of Article 82, namely, objective justification. The concept of objective justification began to be articulated as a

¹⁹⁰ Lasok, *The European Court of Justice. Practice and Procedure*, 2nd ed, Butterworths, 1994, p 420.

‘meeting competition defence’ and an ‘efficiency justification’, which loaded it with meaning going beyond what the Community Courts understand by the concept. Indeed, in so far as it is built on the principle of proportionality, the concept of objective justification allows for juxtaposing two colliding interests and determining which one is worthier of protection. This made it look suitable for balancing, on the one hand the commercial interest of dominant undertakings which relates to a right to compete on equal footing with other market operators and the possibility of carrying out a profit-oriented policy, and on the other hand, the interest of consumers to benefit from a sufficient degree of competition.

However, the examination of the case law carried out in this article shows that the Community Courts understand the concept of objective justification to include only two types of considerations: (i) purely objective factors beyond the control of undertakings (not only dominant ones) which prevent those undertakings from carrying out their normal course of conduct; and (ii) public policy considerations which are generally of a non-economic nature but in particular circumstances, for example where there is a need to provide efficient service to the public, may be given an economic dimension.

The review of the case law demonstrates that the use of the concept of objective justification as a meeting competition defence or as an efficiency justification is problematic for several reasons. First of all, such a meaning of the concept departs from the notion of ‘objectivity’, which is central to the concept. Applying a meeting competition defence requires consideration of how a given competitive situation on the market affects a particular dominant undertaking and applying an efficiency justification attaches importance to the dominant undertaking’s economic performance.

Secondly, characterising a meeting competition defence as an objective justification is unhelpful because the case law, and in particular the concept of special responsibility, does not allow dominant undertakings to adopt a strategy that may have an exclusionary intent or effect, even if confronted with aggressive competition.

Thirdly, the concept of objective justification does not seem to be a suitable vehicle for introducing an efficiency justification. Apart from the fact that the Community Courts have never justified exclusionary conduct on the grounds of efficiency gains and have explicitly rejected the possibility for dominant undertakings to claim any efficiencies in order to escape the application of Article 82, the concept of objective justification does not provide a mechanism for balancing restrictions of competition against the efficiency gains and then passing a fair share of those efficiencies on to consumers in the way this analytical exercise can be performed under Article 81. Thus, applying an efficiency justification, although this would make it possible to introduce efficiency considerations, does not provide the desirable effect of aligning the objectives of, (and the results from the analysis under) Articles 81 and 82.

Finally, the use of the concept of objective justification as a meeting competition defence or an efficiency justification is obstructed by the way the concept of abuse is interpreted. More specifically, the identification of abuse with exclusion of competitors rather than with effect on consumers and the broad reliance on the special

responsibility of dominant undertakings makes any sensible use of the concept of objective justification difficult.

The above considerations make me sceptical about the usefulness of speculating about the concept of objective justification before having reconsidered the concept of abuse. Contemplating what could be justified before having a good understanding what we want to prohibit and why is a futile exercise.