Only ‘conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object’ (Opinion of AG Wahl, case C-67/13 P, Groupement des cartes bancaires v EC, ECLI:EU:C:2014:1958, paragraph 38).

Critically discuss the above statement in light of the perennial controversy over the legal and historical dichotomy between the ‘object and effect’ of anti-competitive restraints on competition.

Introduction

This essay will examine the distinction between ‘object’ and ‘effect’ by analysing firstly; the intention of Article 101(1) Treaty on the Functioning of the European Union 2007 (TFEU); the historical context of the creation of this provision; actions which constitutes an agreement; and the theoretical orthodox approach to the distinction, linking to AG Wahl’s assertion in Groupement des Cartes Bancaires v European Commission (GCB)\(^1\). Secondly, it will go on to consider the historical and orthodox theories have been applied to case law; the liability exemption under Article 101(3) and whether the object category has been blurred into the effects category; considering whether this changes our initial reading of AG Wahl’s assertion. It will finally offer an analysis regarding how legal application of the economic definition of effect may provide clarification to the distinction. This essay will conclude that despite the clear intentions of Article 101(1), historical and orthodox theories, the distinction between object and effect is still not clear when applied in law; ‘perennial controversy’ remains, thus reducing legal certainty and predictability of Article 101(1) application.

\(^1\) Case C-67/13 P [2014]5 C.M.L.R.22[38]
Article 101(1)

Article 101(1) prohibits all agreements² ‘between undertakings, decisions by associations of undertaking and concerted practices’³ that the European Commission (EC), or other regional Competition authorities, regard as anti-competitive, through having ‘as their object or effect the prevention, restriction or distortion of competition within the internal market’⁴. Some such examples of this include fixing ‘purchase or selling prices’⁵, limiting or controlling ‘production, markets, technical development, or investment’⁶ and the conclusion of contracts imposing supplementary obligations on other parties which ‘by their nature… have no connection with the subject of such contracts’⁷. (Despite previous competition law principles being based on a ‘commitment to ‘undistorted competition’⁸, this teleological interpretation is no longer referred to in the TFEU⁹; Article 101 is more practically applied under the modern notion of ‘enhancing consumer welfare’¹⁰.)

Difficulty lies for competition regulators distinguishing what is contained within the separate ‘object’ and ‘effect’ categories; as noted by the court in Société Technique

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³ Article 101(1) Treaty on the Functioning of the European Union 2007
⁴ Ibid.
⁵ Ibid.(a)
⁶ Ibid.(b)
⁷ Ibid.(c)
Minière\textsuperscript{11} and GlaxoSmithKline (GSK)\textsuperscript{12}, object and effect are not cumulative conditions and thus their distinct separation in application is essential. Chirita notes that this distinction ‘has been extensively discussed in the European literature’\textsuperscript{13} yet it ‘has not always been clearly explained’\textsuperscript{14}.

Nagy explains that essentially, ‘every arrangement is granted a full-blown inquiry (effects-analysis)’ however some agreements are ‘so pernicious that it is justified to single them out and condemn them outright’\textsuperscript{15} and thus no effects analysis is necessary. Despite case law telling us that in practice the object of an agreement ‘should be assessed first’\textsuperscript{16}, in theoretical terms, by singling out object-type arrangements as exceptional and effects-type as the norm, this inverted process perhaps helps to explain the relationship between object and effect more clearly.

**Historical Context**

i. **Drafting Processes**

Relevant case law, as will be examined below, is unable to simplify the object / effect dichotomy, thus we must look to the historical context which shows us the intended strict, widely inclusive category of restrictions that are prohibited under Article 101(1). Due to the regional drafting of the Treaty of Rome 1957 in French and German, translation difficulties resulted in lack of consensus over crucial wordings.

\textsuperscript{11} Case C-56/65 Société Technique Minière v Maschinenbau Ulm [1966]ECR 235
\textsuperscript{12} Case C-501/06 2010 GlaxoSmithKline v Commission [2010] 4 C.M.L.R.2
\textsuperscript{13} Chirita A.D., ‘A Legal-Historical View of the EU Competition Rules’(2014) 63 I.C.L.Q. 291
\textsuperscript{14} King S., ‘The Object Box: Law, Policy or Myth?’ (2011) Euro.C.J. 7(2): 72
\textsuperscript{15} Nagy, C.I., ‘The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?’(2013)W.Comp.36(4), 546/7
\textsuperscript{16} *Ibid.*(No.11) 272
However the Schuman Plan would have as its ‘object’ the ‘limitation of the production of coal and steel’; as Chirita has noted, it is thus clear that ‘in this context ‘object’ is a synonym for ‘purpose’”\(^\text{17}\).

The Treaty drafting proposals thus intended to outright prohibit any deal with the purpose of ‘preventing, restraining or altering free competition’ and ‘in particular ‘fixing prices, limiting or controlling production in any manner, or of dividing markets, production, customers or sources of supply’\(^\text{18}\). The clear distinction of such practices show from this historical background that exceptions were not meant to apply to hard-core restrictions; they are to be prohibited outright. Alternatively, effect is to be used for less clear-cut breaches, examining the resulting effects caused by the anti-competitive conduct.

ii. Identifying Agreements

Difficulty lies, however, when attempting to identify an agreement, which we clearly require to define the purpose of such agreement. As a starting point, the switch from the German proposal of the term ‘contracts’ to the French proposal of ‘agreements’ during drafting removed the need for intention to create legal relations within an agreement, thus increasing the restrictiveness of Article 101, as it will encompass a wider array of arrangements. This change further asserts that the provision is intended to mirror a ‘strong public enforcement mechanism against illegitimate restrictions of competition by object’\(^\text{19}\) and these should be a distinct, clear category from which there is little derogation.

\(^{17}\) Ibid. (No.13)
\(^{18}\) Ibid.292
\(^{19}\) Ibid. (No.13) 303
Bayer defines an agreement as ‘a concurrence of wills between at least two parties, the form of which is unimportant as long as it constituted the faithful expression of the parties’ intention’. The Sherman Act refers to agreements involving ‘conspiracy in restraint of trade’ as being objectionable, yet over time the category of agreements has expanded to be anything from a gentleman’s agreement to merely participating in a meeting – some cases involve mere presence at a meeting, which appears to be a very wide reading of ‘conspiracy’ mentioned in the Sherman Act. Due to the very minimal levels of involvement required to partake in an agreement, proving the existence of such agreements and parallel conduct between undertakings can be extremely difficult. Thus it is possible that the effect categorisation was created with a lax distinction from object, purely to cover all bases and catch more anti-competitive agreements.

Orthodox Approach

The simplest theoretical distinction of object and effect comes through the orthodox approach; however in practice, this approach has not been strictly followed. This approach is ‘reflected’ in both the EC’s ‘Article 81(3) Guidelines’ and Whish’s notion of the ‘object box’, within which contains a ‘list of particular ‘types’ of agreements’, (what the Commission terms ‘hard-core’ restrictions) as they involve

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21 Ibid.[69]
22 Sherman Antitrust Act 1890, Chapter 1 Code 3
23 In Case T-541/08 Sasol and Others v Commission [2014] a note passed round with an ‘arrow preceding the price figure points to an agreed strategy for the future’ [301] constituted an agreement
26 Ibid.(No.15) 544
27 Ibid.545
an ‘obvious’ infringement of Article 101(1)\(^{28}\) within the purpose of the agreement (not the intention of the parties). (While Grant notes that although using a test of whether an agreement contains an ‘obvious’ restriction of competition is somewhat unclear, ‘it should not be dismissed too quickly’ due to the notion of object not being a wholly ‘sound legal construct’\(^{29}\) anyway). Contents of this box include ‘price fixing, market sharing, output limitation, collective exclusive dealing, imposing minimum or fixed resale prices and the imposition of export bans\(^{30}\). Similar to the application of per se illegality in US antitrust law\(^{31}\), it is ‘irrebuttably presumed that these agreements have perceivable negative effects on competition\(^{32}\) thus the analyser need only decide whether the arrangement falls into this category.

i. Benefits of Orthodox Approach

The purpose of anti-competitive object based on ‘category building’\(^{33}\) provides legal certainty\(^{34}\), as undertakings can predict what practices are irrefutably restrictions by object. Case-by-case assessment would otherwise result in ‘the lowest level of predictability law can afford’\(^{35}\). The automatic condemnation rule also means that ‘it is not necessary to examine actual or potential effects of an agreement on the market’\(^{36}\) once an undoubtedly anti-competitive object has been found, thus saving resources by reducing further investigation into agreements for which a ‘more

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\(^{29}\) M, Grant, ‘In search of the obvious: groupement des cartes bancaires and ‘by object’ infringements under EU competition law’ (2015) E.C.L.R. 48

\(^{30}\) Ibid.(No.24) p.30

\(^{31}\) Continental Television Inc. v GTE Sylvania Inc (1977) 433 US.36, 49-50

\(^{32}\) Ibid.(No.15) 544

\(^{33}\) Ibid. 546/7

\(^{34}\) Ibid.(No.28) 274

\(^{35}\) Ibid.(No.15) 555

intensive and costly’\textsuperscript{37} effects analysis would be superfluous and unnecessary. This approach is harsh and leaves little margin for error, as it can result in extreme financial penalties\textsuperscript{38} even if no harm takes place, yet its predictability and cost-saving benefits are persuasive.

iii. Automatic Condemnation

Although uncommon, it appears curious that a breach of competition law resulting in vast fines can be identified where potentially no negative effects occur. Kokott provides interesting explanation for this, comparing this to driving under the influence which is ‘liable to criminal or administrative penalty’\textsuperscript{39} regardless of whether an accident has occurred. The idea of potential harm is the crucial basis for liability here. Actual harm is not necessary. Under Kokott’s analysis, it follows that the mere planning of anti-competitive practices is restrictive, and the actual implementation of the plan is superfluous. Cartel members need only agree ‘to make or implement’\textsuperscript{40} the relevant arrangements to be liable.

Interestingly, Nagy mentions that such practices are ‘intended mischiefs’ which show ‘no virtue at all’\textsuperscript{41}, clearly referencing his consideration of a guilty frame of mind. This rationale however initially appears to contradict the principle that object is not the intention of the parties in the agreement, but the objective meaning and purpose of the agreement. However \textit{T-Mobile} clarified this to some extent by noting that although the purpose is not the direct intention of the parties, ‘there is nothing to

\begin{footnotesize}
\footnotetext{37}{Ibid.(No.28) 272}
\footnotetext{38}{Ibid.(No.29) 47}
\footnotetext{39}{Case C-8/08, \textit{T-Mobile Netherlands BV and Others} [2009] 5 C.M.L.R.11 [47]}
\footnotetext{40}{Carroll J.,‘Caught by the Cartels’, J.Law Soc.Sc.,(13 July 15) http://www.journalonline.co.uk/Magazine/60-7/1020495.aspx}
\footnotetext{41}{Ibid.(No.15) 544}
\end{footnotesize}
prevent the… competent judicature from taking [parties intentions] into account’\textsuperscript{42} when identifying the object.

\textbf{AG Wahl’s Assertion}

From the above analysis it is clear that the theoretical orthodox approach intends to base what qualifies a restriction by object on ‘experience’ that has already proven ‘harmful’ economic effects, which has filled the object box and is thus ‘easily identifiable’. With regards whether this conduct of a harmful nature must be proven is slightly more complex. Wahl’s assertion can be interpreted two ways; a) an agreement’s ‘harmful nature is proven’ either in the past and therefore readily applied presently, or b) is proven in each case. The orthodox approach is clearly reliant on a), the dependence on previous proof.

\textbf{Development of ‘Object’ Case Law}

Despite the analysis above providing a theoretical explanation of the object-effect categories, deeply varying case law has suggested that such a distinction is not so clear in practice. Black even contends that the orthodox view is ‘highly implausible’\textsuperscript{43} and a distinction no longer exists, due to the debate surrounding just ‘how much context is to be examined’ that has ‘arisen with regularity and tormented the case law’\textsuperscript{44}.

It has become apparent that a basic element of context is required to categorise an agreement, for example where the exchanging of data is being considered but the data

\textsuperscript{42} \textit{Ibid.}(No.39) [27]
\textsuperscript{43} Black O., \textit{Conceptual Foundations of Antitrust} (CUP, 2005) 119
\textsuperscript{44} \textit{Ibid.}(No.29)
is merely historical, thus no negative object exists. In both *GlaxoSmithKline*\(^{45}\) and *Consten and Grunding v Commission* the court recognised the need to have regard to the ‘economic and legal context in the light of which [the agreement] has been concluded by the parties’\(^ {46}\). This requirement has since been added to Commission Guidelines\(^ {47}\), a clear acknowledgement of a move away from the traditional orthodox approach.

A similarly low threshold was identified in *T-Mobile*, such that an object with ‘the potential to have a negative impact on competition’\(^ {48}\) could be anti-competitive. Concern over this judgment was apparent due to fears it could result in ‘too broad a category of information exchange’\(^ {49}\) being classed anti-competitive.

The case law begins to vary over time however; in the case of *Competition Authority v Beef Industry Development Society Ltd (BIDS)*\(^ {50}\) the anti-competitive object was found as the society intended to ‘change the structure of the market through a mechanism intended to encourage withdrawal of competitors and eliminate almost 75 per cent of excess production capacity’\(^ {51}\). The Court describes an object restriction as one with ‘sufficiently deleterious’\(^ {52}\) effects. This case is considered pivotal in beginning to blur the object/ effect distinction. Whereas before, agreements only had the potential to produce negative effects; *BIDS* introduces an assumption that they

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\(^{45}\) Ibid. (No.12) [58]

\(^{46}\) Cases 56 and 58/64 1966 C.M.L.R. 418 [474]

\(^{47}\) Ibid. (No.36) [25]

\(^{48}\) Ibid. (No.39) [31]


\(^{50}\) C-209/07 [2009] 4 C.M.L.R. 6

\(^{51}\) Ibid. (No.29)

\(^{52}\) Ibid. (No.50) [15]
categorically produce negative effects. *Expedia* agrees with this progression to a certain extent, referring to object arrangements being ‘injurious to the proper functioning of normal competition’\(^{53}\); hinting at the necessity to prove a negative effect by the practice in question.

**Allianz and Groupement des Cartes Bancaires**

The cases of *Allianz*\(^{54}\) and *GCB* have signalled a further move towards an effects-type approach when analysing the context of an agreement. In *GCB*, pricing measures were adopted regarding issuing of cards which were based on calculation formulas, which the General Court (GC) found were injurious to competition due to varying prices for issuing banks. However the Court of Justice (CJ) overturned this ruling; the GC did not explain ‘in what respect that restriction of competition reveals a sufficient degree of harm in order to be characterised as a restriction ‘by object’’\(^{55}\). The ‘sufficient degree of harm’ requirement appears to be new to these cases as ‘it is not immediately obvious’\(^{56}\) that it has ever existed previously. Indeed calculating whether an agreement causes ‘sufficient harm to competition’ surely requires effects analysis, signifying a fairly marked move away from the idea in *T-Mobile* that an agreement with mere potential to restrict competition is sufficient.

*Allianz* involved car insurance companies, Allianz and Generali, making deals with car dealers to, in essence, increase the amount of insurance sold by the car dealers provided by these companies, with the hope of increasing and consolidating their

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\(^{53}\) Case C-226/11 *Expedia Inc. v Autorité de la concurrence* [2013] All E.R. 1209 [36]

\(^{54}\) Case C-32/11 *Allianz Hungária Biztosító Zrt v Gazdasagi Versenyhivatal* [2013] 4 C.M.L.R. 25

\(^{55}\) Ibid. [69]

\(^{56}\) Ibid.(No.29)
market shares for car insurance. The CJ stated that with regards context, ‘it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question’.

This market consideration is a major progression as previously it was considered that an agreement with an anti-competitive nature ‘accrues directly from the agreement itself and not from the joint effect of the agreement and the market circumstances’; in other words the anti-competitive potential should not be affected by the market in which the agreement operates in. This is because it was accepted that the need to link into markets ‘runs the rusk that an effects analysis is carried out’, thus analysing in too much depth. However GCB clearly condones this practice.

In certain cases, full effects analysis has been carried out, despite the scenarios involving restrictions by object. Mastercard was found to have a restriction by object because the MIF had the effect of ‘appreciably restricting competition’, and indeed in GSK ‘despite determining that the object of the agreement was to restrict competition, the Commission still insisted on assessing the effect’. The realm of effects analysis has clearly been permeated, beyond merely initially providing basic

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58 Ibid.(No.15) 556
59 Ibid.547
60 Ibid.(No.29)
61 Case T-111/08 [2007]
62 Ibid.(No.28) 274
63 Ibid.
legal and economic context required in GSK and Consten and Grunding. This has resulted in the view that ‘the object-effect dichotomy is no longer relevant’\(^{64}\).

**Article 101(3)**

Indeed the exemption clause in Article 101(3), which tests the gravity of a restriction and thus previously inadvertently helped aid the object effect distinction, is also lacking clarity. A disputed restriction may in fact have positive impacts such as ‘the production or distribution of goods’ or ‘promoting technical or economic progress’. This exemption is readily available for restrictions by effect; for example in *Wouters v Algemene Raad van de Nederlandse Order van Advocaten*\(^ {65}\) where a regulation adopted by the Dutch Bar Council ‘prohibited professional partnerships between lawyers and non-lawyers, such as accountants’\(^ {66}\), it was ‘considered to be necessary in order to ensure the proper practice of the legal profession’\(^ {67}\). It can be easier to prove such agreements are not wholly negative due to the process of their effects assessment, which object restrictions are not subject to.

Indeed, ‘in principle, no anti-competitive practice can exist which… cannot be exempted’\(^ {68}\) under Article 101(3); thus, as Monnet\(^ {69}\) asserts, exemption should also be readily available to restrictions by object. Yet in practice, if agreements involve a

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\(^{64}\) *Ibid.* (No.57)

\(^{65}\) Case C-309/99 [2002] ECR I-1577


\(^{69}\) *Ibid.* (No.13) 291
prohibited object, ‘it is unlikely that they can meet the requirements of individual exemption’\textsuperscript{70}. This assertion is certain for cartel cases; it is ‘almost inconceivable that a cartel agreement would satisfy the criteria of Article 101(3)’\textsuperscript{71} due to its clearly negative nature of trade conspiracy, contrary to the interest of the consumer; an unjustifiable purpose.

However case law has challenged this approach and despite the presumption that agreements with price-fixing as the unlawful purpose ‘are automatically void… is difficult to rebut’\textsuperscript{72}, in intermediate service fee cases (unlike cartel cases) there may be scope for exemption. The case of \textit{Visa International – Multilateral Interchange Fees}\textsuperscript{73} involved price-fixing, a hard-core restriction thus falling comfortably within the object box, yet it was exempted under Article 101(3) due to its positive service effects, such as it ‘promotes the wider distribution and acceptance of Visa cards’ and the ‘indispensability’\textsuperscript{74} of the MIF scheme under consideration. The exemption was only permitted as the payment network was ‘set in a reasonable and equitable manner’\textsuperscript{75}. Firstly, it is surprising that object restriction cases are being exempted at all; further removing the barriers which once aided us to distinguish object and effect cases by testing the gravity of the restriction. Secondly, this case hints that in future the Commission will retain a wide degree of discretion as to not only which

\textsuperscript{70}\textit{Ibid.}(No.15) 541
\textsuperscript{72}\textit{Ibid.}(No.13) 303
\textsuperscript{73}[2003] 4 C.M.L.R. 283
\textsuperscript{75}\textit{Lista A., EU Competition Law and the Financial Services Sector,} (Taylor and Francis, 2013) p.161
anomalous exemptions to object restrictions are permitted, such as those involving service fees, but also whether the extent to which the potentially justifiable restriction is too unreasonable to be exempted.

Re-addressing AG Wahl’s Assertion: Does the Distinction Remain?

Successive cause law highlights that although not preferable, the elements of legal certainty and predictability the object category once provided have been lost.

As analysed above, Wahl’s assertion was directly applicable to the theoretical approaches. With regards application to case law however, the latter reading (b) proven in each case) appears to be more applicable here, due to the case-by-case analysis that occurs in reality, considering increasing context, ‘economics’ and market considerations. In turn, it would appear that then the courts are also relying less on ‘experience’ and more on their present day analysis.

The previous disregard of market circumstances was ‘the chief merit of the concept of anti-competitive object’ ⁷⁶, because the object box was supposed to ‘ease the administrative burden and simplify the process under Article 101(1)’ ⁷⁷. The case law has shown that in reality harmful anti-competitive behaviour is not so ‘easily identifiable’ as to immediately and unquestionably fall within the object category; this shift in case law means that the process is now anything but simplified.

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⁷⁶ *Ibid.* (No.15) 542
⁷⁷ *Ibid.* (No.12) 274
Economic Definition of Effect

A potential resolution to the object/effect dichotomy would be to consider the distinction from an economic perspective. From this angle, it can be argued that the distinction should be based on whether an agreement is horizontal (two economic operators active at the same level) or vertical (‘agreements between ‘non-competitors’ such as retailers or producers78), due to the fact that horizontal agreements are generally ‘more harmful’79 to consumer welfare80. Vertical agreements do not necessarily suggest anti-competitiveness, whereas horizontal agreements tend to result in an array of ‘negative market effects with respect to prices, output, innovation or the variety or quantity of products’81, affecting many aspects of the market. For example it is near impossible to prove benefits to consumers if you raise prices.

In this sense, the clearer ability to separate such agreements through economic distinction could benefit courts’ application of the provision. This would have also potentially helped to keep the Article 101(3) distinction intact, as vertical agreements are more likely to be exempted as justification is also more likely, such as ancillary restrictions objectively necessary and proportionate to the operation of the agreement, whereas horizontal agreements are not likely to. However the approach is not perfect; there may be cause to challenge the object of some particularly controversial vertical agreements.

80 Bergh, R.V.D., Camesasca, P.D., European Competition Law and Economics, (Intersentia 2001) p.64
81 Ibid.(No.36) [3]
Conclusion

Despite the initial clarity within the historical context, orthodox theory, and early application of Article 101 that the object box is purely for ‘easily identifiable’ anticompetitive practices, over time the considerations required to determine what these constitute has widened considerably. Initially including only a mere consideration of economic and legal context and the potential to negatively affect competition law, increasing ‘experience’ has in fact expanded considerations to include elements such as market activities, goods and services affected, the nature of the agreement, and whether its ‘sufficient harm to competition’ to name a few. While a distinction between object and effect is vital in providing legal certainty and helping to save resources of competition regulators, perhaps the lack of clarity is teaching us that current forms of categorisation, combined with differing legal and economic approaches, are actually incompatible with analysing this area of law. As Wendell noted, ‘the life of the law has not been logic; it has been experience’\(^\text{82}\), and such experience shows that if the courts cannot clarify the application of the provision, perhaps its time to take a whole new approach.

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\(^{82}\text{Holmes O.W., The Common Law 1, (Boston: Little, Brown and Company 1881) 1} \)
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