

The London School of Economics and Political Science

**Agreements that restrict competition by object under
Article 101(1) TFEU: past, present and future**

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Declaration

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This thesis is dedicated to my beloved family: to my wonderful children, Sabella and Sebastian, my husband Spencer and my parents. Thank you.

Stone-in-Oxney

January 2015

Abstract

This thesis conducts a robust and granular examination of the concept of 'object' under Article 101(1) TFEU and its resulting legal and practical implications. To that end, a methodology focusing on the case law of the European Courts and other primary sources is adopted. This enables a legal analysis of the meaning, application and role of restrictions of competition by object to be undertaken. The case law reveals three key approaches adopted by the European Courts to restrictions by object: the 'orthodox approach', the 'more analytical approach' and an amalgamation of these two approaches, the 'hybrid approach'. This finding immediately questions the dominance of the orthodox approach within legal discourse over the years. The orthodox approach contends that a limited category of agreements are considered by law to automatically restrict competition by virtue of their object. This is reflected in the European Commission's *Article 81(3) Guidelines* and is encapsulated by the widely recognised 'object box'. This thesis poses a direct challenge to such narrow interpretation of the law. It argues that this depiction of the law does not fully reflect the jurisprudence of the European Courts. Rather the case law reveals an alternative interpretation of the concept of object based on the seminal case of *Société Technique Minière* concerned more with determining the aim of the agreement within its legal and economic context as opposed to its categorisation. Moreover, the 'more analytical approach' benefits from greater judicial support. Having established the three key approaches and their application under Article 101(1) TFEU, the question of what is the best interpretation of the law on restrictions of competition by 'object' is reflected on. Based on the case law of the European Courts, it is argued the more analytical approach provides the best interpretation of the law. This is assessed in relation to the framework of Article 101 TFEU as a whole. Finally, this thesis briefly explores whether such conclusion is then consistent with the optimum function of the object criterion from an enforcement perspective.

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Introduction

1. Introduction

Historically, one of the most neglected aspects of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), indeed of EU competition law more generally, has been the concept of agreements whose ‘object’ is to restrict competition. Many commentators were in the past willing to accept Professor Whish’s infamous depiction: the ‘object box’.¹ In his terms, the object box comprises a limited class of ‘particularly pernicious’ agreements, which are considered *by law* to have as their object the restriction of competition.² By implication, restrictions of competition by object are akin to a form of *per se* offence as understood within the context of section 1 of the Sherman Act 1890.³ Although an agreement restricting competition by object could be exempted under Article 101(3) TFEU, this was seen as highly unlikely. Particular restrictions that fall within the impugned category are therefore *automatically* seen as having the object of restricting competition under Article 101(1) TFEU.⁴ As such, they involve an ‘obvious’ infringement of Article 101(1) TFEU.⁵ Restrictions by object do not require their anti-competitive effects to be proven; hence they immediately fall foul of Article 101(1) TFEU.⁶

This perception and presentation of the law has been challenged only recently.⁷ This was due in large part to the clear embrace of the object box concept by the

¹ (Whish & Bailey, 2012), p124. See (Bellamy & Child, 2008). The object box reflects what is referred to as the “orthodox approach” within this thesis. See Chapter 1.

² (Whish, 2009), pp115, 118 and (Whish & Bailey, 2012), pp117, 121. Whish admits his presentation of the object box “slightly oversimplifies” the law (Whish & Bailey, 2012), p124. Whish is used as an authoritative benchmark as he pioneered the vision of the ‘object box’, which has been followed, not just by scholars, but cited by Advocate Generals (see AG Trstenjak in *BIDS infra* n14 and 41) and courts such as the Competition Appeals Tribunal.

³ See eg (Jones, 2010), ‘*Left Behind by Modernisation?*’, pp658-660; also Case T-148/89 *Tréfilunion v Commission (Welded Steel Mesh)* [1995] ECR II-1063.

⁴ (Whish, 2009), pp115-117.

⁵ (Whish, 2009), p119 and (Whish & Bailey, 2012), p121: citing the General Court’s judgment in *ENS infra* n19.

⁶ (Whish & Bailey, 2012), p118. The contents of the object box are found at p124.

⁷ Since 2010 a number of articles on the object criterion emerged, for instance *supra* n3 (Jones), ‘*Left Behind by Modernisation?*’; (King, 2011); (Andreangeli, 2011); (Bailey, 2012).

European Commission (Commission) through its categorisation of restrictions by object designated as ‘hardcore’ restrictions, evident in its guidelines and Block Exemption Regulations (BERs).⁸ This meant that most focus of debate concerning the object concept centred on whether the Commission correctly categorised various types of agreement under the object heading and whether the object box should be ‘thin’ or ‘fat’.⁹ The associated benefits such categorisation may bring in terms of legal certainty or ease of administrative burden were also reflected upon.¹⁰ The more pertinent question of whether categorising different types of agreements as ‘object’ or ‘effect’ was legally correct was rarely considered. Instead, that the law operated in the terms of an object box was simply and unreservedly assumed.¹¹

Due to the implementation of modernisation, however, particularly the acceptance by the Commission of an ‘effects-based approach’ to determining restrictions of competition by effect under Article 101(1) TFEU, the ‘effect’ criterion had for many years taken centre stage within legal discourse.¹² The object concept was therefore

⁸ See eg, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97 (the Article 81(3) Guidelines), paras 20-23; Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102 1-7; Guidelines on Vertical Restraints [2000] OJ C291 1-44; Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C101 2-42, para 14; Horizontal Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 74 (the Horizontal Co-operation Guidelines).

⁹ This was evident at the conference on ‘Object/Effect and Information Sharing – the good, the bad and the ugly’ 6 October 2010 at the British Institute of International and Comparative Law. Here delegates pressed the panel on precisely which types of agreement fall within the object category and whether the Horizontal Cooperation Guidelines correctly delineated that category.

¹⁰ (Bennett & Collins, 2010), pp311, 312-314. See also *supra* Jones n3, ‘Left Behind by Modernisation?’, p656 and AG Kokott, *infra* n41 *T-Mobile*, para 43.

¹¹ *Ibid* Bennett and Collins pp311, 312-314: “The most difficult thing to do is to determine exactly what kinds of agreement, arrangement or practice should fall within the object category, and hence carry the presumption of harm”. The authors provided no authority or case law supporting the basis on which they stated their view of the law.

¹² 2004 marked a significant chapter in the Commission’s role as the central enforcer of the EU’s antitrust regime. The ‘modernisation’ of EU competition law under Council Regulation (EC) No 1/2003 [2003] OJ L1/1 (Regulation 1/2003) meant the notification system was abolished and the application of Article 101 TFEU was decentralised. This meant businesses no longer needed to notify their agreements to the Commission and National Competition Authorities (NCA’s) and National Courts (NC’s) now had the power to grant exemptions to the prohibition, thus ending the Commission’s monopoly over Article 101(3) TFEU. See eg (Marquis, 2007), (Nazzini, 2006), (Wesseling, 2000) and for an in-depth examination of the effects-based approach see (Bourgeois & Waelbroeck, 2013).

not high on the academic or, seemingly, the political agenda. This position no longer stands: Gerard confirmed that the meaning of the object criterion has resurfaced as one of the “fundamental legal questions of the day”.¹³

The shift in the debate from ‘effect’ to ‘object’ can be attributed to a variety of factors. For instance, a number of important judgments were handed down by both the General Court (GC) and Court of Justice (CJEU), which firmly drew attention back to the object concept.¹⁴ Additionally, the process of modernisation meant that the Commission was able to free up its resources to investigating and uncovering cartels, typically forms of agreement that are restrictive by object.¹⁵ A consequence of this enforcement priority adjustment and the absence of the notification system has been that nearly every Decision issued by the Commission under Article 101 TFEU in the past ten years has been framed in object terms.¹⁶

In parallel with this development, the application of an ‘effects-based’ approach to agreements under Article 101(1) TFEU is seen as complex.¹⁷ Competition authorities find it harder to win cases on an effects-based analysis given the level of economic assessment demanded by the Community Courts. For instance, in *O2* the GC reminded the Commission of the importance of the counterfactual.¹⁸ In *Delimitis* and *ENS*, the Courts also asked for more evidence of effects than in previous effect cases.¹⁹ Hence, competition authorities would rather resort to applying the object criterion, which carries a burden of proof that is easier to satisfy.²⁰ As the concrete effects of the agreement do not need to be proven under the object criterion, a rational competition authority will therefore look to stretch

¹³ (Gerard, 2013), p39.

¹⁴ See Chapter 2: Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969 and *infra* n41: C-501/06 P *GSK*, C-209/07 *BIDS* and C-8/08 *T-Mobile*. Note that previously the General Court was known as the Court of First Instance.

¹⁵ White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty Commission Programme No 99/027 [1999] OJ C132/1.

¹⁶ (Gerard, 2013), p38.

¹⁷ See eg Gerard, *supra* n13: “The term ‘economic’ approach is often used as a synonym for ‘effects-based’”, p20.

¹⁸ Case T-328/03 *O2 (Germany) GmbH & Co, OHG v Commission* [2006] 5 CMLR 258, 65-117. See (Robertson, 2007), p262; (Whish & Bailey, 2012), p127.

¹⁹ C-234/89 *Delimitis v Henninger Bräu* [1992] 5 CMLR 210; Joined Cases T371, 375, 384 & 388/94 *European Night Services v Commission* [1998] ECR II-3141 (*ENS*).

²⁰ (Goyder, 2011), III.

the meaning of the object criterion - usually in the guise of expanding the contents of the object box - as a mechanism for ensuring it is successful in finding an agreement anticompetitive.²¹ As a result, there is a growing reliance on the object criterion by competition authorities within their decision-making. This refocus on the object criterion has given rise to a concern amongst some commentators that the economic rationale behind the impetus of the effects-based approach is now meaningless; because all economic analysis is reserved for restrictions by 'effect' as opposed to those by object.²² This proposition needs testing.

What is certain is that the relevance of the object criterion continues to increase within the current legal landscape. The debate, that had long been so absent over its meaning and application, now shows no signs of abating.²³

2. Background to the thesis

In September 2006 the GC handed down a controversial judgment, which departed dramatically from the concept of object as traditionally perceived.²⁴ In *GSK*, the Court found on the facts that an intended restriction of parallel trade, a known 'hardcore' restriction, did not infringe Article 101(1) TFEU by object. Rather, it held that the agreement was restrictive by effect. In doing so, it deviated from the standards employed by the Commission in its Article 81(3) Guidelines. The prevalent reaction to the judgment at the time was that the GC was wrong: that its application of the object criterion to the agreement blurred the line between the concepts of object and effect.²⁵ The GC's interpretation of the law was, therefore,

²¹ Arguably the Commission did this in *Lundbeck* (Case No. 39226) and in its Horizontal Co-operation Guidelines.

²² (Gerard, 2013), pp38-39. Also noted by (Jones, 2010), '*Left Behind by Modernisation?*', p650.

²³ Numerous conferences on the subject continue to take place, eg, ERA conference "Restrictions of Competition by object after *Cartes Bancaires* and the Commission's Initiatives" on 11 December 2014; of many blog posts on this topic see also (Lawrence, 2014), Object Restrictions on the Menu; and, more generally, www.chillingcompetition.com; Lovdahl Gormsen highlights the "considerable debate" over whether the presumption of effects under the object criterion is rebuttable under Article 101(1) TFEU as opposed to being exempted under Article 101(3) TFEU, (Lovdahl Gormsen, 2013), ft23.

²⁴ *Supra* n14, Case T-168/01 *GlaxoSmithKline Services v Commission*. See (Goyder & Albors-Llorens, 2009), p120.

²⁵ See eg (Whish, 2009), p121.

regarded as an anomaly.²⁶ Such reaction demonstrated how entrenched the position, that the law operated in terms of an object box, was within the legal community. The notion that the law may, in fact, operate in a way not wholly reflected in the Commission's guidelines, was largely absent. Hence, an initial enquiry was to test whether the judgment was, indeed, "surprising".²⁷

Testing the hypothesis revealed a number of significant findings. Even on a preliminary reading of the case law of the CJEU, the judgment should not have been especially surprising.²⁸ In particular, much of the careful application and recounting of the law on the object criterion by the GC was, in fact, more rather than less, indicative of the jurisprudence. The GC's judgment highlighted an alternative, more analytical means of applying the object criterion, far removed from the deployment of the object box analogy by the Commission in its decision.²⁹ It was evident from this early research, that the meaning and application of the object criterion was considerably more nuanced than the Article 81(3) Guidelines would suggest.³⁰ The very real prospect was thus raised, that the Article 81(3) Guidelines did not accurately reflect the law. Moreover, the dearth of in-depth academic research into the object concept was exposed.³¹

Many of the leading texts and academic papers published prior to 2010 revealed the common acceptance of the Commission's interpretation of the object criterion.³² Indeed, the object concept was of so little interest that some commentators ignored it entirely in their critiques of Article 101(1) TFEU.³³ For

²⁶ (Whish, 2009), p121. See also (Bennett & Collins, 2010), pp312-314. Many comments voiced at conferences confirmed this perception, eg, at the PhD conference held by QMW at Goodenough College in November 2007.

²⁷ *Ibid*, Whish, p121.

²⁸ This initial research was undertaken between 2008-2010.

²⁹ Commission Decision, *GlaxoSmithKline*, 2001/791/EC.

³⁰ For instance, at least 6 different definitions of 'object' were found.

³¹ Cf two papers on the object concept authored by Odudu in 2001, '*Object as Subjective Intention*' and '*The Object Requirement Revisited*'; (Jones, 2006); a paper written for the Swedish competition authority (Kolstad, 2009) and a short article written on the rule of reason by Lasok QC (Lasok QC, 2008).

³² See eg (Whish, 2009), (Bellamy & Child, 2008), (Faull & Nikpay, 2007), (Chalmers, et al., 2006) who rely heavily on the judgment in *ENS*; (Goyder & Albers-Llorens, 2009), pp118-122, particularly p119-120. Cf (Odudu, 2006) and (Black, 2005), pp115-127.

³³ See eg (Slot & Johnston, 2006).

others, the object criterion was clear and straightforward.³⁴ On the whole, the texts provided limited explanation of the meaning or application of the object criterion to agreements, or to the case law underpinning it.³⁵ Instead, the modernisation process meant most commentary focused on the role and assessment of the effect criterion. Nevertheless, it was acknowledged on occasion, paradoxically by Whish, that the object concept did present some inconsistencies and therefore was “confused and confusing”.³⁶ Few at this juncture, however, chose to unravel and respond to the problems.³⁷

In view of the nature of the object criterion as a substantive element of Article 101(1) TFEU these initial findings were illuminating and unexpected. The assumption was that the object concept would have been subject to careful examination, as the importance of the object criterion within Article 101(1) TFEU was always clear.³⁸ This was underlined by Odudu who opined that:

“economic effects need not be considered when the object is to restrict competition; when an economic effect must be shown is

³⁴ See eg, (Chalmers, et al., 2006) p1000: “object cases are simple: a cartel...has as its object the elimination of competition because the parties monopolise the market and raise prices, as such it is prohibited. The object of an agreement is not determined by the intention of the parties, rather an agreement has its anti-competitive object when the restriction of competition is obvious. If the object is to harm competition, then there is no need to enquire about the effects.” See also (Bourgeois & Bocken, 2005).

³⁵ Arguably many commentators were guilty of this: see eg, (Nicolaidis, 2005), pp129-130; also (Bellamy & Child, 2008), para 2/097 who viewed object as a “per se” restriction, which “of their nature” restricted competition, which they claimed was the same approach adopted by the Commission; (Korah, 2006), pp74-84 and (Dabbah, 2004), pp73-76.

³⁶ (Whish, 2003), pp108-115. The statement was made in reference to the amount of market analysis required under the object heading when assessing whether the agreement is appreciable.

³⁷ At the PhD conference at Goodenough College in 2007, David Gerber made an observation that resonated with the impetus behind this thesis. He stated that, despite over 50 years of EU competition law, there was a need for a “back to basics” approach, as the Courts and commentators were still struggling to understand the fundamental elements of Article 101 TFEU, despite the advancement of competition law in terms of economic considerations, policy developments and other deviations. Marquis also acknowledged Article 101(1) TFEU and its “exotic mysteries” (Marquis, 2007). Notably Odudu did advance an alternative view of the object criterion: (Odudu, 2001) “Interpreting Article 81(1): Object as Subjective Intention” and “Interpreting Article 81(1): the Object Requirement Revisited”.

³⁸ Goyder agrees, “...the concept of an ‘object’ restriction has not yet been firmly nailed down, and still gives rise to confusion. It seems even more surprising when one considers that object infringements represent the most serious anticompetitive conduct, and so tend to be enforcement priorities for competition authorities, and to attract significant fines...it is hard to discern clear outlines of the concept of ‘object restriction’ [despite the volume of case law].” (Goyder, 2011), I (Introduction).

determined by the scope and content of the object category. Article [101 TFEU] remains uncertain to the extent that the meaning and functioning of the 'object' element is unspecified."³⁹

The lack of historical research was all the more startling in view of the acknowledgment, by several prominent scholars such as Marquis and Whish, that Article 101(1) TFEU lacked clarity as a whole, despite the Commission's claim that EU competition law had "clearly established basic principles and well-defined details".⁴⁰ The need for detailed research into the object criterion was further underscored by three seminal judgments handed down by the CJEU that dealt specifically with the law relating to the object criterion: *GSK*, *BIDS* and *T-Mobile*.⁴¹ These judgments significantly raised the profile of the object concept and highlighted a more contextual approach to determining an agreement's object.

The increase in interest surrounding the object criterion has coincided with a palpable shift in the perception of it in a number of the current editions of leading texts. Certainly, in contrast with earlier editions, the object concept has been subject to a more full and balanced appraisal. This, in conjunction with the recent spate of CJEU judgments, is due to the influence of a number of prominent academic papers published between 2010 and 2012, which highlighted the limitations of the orthodoxy.⁴² Whish & Bailey's description of the object criterion, for example, is now more expansive than in previous editions insofar as the authors recognise that the object concept is more complex than was previously stated.⁴³ The premise of their interpretation of the law still rests on the understanding that certain agreements can be "classified as having as their object the restriction of competition since in such cases it is not necessary to prove that anti-competitive

³⁹ (Odudu, 2006), p3.

⁴⁰ (Odudu, 2006), p97; (Marquis, 2007), p29; White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty Commission Programme No 99/027 [1999] OJ C132/1, introduction, para 3. See generally (Monti, 2007) and (Gerber, 2008).

⁴¹ Joined cases C-501/06P, C-513/06P, C-515/06P, C-519/06P *GlaxoSmithKline Services Unlimited v Commission and Others*, [2009] ECR I-9291 (*GSK*); Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637 (*BIDS*); Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 (*T-Mobile*).

⁴² (Jones, 2010), 'Left Behind by Modernisation?', (King, 2011), (Andreangeli, 2011), (Bailey, 2012).

⁴³ (Whish & Bailey, 2012), p122, ft 367 citing Jones and King. They acknowledge the object box is not an exhaustive list, p122.

effects would follow”.⁴⁴ Hence, the categorisation of agreements falling into the “object box” remains at the heart of their argument.⁴⁵ They also continue to assert that any quantitative component to the object analysis lies primarily in the fact that any restriction of competition must be appreciable.⁴⁶ How the object criterion is, in fact, applied to agreements is not elaborated on.⁴⁷

The shift in the perception of the object concept is most palpable in Bellamy & Child.⁴⁸ In contrast to its previous account of the object criterion, though notably relying on much of the same case law as in its previous edition, Bellamy & Child provides one of the most comprehensive text-book accounts of the object criterion.⁴⁹ Having previously advanced a position sympathetic to the object box approach and analogous with US-style *per se* infringements, the 7th edition places more reliance on determining the precise purpose of the agreement within its legal and economic context.⁵⁰ What the text lacks is greater detail and a more granular account of the various elements that play a role under the object criterion, such as legitimate objectives and restrictive effects.

What emerges, therefore, from the proliferation of judgments, new guidelines and commentary in recent years is that the object criterion is currently in a state of flux. This status is evidenced by the Commission. In September 2013 Alexander Italianer, the Director General of DG COMP, gave an insightful speech on the object

⁴⁴ *Ibid*, p120.

⁴⁵ *Ibid*, p120. *ENS* is cited as authority for this contention, pp121-123.

⁴⁶ *Ibid*, p120. Following the judgment in Case C-226/11 *Expedia Inc v Autorité de la concurrence*, 13 December 2012, nyr (*Expedia*) this understanding is contentious (see Chapter 5). Bellamy & Child also find that the function of an effects-based analysis under the object heading is limited to (i) the determination of appreciability, (ii) the level of fine, (iii) the application of Article 101(3) TFEU and (iv) the affect on trade, (Bellamy & Child, 2013), 2.117. This thesis argues that the quantitative component is not only due to these factors. See Chapters 2-4.

⁴⁷ For instance, there is no examination of the role of the legal and economic context, which is shown in later chapters of this thesis to form a fundamental part of the application of the law under Article 101(1) TFEU.

⁴⁸ (Bellamy & Child, 2013), 2.111-2.123.

⁴⁹ (Bellamy & Child, 2013), 2.111-2.123. (Jones & Sufrin, 2014) also provides a comprehensive account, though describes the object concept in terms of the identification of a category of object restraints automatically assumed to restrict competition, p205. However, the exceptions to this general rule are noted: pp212-226, 232.

⁵⁰ (Bellamy & Child, 2013), 2.111.

criterion.⁵¹ He advocated a more contextual approach to ascertaining an agreement's object, operating along the lines of a continuum or sliding scale: the complexity of such assessment being dependent on the circumstances of the case.⁵² Conversely, in its Guidance on restrictions by object published in June 2014, the Commission seemingly distances itself from a more in-depth contextual analysis by re-enforcing its perception of the relationship between the object concept and hardcore restrictions.⁵³ The judgment in *Expedia* ostensibly exacerbated this understanding, which the Commission interpreted to mean that anticompetitive agreements by object "have by definition an appreciable impact on competition".⁵⁴ The truth of this assertion requires careful attention.

Having flirted with the notion that the object criterion is not straitjacketed by an object box, it would appear in some quarters that the Commission, and indeed certain commentators, are again favouring a return to formalism.⁵⁵ It is perhaps no coincidence that the complexity of analysis involved in determining restrictions by effect (under the effects-based approach), has reignited the call for 'bright lines' under the object condition.⁵⁶

3. The research question and methodology

In view of these insights the need for comprehensive research into the concept of object, not just the issue of what constitutes a restriction by object, is long overdue. Set against the backdrop of modernisation, this thesis casts a probing light on this substantive element of Article 101(1) TFEU. It asks what the object concept means if the case law is interpreted carefully and recounted accurately. The thesis is therefore designed to advance our knowledge and enhance our legal understanding

⁵¹ (Italianer, 2013) '*Competitor Agreements under EU Competition law*', Fordham.

⁵² *Ibid*, p5. Even though this thesis does not support all of the proposals made in the speech, it is a notable departure from the Article 81(3) Guidelines.

⁵³ Commission Staff Working Document, Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice', 2014.

⁵⁴ Commission Press release, 25 June 2014; Case C-226/11 *Expedia Inc v Autorité de la concurrence*.

⁵⁵ See generally (Nagy, 2013), p542 and AG Kokott in *T-Mobile and Expedia*; (Jones & Sufrin, 2014), p205. However, the judgment in Case C-67/13 P *Groupement des Cartes Bancaires v Commission* (11 September 2014) (*Cartes Bancaires*) has re-ignited the debate regarding the object criterion and its relationship with the effects-based approach.

⁵⁶ See (Waelbroeck & Slater, 2013).

of this provision by focusing on its legal meaning, application and role within Article 101(1) TFEU as determined by the European Courts. The outcome of this examination will then be considered in the wider context of Article 101 TFEU as a whole, in terms of the object concept's relationship with Article 101 TFEU. Additionally, the Article 81(3) Guidelines, which the Commission issued as part of its package of guidelines intended to ensure the coherent enforcement of Article 101 TFEU across the EU as well as to clarify its application, are significant in this research.⁵⁷ They represent the official account of the Commission's interpretation of the object concept and embody the traditional perception of the concept of object. Consequently, they provide a useful comparative component, which exemplifies the complexity and nuances of the case law that becomes evident throughout the body of this thesis.

This thesis is doctrinal in nature and utilises doctrinal restatement techniques.⁵⁸ Given its focus on undertaking a legal examination of the concept of object under Article 101(1) TFEU, the key methodological approach employed in this thesis is to conduct a detailed examination of the jurisprudence emanating from the Community Courts and to present the evidence. As the ultimate interpreter of the TFEU the emphasis on the case law of the European Courts is fundamental to this research.⁵⁹ Other primary sources and academic research are also considered.⁶⁰ This methodology not only highlights the questionable origin of the interpretation of the object concept provided in the Article 81(3) Guidelines and other commentary, but more importantly provides legal justification for the conclusions reached in this research.

⁵⁷ Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97 (Article 81(3) Guidelines). Article 81 is now Article 101 under the Treaty on the Functioning of the European Union (TFEU).

⁵⁸ (Minow, 2006), pp34–5.

⁵⁹ See (Goyder, 2011), III.

⁶⁰ Including Advocate General opinions, Commission Guidelines, Regulations, Notices, Decisions, guidance, white and green papers, Commission newsletters, speeches and press releases. Also the case law, decisions, guidelines and other primary sources emanating from the NCA's and NC's are examined as appropriate.

The benefit and rationale behind focusing on black letter law is well documented.⁶¹ Separating the 'is' from the 'ought' question is an important component of this thesis.⁶² To determine the law on object is an interpretative task and, to this end, the meaning, application and function of the object concept is examined to reveal the characteristics, structure, concepts and principles ascribed by the European Courts. This approach could be criticised as one-dimensional,⁶³ but given the overwhelming influence of the orthodox approach on legal discourse a return to a basic premise relying on the jurisprudence of the European Courts is warranted. This thesis therefore also explores the limits of the application of the law and its potential application in the future. Once the interpretative task is completed, then soft law, policy, economic and normative considerations can be re-incorporated to those findings.

To provide an accurate legal account of the object concept, economic considerations will be provisionally set to one side. The text of Article 101 TFEU is enshrined in law and interpreted by judges, not economists, in the European Courts. The economics of Article 101(1) TFEU has, rightly, been a dominant feature in legal scholarship over the past 10 years, but this has come at a cost: the legal interpretation of the law concerning the object concept has been neglected, particularly as emphasis was generally placed on deciphering restrictions by effect in accordance with the 'effects-based' approach.⁶⁴ Such focus on economic considerations and values resulted in questionable assumptions as to the state of the law being advanced with respect to the object criterion.⁶⁵ This has been greatly aided by the general acceptance of the Commission's legal interpretation of restrictions by object despite the under-acknowledged existence of a contradictory

⁶¹ See (Kelsen, 1934); (Smith, 2004) '*Contract Theory*', p5.

⁶² See (Austin, 1832). See also other legal positivists such as Bentham, Kelsen and subsequent criticisms by Hart regards precisely how the 'is' question is determined: (Davies & Holdcroft, 1991).

⁶³ Hart argues that identifying what the law is, is not just attributable to what the Courts say: (Hart, 1997). Dworkin takes this proposition further claiming that the law is made up of rules, standards (such as policies) and principles and as such there cannot be a strict separation between law and morality: (Dworkin, 1977), (Dworkin, 1986).

⁶⁴ See eg (Gerard, 2013).

⁶⁵ Economists often recount the basic premise of law, as interpreted by the Commission, as being accurate. This is evidenced in papers, texts and at conferences. See eg (Bennett & Collins, 2010).

array of case law.⁶⁶ Revealing the true legal nature of the object criterion and reclaiming it for legal discourse ensures that policy and economic considerations can then be countenanced appropriately as tools to help determine agreements within a legal framework.

This thesis will therefore develop the conclusions reached from such investigation into the positive law and engage in a form of legal interpretation.⁶⁷ The case law will be reorganised by calibrating it as reflecting an ‘orthodox approach’, a ‘more analytical approach’ (the MAAP), and a ‘hybrid approach’.⁶⁸ Ultimately, this thesis seeks to determine what is the best interpretation of ‘restriction of competition by object’ based on the case law of the European Courts. The advantages and flaws of the three approaches will therefore be documented and highlight how the inconsistent application of a narrow category of agreements seen to be restrictive by object renders the legal value of any so-called ‘object box’ meaningless.

More fundamentally, this thesis contributes to the literature by advocating an approach to the object concept that moves away from the notion of categorisation and from any analogy with the US *per se* system. Instead, it promotes a return to the contextual understanding of the law first set out in the seminal case of *STM*.⁶⁹ In that case, the Court looked to the “precise purpose” of an agreement determined within its legal and economic context as opposed to identifying a category of restraints automatically presumed as being restrictive by object.⁷⁰ Consequently, such an understanding of the law can be seen as being, in a sense, neither new nor transformative.⁷¹ Having answered the key research question of

⁶⁶ See NCA’s submissions in cases before the CJEU supporting the orthodox understanding of the law, eg: *supra* n41, *BIDS*. NCA’s, particularly those with less sophisticated and newer competition regimes will often support the Article 81(3) Guidelines in their submissions, despite not being obliged to follow the Guidelines (see *supra* n46 *Expedia*). AG’s have also used the Article 81(3) Guidelines to justify their interpretation of the law: see AG Cruz Villalón in Case C-32/11 *Allianz Hungária*, 25 October 2012, nyr, para 65 (*infra* Chapter 4, section 3.1).

⁶⁷ (Smith, 2004), p5.

⁶⁸ See generally (King, 2011).

⁶⁹ Case C-56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 249 (*STM*).

⁷⁰ *Ibid*, *STM*, 249.

⁷¹ Cf ‘*The Object/Effect Distinction in Competition Law Article 101, categorical distinctions and Predictable Enforcement*’, New Challenges in Competition Law Enforcement conference, Istanbul, 6 June 2014: (Rodger, 2014).

what is the best interpretation of law on the object criterion, the implications of adopting the MAAP for Article 101 TFEU are then explored.⁷²

This thesis therefore addresses the gap in the historical literature by presenting a comprehensive legal account of the object criterion within Article 101(1) TFEU, and investigating the repercussions of that research on Article 101 TFEU as a whole. As less attention is paid to the perspectives of the Commission, and greater emphasis is placed on the jurisprudence of the European Courts, the questionable origins of the orthodox approach are revealed.

4. Chapter organisation

This thesis is organised as follows: *Chapter 1: Establishing the orthodox approach*, sets out the conventional understanding of the law on the object criterion as set out by the Commission in its Article 81(3) Guidelines and the ‘object box’ proposed by Professor Whish. This perception of the law is referred to in this thesis as the ‘orthodox approach’. The essence of the orthodox approach in terms of its meaning, application and role will be examined with the aid of the Commission’s policy documents and decisional practice, literature and a summary of the case law supporting such interpretation. The US *per se* system under the Sherman Act is drawn on as an appropriate analogy. Hence the significance of the orthodox approach as the leading interpretation of the law will be underlined whilst noting it still attracts many followers. Thereafter, the chapter will identify the problems with the orthodox approach as highlighted, most prominently, by the seminal judgment of the GC in *GSK*.⁷³ This encompasses the inconsistent and contradictory application of the Article 81(3) Guidelines to cases by the Commission, the expansion of the ‘object box’, the evolution of approach adopted by the Commission evidenced in its new guidelines by the clearer adoption of the ‘legal and economic context’ to cases and hence a more ‘analytical’ application of the object concept.

⁷² For instance, in terms of object’s relationship with restrictions by effect, Article 101(3) TFEU and as a tool of enforcement.

⁷³ *Supra* n14, *GSK*.

Having mapped out the orthodox approach to the object criterion, established its significance within legal discourse, in particular to the Commission, and then identified its anomalies, Chapter 2: The meaning and application of restrictions by object according to the European Courts tests the accuracy of the orthodox approach vis-a-vis the case law of the European Courts.⁷⁴ As such it sets out the legal foundations underpinning the law relating to the object criterion. Such analysis thereby provides the authority upon which to critique the object criterion and the Article 81(3) Guidelines. The purpose of the chapter is to: (i) set out the development of the case law thereby determining that the Courts have used a variety of approaches when assessing the object of an agreement, namely, the more analytical approach (the MAAP) and the hybrid approach in addition to the orthodox approach, (ii) assess the meaning and application of the object criterion adopted by the Courts, thereby finding the case law in fact provides greater support for a more analytical approach; and (iii) prove the orthodox approach lacks judicial support commensurate with its prominence within EU competition law. Overall, the chapter demonstrates how the contextual analysis promulgated by the more analytical approach is not 'new', and that the judgment in *STM* holds the most influence throughout the case law.

Having identified the three key approaches to the object criterion drawn on by the Courts, the reconstruction of the case law undertaken in chapter 2 is further fleshed out in chapters 3 and 4, which probe the features of the object criterion established by the case law review in more depth. This enables the primary research question, what is the best interpretation of restrictions of competition by object based on the case law of the European Courts, to be answered. To this end, Chapter 3: Identifying the concept of object has two main tasks. First, it sets out the

⁷⁴ This involved a comprehensive examination of the jurisprudence of the CJEU (including opinions) and GC relating to Article 101(1) TFEU for both object *and* effect since the 1960's. Therefore, not only were those cases which were identified as relating to the object criterion in the various texts, articles and Commission's guidelines scrutinised, but also cases usually considered relevant to 'effect' (such as *STM*). It was noted that 'effect' cases often included a general pronouncement by the Court regarding the application of Article 101(1) TFEU to agreements as a whole. Hence, the cases reported in the text of this thesis are those that provide more helpful illustrative examples of such pronouncements.

so-called ‘universal principles’ of the object criterion. These principles are consistently applied to agreements or upheld by the Courts, regardless of the approach adopted by the European Courts to the object concept. Secondly, it establishes the definition of ‘object’ under Article 101(1) TFEU, critiquing the object/effect distinction advocated in *BIDS*, and assessing the definitions of the object concept proposed under each approach.

Chapter 4: Applying the object concept to agreements in accordance with the MAAP

then investigates the application of the object criterion to agreements by focusing on the MAAP and contrasting this with the hybrid approach. The abundance of recent case law helps depict how the object criterion is applied to agreements. The chapter turns, first, to a comprehensive assessment of the application of the legal and economic context to agreements. Next, it examines how restrictive effects impact the application of the legal and economic context to agreements that are *prima facie* restrictive by object. It then draws on more recent commentary to ascertain how others have rationalised developments in the case law in this regard. Finally, the main research question is answered: it is proposed that the MAAP is the better interpretation of the law in view of its greater and less conflicting judicial support.⁷⁵ The MAAP reveals the object concept to be a multi-faceted, complex yet flexible element of Article 101(1) TFEU that seeks to uncover the ‘primary purpose’ of an agreement. It is able to explain, therefore, why the so-called anomalies identified in the case law have not followed the orthodox approach. It is noted that interpreting the law in accordance with the MAAP has garnered increasing support and recognition in the past few years, though is not without its critics.

Following the detailed examination of the mechanics of the object concept conducted in chapters 3 and 4 and having chosen the MAAP as the preferred approach, *Chapter 5: The implications of the MAAP on Article 101 TFEU as a whole* explores the wider implications of the MAAP on Article 101 TFEU. It seeks to explain why the MAAP is a better approach. Given the sheer breadth of such a task,

⁷⁵ Though it is still acknowledged that the jurisprudence remains confusing, however the application of the MAAP to agreements makes better and more rational sense of it.

this chapter is selective in its scope. It thus tackles what the implications of the MAAP are for specific aspects of Article 101 TFEU. Given the nature of the MAAP it will focus on those aspects usually associated with restrictions by ‘effect’, such as the relationship between the object criterion and the *de minimis* doctrine (and the concept of market power) and the ‘effect on trade’ criterion. It also addresses the relationship between restrictions by object and by effect. This involves a general consideration of the objectives of Article 101 TFEU and the impact the more analytical approach has on such objectives. More particularly, it will look at how the more analytical approach, with its emphasis on the legal and economic context, slots in with the ‘effects-based’ approach adopted by the Commission post-modernisation. Finally, the chapter investigates what MAAP means for the availability of an Article 101(3) TFEU exemption and its relationship with Article 101(3) TFEU.

Having interpreted the case law on the object concept under Article 101(1) TFEU, promoted the application of the MAAP and then examined the implications of the MAAP on Article 101 TFEU as a whole, the final chapter, *Conclusion: The function of the object criterion under Article 101(1) TFEU* concludes the thesis. It considers what this research means for the normative function of the object concept. To this end, it briefly explores how best the enforcement of Article 101 TFEU is tackled through the use of the object criterion. The experience gleaned from the US will aide this discussion. It proposes that a practical solution would be for the Commission to better articulate its policy in respect of the object criterion and clearly differentiate its policy approach from the law. Contrary to the Commission’s assertions, the Article 81(3) Guidelines do not wholeheartedly reflect the jurisprudence of the European Courts or indeed its own practice. Hence, the Commission should recast its Article 81(3) Guidelines.

This thesis is intended to provide an authoritative legal account of what constitutes the concept of object under Article 101(1) TFEU in all its guises. By presenting the case law in this manner and assessing the impact of that research on Article 101 TFEU as a whole, this thesis makes a substantial contribution to the literature by promoting an alternative way of perceiving the object criterion based on a faithful

reflection of the jurisprudence of the European Courts. The object concept is currently one of the most debated and pivotal aspects of Article 101 TFEU. This thesis reinforces that status by addressing the gap in the literature, providing detailed analysis and interpretation of the case law, then advocating an approach removed from the orthodoxy. Ultimately, this thesis maps out the past and present, with a view to ensuring this body of work will continue to be relevant (regardless of how the European Courts or Commission go on to interpret the object criterion) in the future.

Some preliminary matters should be addressed here. In order to provide a focused account of the object criterion, there are a number of issues that this thesis is unable to address, though that does not denote they are not significant. For instance, this thesis does not seek to determine if the outcome of particular judgments and decisions are necessarily correct. Nor does this thesis aim to address every aspect of Article 101 TFEU that may be affected by the object criterion in the wider arena. Rich sources for future research that stem from this study would therefore include the impact of the MAAP on National Competition Authorities (NCAs) in light of their obligations under Regulation 1/2003 and the judgment in *Expedia*, as well as an examination into any links in terminology and concepts between Articles 101 and Article 102 TFEU.

This thesis takes account of developments to August 2014.⁷⁶ Several acronyms are also used throughout this thesis, which are referenced in the glossary at page 276. Finally, the focus of this thesis is on the law of the EU contained within the TFEU, though some comparative work has been done with other jurisdictions such as the US and UK.

⁷⁶ Given its importance, the judgment in C-67/13 *Cartes Bancaires* rendered on 11 September 2014 is referenced. Hence, conferences or blogs reviewing this judgment have also been referenced where appropriate.

Chapter 1: Establishing the ‘orthodox approach’

1. Introduction

A longstanding orthodoxy has informed the general appreciation of the object criterion in Article 101(1) TFEU. This orthodoxy has been described by leading scholars of competition law and adopted by the Commission in its guidelines. A first task of this chapter is to sketch out this traditional or ‘orthodox’ view of the object criterion under Article 101(1) TFEU by reference to commentators’ views, to the case law of the European Courts, and to policy statements made by the Commission.

The orthodox approach continues to provide the bedrock of the Commission’s interpretation of the object criterion in its Article 81(3) Guidelines. Hence, it carries great significance under EU competition law, and must be taken seriously.¹ Notably, however, the orthodox understanding is not always followed by the European Courts or, indeed, the Commission. As a result, its value immediately becomes questionable. While the orthodox understanding of the meaning, application and role of the object criterion has had many followers, a second aim of this chapter is to explain that it is unpersuasive. The chapter therefore documents provisionally a confusion surrounding the application of the object concept.

This exercise provides an appropriate backdrop to the review of case law that is presented in chapter 2, and which exposes how far the jurisprudence of the European Courts fails to support the orthodox interpretation of the law. The depiction offered of the orthodox approach also acts as a useful comparative benchmark in chapters 3 and 4 when this thesis seeks to ascertain what truly constitutes the object criterion and its various facets under Article 101(1) TFEU.

¹ In view also of how many NCAs and businesses explain the application of the object concept under Article 101(1) TFEU in terms of the orthodox approach, in cases that go on appeal to the GC or as preliminary references to the CJEU.

1.1. The object criterion: an overview

As is clear from the text of Article 101(1) TFEU, the provision prohibits agreements or concerted practices that have either as their ‘object’ or their ‘effect’ the ‘restriction of competition’.² A close association between object and effect can therefore be assumed. They are distinct legal terms, however, and the significance and the consequences of this distinction have not always been clearly or accurately portrayed. This is due, in part, to the tendency in the past for ‘object’ and ‘effect’ to be referred to collectively not separately in both legal texts and court judgments.³ The importance of the distinction regained prominence following the General Court’s (GC) judgment in *GSK*. The court was widely criticised for blurring the line between the object and effect analysis and misinterpreting the distinction between the concepts.⁴

When determining whether an agreement restricts competition under Article 101(1) TFEU, ‘object’ expresses a true alternative to ‘effect’ and as such requires separate consideration.⁵ This principle was established in *Société Technique Minière v Maschinenbau Ulm (STM)*.⁶ The European Court of Justice (CJEU) held that the object of an agreement should be assessed first. Where it is not clear that

² For the purposes of this thesis, reference to ‘agreement’ is in its widest sense, including concerted practices and gentlemen’s agreements.

³ See, for example, (Slot & Johnston, 2006), p59; (Bellamy & Child, 2008), 2.096. The CJEU has often referred to both concepts together in its judgments when deciding whether or not there has been a ‘restriction of competition’, see for example Case C-5/69 *Franz Völk v SPRL Ets J Vervaecke* [1969] ECR 295; Case C-28/77 *Tepea BV v Commission* [1978] ECR 1391; Case C-31/80 *L’Oréal NV and L’Oréal SV v De Nieuwe AMCK PVBA* [1980] ECR 3775; Case C-61/80 *Cöoperatieve Stremsell-en Kleurselfabriek v Commission* [1981] ECR 811; Case C-107/82 *AEG-Telefunken v Commission* [1983] ECR 3151. The distinction between ‘object’ and ‘effect’ is considered in greater detail in the following chapters.

⁴ Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969 (*GSK*). There the GC held that the object of the agreement was not to restrict competition despite the involvement of an admitted restriction of parallel trade, usually seen as a ‘hardcore’ restriction and thus automatically anticompetitive by object.

⁵ (Bellamy & Child, 2008), para 2.096. In the Italian version of the text of the Treaty it referred to object and effect being cumulative by stating the “object *and* effect”. The Court of Justice in Case C-219/95P *Ferrière Nord v Commission* [1997] ECR I-4411 rejected this interpretation and confirmed the text ‘object or effect’ was disjunctive. Both elements do *not* need to be proved in order to establish a restriction of competition. Goyder says that only if the purpose of the agreement does not appear to restrict competition is it necessary to consider the effects: (Goyder & Albors-Llorens, 2009), p118.

⁶ C-56/65 *Société Technique Minière V Maschinenbau Ulm* [1966] ECR 235.

the object of an agreement is to restrict competition, then the effect of an agreement should be considered.⁷ Moreover, the courts have repeatedly held that once it has been shown that the object of an agreement is to restrict competition, ‘there is no need to take account of the concrete effects of an agreement’.⁸ This distinction is crucial. Having found that the object is to restrict competition, the assessment under Article 101(1) TFEU can end there. The object criterion clearly has the scope to be an incredibly useful tool, as to determine the *actual* effects of an agreement on competition demands a higher, and thus more intensive and costly, level of economic and market analysis. The rationale behind this principle is contentious, as the court, having established the principle in *Consten & Grundig*, never clarified the reasoning that underpinned its statement.⁹ However the principle has arguably led to the rationalisation of the orthodox approach described below.

2. The orthodox approach

2.1. Restrictions that ‘by their very nature’ distort competition

The orthodox approach to the object criterion contends that a narrow category of “serious” agreements, “by their very nature” restrict competition by object due to their known ‘necessary effect’.¹⁰ Such agreements involve an “obvious” restriction of competition.¹¹ They automatically restrict competition as the case law dictates that satisfying the object criterion does not require actual restrictive effects on competition to be determined and, according to the Commission, experience tells us particular restrictions will harm competition (that is, an agreement’s ‘necessary

⁷ *Ibid*, 249.

⁸ Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299 (*Consten & Grundig*).

⁹ *Ibid*.

¹⁰ Necessary effect also known as ‘necessary consequence’ or ‘prior belief’ refers to the known anticompetitive effects of particular agreements in view of their “nature”: (Goyder, 2011), II. See also Article 81(3) Guidelines paras 20-23; (Whish, 2009), pp116-122 citing the General Court’s judgment in *ENS* to support the contention that object restrictions are “particularly pernicious” and *infra* section 2.1.1.

¹¹ (Whish & Bailey, 2012), p121 referencing *ENS*.

effect') regardless of the subjective intention of the parties.¹² The main premise of the orthodox approach therefore rests on the categorisation or classification of particular restrictions of competition, which can then be automatically condemned as restrictions of competition by object under Article 101(1) TFEU.¹³ That particular restrictions of competition are *presumed* anticompetitive by object under Article 101(1) TFEU is an important element of this perception of the law.¹⁴ Evidently this interpretation elicits parallels with the US *per se* offence.¹⁵ There is one obvious distinction however.¹⁶ Unlike US antitrust law, an infringement of Article 101(1) TFEU by object can potentially be exempted under Article 101(3) TFEU.¹⁷

Under the orthodox approach, the identification of those types of restriction falling within the impugned category is of crucial significance.¹⁸ Whish & Bailey identify a number of such restrictions within their so-called 'object box'. This includes, price fixing, market sharing, output limitation, collective exclusive dealing, imposing minimum or fixed resale prices and the imposition of export bans.¹⁹ These restrictions of competition are synonymous with what the Commission refers to "hardcore restrictions" in its Guidelines and Regulations.²⁰ As such, the application of the orthodox approach is apparently straightforward: merely proving the existence of the agreement is all that is required. A competition authority is "not required to prove any economic (or other) evidence of likely anticompetitive harm. It is sufficient to demonstrate that the agreement fits into the object category and hence breaches Article 101(1) TFEU".²¹ Determining the contents of the object

¹² Article 81(3) Guidelines, paras 20-23.

¹³ (King, 2011), p269; (Whish & Bailey, 2012), p117.

¹⁴ See eg (Bennett & Collins, 2010), p313.

¹⁵ Section 1 of the Sherman Act 1890. See (Jones, 2010), pp658-660. Also, Case T-148/89 *Tréfilunion v Commission (Welded Steel Mesh)* [1995] ECR II-1063.

¹⁶ As designated under s.1 Sherman Act; *Standard Oil Co (NJ) v United States* (1911) 221 US 1.

¹⁷ See generally (Jones, 2006).

¹⁸ (Bennett & Collins, 2010), pp312-314.

¹⁹ (Whish & Bailey, 2012), p124.

²⁰ Article 81(3) Guidelines, para 23.

²¹ (Bennett & Collins, 2010), p314.

category is of vital importance as such agreements carry the presumption of harm.²²

2.1.1. Necessary effect

The concept of necessary effect is important as it is intrinsically linked to the idea of legal presumptions of harmful effects under the object heading.²³ Necessary effect is based on the assertion that under the object heading the concrete effects of an agreement do not need to be considered, as certain restrictions of competition automatically infringe Article 101(1) TFEU due to their known negative effects on competition.²⁴ This is derived from experience. As such, there is a presumption of anti-competitiveness as agreements have the inevitable consequence of restricting competition.²⁵ Presumptions of harm play a key role within the orthodox approach and the desire to make comparisons with the US is therefore understandable.

2.1.2. US *per se* offence

Under the Sherman Act 1890, the American antitrust law system makes unequivocal use of presumptions in its set of '*per se* rules'. These rules allow the US courts to rule on the illegality of certain practices, which *prima facie* satisfy the conditions required by such rules without recourse to a detailed examination of all the relevant facts.²⁶ Kolstad submits that the *per se* rules are developed on the basis of experience the Supreme Court has gleaned from its case law and that covered practices are presumed illegal because of their pernicious effect on

²² *Ibid*, p314.

²³ Also referred to as 'necessary consequence' or 'prior belief'.

²⁴ (Odudu, 2001), '*Interpreting Article 81(1): the Object Requirement Revisited*', p384. See also (Black, 2005), p118; AG Trstenjak's Opinions in *BIDS* and *GSK* and (Goyder, 2011), I-II. Such restrictions include, price fixing, market sharing etc. See also (Odudu, 2001), '*Interpreting Article 81(1): Object as Subjective Intention*', pp60-75 (though Odudu does not support this proposition in his paper, he defines the orthodox approach in terms that 'object' means 'necessary effect'); (Jones, 2006), '*Left Behind by Modernisation?*', p691; (King, 2011), p270. Necessary effect is based on the idea of past experience: AG Mazák's opinion, Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence* [2011] ECR I-9419, para 27; Article 81(3) Guidelines, para 21. Justifications for necessary effect are also found in (Waelbroeck & Slater, 2013), paras 4.12-4.17. Though much of their analysis is erroneously based on the Commission's Article 81(3) Guidelines.

²⁵ (Odudu, 2009); AG Kokott, *T-Mobile*, para 43.

²⁶ (Svetlicinij, 2008), p122(C).

competition.²⁷ Moreover, where there is a *per se* infringement the parties cannot then argue that their agreement does not restrict competition.²⁸ This is because, US law has determined that, by law, a small, limited category of agreements automatically restrict competition and the parties cannot argue the contrary.²⁹ As such all that the claimant need prove is that the prohibited practice occurred.

Alongside numerous other commentators, Whish & Bailey find that there is “clearly an analogy” between the object concept and s.1 of the Sherman Act.³⁰ They also note, however, the important distinction between the US and EU legal systems, namely that even if “[an agreement] infringes Article 101(1) TFEU *per se*, the parties can still argue that the agreement satisfies the terms of Article 101(3) TFEU”.³¹ This possibility is not available under US law.

2.2. Case law

Many commentators continue to subscribe to the understanding of the law on the object criterion described here as the orthodox approach.³² Chapter 2 subjects the case law to a detailed critical legal analysis in order to determine more precisely the law on the object criterion. For the purposes of this chapter, however, this section provides a brief description of the case law that supports the orthodox approach in order to illustrate the European Courts’ contribution to the development of the orthodox approach.³³

The clearest embodiment of the orthodox approach is found in *European Night Services (ENS)*.³⁴ The influence of the GC’s judgment in *ENS* on the legal interpretation of the object concept under Article 101(1) TFEU is profound and is consistently cited as authority for the proposition that the object concept operates

²⁷ (Kolstad, 2009), p5.

²⁸ (Whish & Bailey, 2012), p121.

²⁹ (Bailey, 2010), p364, II, 2.

³⁰ (Whish & Bailey, 2012), p121.

³¹ *Ibid.*

³² See Introduction, section 2.

³³ Chapter 2 will therefore highlight those cases that not only support the orthodox approach, but also embody aspects that are pertinent to the other approaches to the object criterion identified in this thesis.

³⁴ Case T-374/94, *European Night Services and Others v Commission*, [1998] ECR II-3141.

in terms of an object box.³⁵ Even though the case concerned the establishment of a joint venture and proof of its effects on competition, the GC's observation on the object criterion has had lasting implications. The GC found that where an agreement contained "obvious" restrictions of competition such as price fixing, market-sharing or the control of outlets, then no economic analysis is required in terms of assessing the legal and economic context, the structure of the market or the actual conditions in which the agreement functions.³⁶ This followed similar judgments in *Tréfilunion v Commission* and *Montedipe SpA v Commission*.³⁷ In *Tréfilunion*, the GC held that as the case involved a "clear" infringement of Article 101(1) TFEU in particular involving subparagraphs (a) to (c) it "...it must be regarded as an infringement *per se* of the competition rules".³⁸ The GC cited *Montepide v Commission* in support of its statement, which articulated the same sentiment.³⁹ Consequently the GC's approach in *Tréfilunion* and *ENS* creates a clear analytical distinction between object and effect analyses: the former relies solely on whether the restriction of competition is 'obvious'; all economic analysis is reserved for the effects analysis. It is not difficult to see why these cases have been so persuasive given the attraction of legal bright lines and the associated lowering of the administrative burden on competition authorities.⁴⁰

The judgment of the CJEU in *Sumitomo v Commission* helped confirm the sentiment that certain types of agreement "in themselves pursue an object restrictive of competition and fall within a category of agreements expressly prohibited by Article [101(1) TFEU]".⁴¹ Furthermore "that object cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned".⁴² Hence, the

³⁵ Most prominently in (Whish & Bailey, 2012), p120-121. Though interestingly it is not cited in the Article 81(3) Guidelines.

³⁶ *ENS*, para 136. See chapter 2 for a more in-depth critique.

³⁷ Case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, para 109; T-14/89 *Montepide SpA v Commission* [1992] ECR II-1155, para 265.

³⁸ *Ibid*, *Tréfilunion* para 109.

³⁹ T-14/89 *Montepide*, para 265.

⁴⁰ See generally, (Bennett & Collins, 2010).

⁴¹ C-403 & 405/04P *Sumitomo v Commission*, [2007] ECR I-00729, paras 42-45, 43.

⁴² *Ibid*, para 43.

absence of effects of an agreement is of no consequence for a finding by object.⁴³ This builds on the understanding that the actual effects of an agreement do not require proof in order to determine whether it restricts competition by object.

Finally, in *BIDS*, the description attributed by the CJEU to the distinction between object and effect was said to arise “from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”.⁴⁴ This statement was then replicated in *T-Mobile*.⁴⁵ This proclamation tallies with the orthodox approach as it suggests that there is a category of agreements that automatically restrict competition by object.

These cases seemingly endorse the understanding advocated under the orthodox approach; that a particular category of agreements, nominally those contained within Article 101(1) (a) to (c) TFEU, automatically restrict competition by virtue of their object regardless of their effects. To determine the object merely requires the identification of such a restriction within the agreement or concerted practice.

2.3. The Commission

Perhaps the clearest endorsement of the orthodox approach comes from the Commission.⁴⁶ The Commission’s interpretation and application of the object concept to agreements can be discerned through its Guidelines, its Block Exemption Regulations (BERs) and its decisions. This section involves a particular focus on the Article 81(3) Guidelines, which following modernisation set out the Commission’s primary interpretation of Article 101 TFEU.⁴⁷ The following paragraphs will also

⁴³ *Ibid*, para 43.

⁴⁴ Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd (BIDS)* [2008] All ER (D) 235, para 17.

⁴⁵ Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 (*T-Mobile*), para 29.

⁴⁶ See (Jones, 2010) ‘*Left Behind by Modernisation?*’, p654.

⁴⁷ Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C101/9, paras 20-23 (Article 81(3) Guidelines). These were issued in conjunction with the Commission’s modernisation package. For a contemporaneous critique see (Lugard & Hancher, 2004).

reflect on the question of whether the Commission has deviated from the position set out in its Article 81(3) Guidelines.

2.3.1. Guidelines and BER's: soft law and policy

Technically, the Commission's guidelines are not law, nor are they binding on Member States. There is a legitimate expectation, however, that the Commission will follow its own guidance.⁴⁸ Goyder agrees that the guidelines should be viewed as guidance only as they bind no one except the Commission.⁴⁹ That the guidelines in fact take on a more meaningful and significant role is highlighted by the Commission itself. In the Article 81(3) Guidelines, it is stated that the purpose of the guidelines is to "set out the Commission's view of the substantive assessment criteria applied to the various types of agreements and practices".⁵⁰ It is stated further that they provide "guidance to the courts and authorities of the Member States in their application of Article 101(1) and (3)".⁵¹ Additionally it is asserted that "the...guidelines outline the current state of the case law of the Court of Justice' and set out the Commission's policy with regard to issues that have not been dealt with in the case law".⁵²

Given the Commission's primary role as enforcer of the competition rules, the fact that the various Guidelines it issues are not law in its truest sense is irrelevant on a practical level: the Guidelines demand to be taken seriously.⁵³ What is more, the guidelines tend to blur the line between law and policy. It is submitted that the division between policy initiatives and the law (as determined by the European Courts) has become almost indeterminate for practical purposes within the context of such guidelines. Therefore the presentation of the law set out in the guidelines is

⁴⁸ Article 81(3) Guidelines, para 4; noted in Case C-226/11 *Expedia Inc v Autorité de la concurrence*, nyr.

⁴⁹ (Goyder, 2011), p12 VI.

⁵⁰ Article 81(3) Guidelines, para 3.

⁵¹ Article 81(3) Guidelines, para 4.

⁵² Article 81(3) Guidelines, para 7.

⁵³ See generally (Stefan, 2008); (Cosma & Whish, 2003). NCA's and businesses rely on the Article 81(3) Guidelines as demonstrated in numerous NCA decisions and submissions to the European Courts, such as in *BIDS*, (*supra* n44). Furthermore there is a legitimate expectation the Commission will follow their guidelines, see Article 81(3) Guidelines, paras 4-7. See also AG Kokott's Opinion of 6 September 2012 in *Expedia*, *supra* n48.

often seen to be an accurate reflection of the law, rather than as a combination of the Commission's policies together with its subjective interpretation of the case law.

The premise of the Commission's approach to the object criterion, as set out in the Article 81(3) Guidelines, is straightforward: certain restrictions are "by their very nature" presumed to have the potential to restrict competition by virtue of their object regardless of their actual or potential effects.⁵⁴ The Commission claims, as it provides no judicial support for its reasoning, that this is because of the serious nature of such restrictions, and the high potential of negative effects on competition arising from such restrictions based on experience, which allows the Commission to predict which restrictions will, or are likely to, harm competition.⁵⁵ As discussed, this "experience" or knowledge that certain agreements harm, or have the potential to restrict, competition is known as the 'necessary effect' of an agreement.⁵⁶ According to the Commission, 'hardcore restrictions' are synonymous with restrictions by object.⁵⁷

The Article 81(3) Guidelines confirm that actual or concrete effects do not need to be demonstrated where an agreement has a restriction of competition as its object.⁵⁸ The Commission references its BERs, guidelines and notices as providing non-exhaustive guidance on what constitutes restrictions by object.⁵⁹ These are typically those restrictions that are black-listed in BER's or identified as "hardcore"

⁵⁴ Article 81(3) Guidelines, para 21. How this is reconciled with the Guidelines on Vertical Restraints [2010] paras 60-64 is questionable. See also Horizontal Cooperation Guidelines, para 24.

⁵⁵ Article 81(3) Guidelines, paras 20-23; (Whish & Bailey, 2012), pp116-122 and cf (Odudu, 2001), '*Interpreting Article 81(1): Object as Subjective Intention*'.

⁵⁶ (Black, 2005), p119.

⁵⁷ Article 81(3) Guidelines, para 23. See also Guidelines on Vertical Restraints [2010], paras 47-64. Note that the Commission allows for some hardcore restraints to fall *outside* of Article 101(1) TFEU in exceptional circumstances if they are "objectively necessary", para 60. For instance, if such a hardcore restriction is objectively necessary to ensure a public ban on selling dangerous drugs or where a distributor is making substantial investments in order to gain entry in a new market. The reference to paragraph 18 of the Article 81(3) Guidelines in support of this is curious as upon its reading it appears to only be relevant to restrictions by effect. See commentary on the revised *De Minimis* Guidelines below. However, the Vertical Guidelines [2010], para 96, suggest that the object criterion is not just limited to hardcore restrictions.

⁵⁸ Article 81(3) Guidelines, para 20.

⁵⁹ Article 81(3) Guidelines, para 23.

in guidelines and notices.⁶⁰ Such restrictions are therefore presumed to restrict competition by object.⁶¹ It is notable that the Commission reserves to itself the ability to expand upon the types of restrictions that constitute restrictions by object.⁶²

The question of how the object of an agreement is in fact determined is recounted in paragraph 22. According to the Commission whether an agreement has as its object the restriction of competition rests on a “number of factors”.⁶³ These “include” the content of the agreement and objective aims pursued by it. It “may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market”.⁶⁴ It could be deduced from a reading of the Article 81(3) Guidelines that it is merely optional that the context of the agreement is considered when determining the object of an agreement. Additionally, that the context referred to is the ‘legal and economic’ context is not specifically revealed.⁶⁵

Furthermore, the Commission provides that an examination of the facts underlying the agreement “may” be required, and that the implementation of the agreement is more persuasive than the formal agreement, which may not even contain an express restriction of competition.⁶⁶ The ease with which the object of an agreement is found is confirmed by the fact that identifying a ‘hardcore’ restriction in an agreement labels it automatically as a restriction by object.⁶⁷ All efforts are therefore seemingly directed towards identifying restrictions by object in an

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*, para 21. The Commission has not been reticent in expanding the category of hardcore restrictions, see for instance its decision in *Lundbeck* Case No. 39226.

⁶³ Article 81(3) Guidelines, para 22.

⁶⁴ *Ibid.*, emphasis added. References to Joined Cases 29 & 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679 and Joined Cases C-96/82 and others *ANSEAU-NAVEWA* [1983] ECR 3369 are cited as authority for this proposition. See chapter 2 for a discussion on whether the Article 81(3) Guidelines accurately represent these judgments.

⁶⁵ As will be demonstrated in chapter 2, this is a fundamental aspect of the application of the object criterion, which is not optional.

⁶⁶ Article 81(3) Guidelines, para 22. The subjective intention of the parties to restrict competition is evidence, but not a necessary condition.

⁶⁷ *Ibid.*, para 23: “Non-exhaustive guidance on what constitutes restrictions by object”. The same applies to those restrictions that are “blacklisted” in BERs.

agreement, not assessing the agreement itself to determine its object. It can be readily inferred that an economic analysis of an agreement is not a requirement. Moreover there is no hint of a suggestion that the presumption that a particular agreement restricts competition by object is rebuttable within the context of Article 101(1) TFEU.

This understanding of the law has been extremely pervasive throughout the EU.⁶⁸ Intriguingly the Article 81(3) Guidelines do not reference *ENS*, though they clearly draw heavily from it. It can be surmised, therefore, that the Article 81(3) Guidelines follow the orthodox approach or indeed that the orthodox approach follows the Commission's perception of the object criterion.

Other Guidelines and BER's tend to uphold how the Commission recounts the law and its policy on the object concept within its Article 81(3) Guidelines.⁶⁹ As such the focus is on the categorisation of restrictions whether labelled as hardcore or blacklisted in BER's. Consequently, the presumption is that such restrictions fall foul of Article 101(1) TFEU by virtue of their object and are unlikely to benefit from an exemption under Article 101(3) TFEU.⁷⁰ Perhaps importantly, there has been a subtle shift in some of the Guidelines published subsequent to the Article 81(3) Guidelines in relation to the necessity of the application of the 'context' of an agreement when determining an agreement's object.⁷¹

⁶⁸ It is submitted that there has been an over-reliance on cases such as *ENS*, which arguably form the backbone of the Article 81(3) Guidelines.

⁶⁹ See eg Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L 102, 1-7; Guidelines on Vertical Restraints [2010] C 130/01 (Guidelines on Vertical Restraints); Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C 101 2-42, para 14 (Technology Transfer Guidelines); Horizontal Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11, 1 para 74 (Horizontal Guidelines).

⁷⁰ See eg Guidelines on Vertical Restraints [2010], para 47.

⁷¹ See eg Horizontal Guidelines, paras 25 and 72-74. Though an agreement's 'context' was ignored in the Technology Transfer Guidelines. See also Guidance on restrictions of competition by object for the purpose of defining which agreements may benefit from the *De Minimis* Notice, July 2014. The *de minimis* doctrine will be examined in subsequent chapters.

2.3.2. Decisions, submissions and speeches

It is clearly also important to assess how far the Commission follows its own Article 81(3) Guidelines in its decision-making. Despite the straightforward nature of the Article 81(3) Guidelines, a cursory review of the Commission's decisional practice reveals a diverse approach to its practical application of the object criterion.

Certainly, the Commission has generally employed a formalistic or 'forms-based' approach to the object criterion. Indeed, it has often been criticised on precisely this ground.⁷² The orthodox approach is formalistic as it does not demand an economic or market analysis of the agreement to determine if the impugned course of conduct generates actual or potential anticompetitive effects. Rather, the formal features of the agreement are given a cursory review and the Commission would then infer that the agreement, by its nature, is restrictive of competition by object. The Article 81(3) Guidelines promote a forms-based approach by linking the identification of hardcore restrictions with restrictions by object.⁷³

An example of the Commission applying its Article 81(3) Guidelines in this manner is shown in the *GlaxoSmithKline* decision.⁷⁴ It considered that as the Community Courts have consistently found that agreements containing dual pricing systems or other limitations of parallel trade, which are identified by the Commission as hardcore restraints, as restrictions by object it was justified in coming to the same conclusion.⁷⁵ A more interesting aspect of the decision is that despite

⁷² (Jones, 2010), *'Left Behind by Modernisation?'*, p649. Though it is notable that in many of its decisions the Commission usually provides a detailed account of the parties, the market, market shares and the nature of the restraints before undertaking the legal assessment.

⁷³ Article 81(3) Guidelines, para 23.

⁷⁴ *GlaxoSmithKline* 2001/791/EC (*GlaxoSmithKline*) subsequently appealed to the CJEU. Similarly in Commission decision IV/30.658 *Polistil/Arbois* (1984), paras 37-49 the Commission decided that the absolute territorial protection (ATP) clause and limits on commercial freedom to set prices were automatically restrictive by object. In this case the Commission did not feel compelled to assess actual effects. See also Commission decision *Seamless Steel Tubes* [2003] OJ L140/1, which found a market sharing agreement to be restrictive by object. Here too the Commission did not describe the agreement's restrictive effects.

⁷⁵ *Ibid*, *GlaxoSmithKline*, para 124. The Commission was subsequently criticised by the GC for this inference in Case T-168/01 *GlaxoSmithKline v Commission*. See (Bailey, 2012), pp573-576.

acknowledging the fact an assessment of the actual effects of the agreements was not then required, “for the sake of completeness” it conducted such an analysis.⁷⁶

There are also, however, a number of notable deviations from this standard mode of applying the Article 81(3) Guidelines. Examples can be seen in the *Visa* and *Mastercard* multilateral interchange fee (MIF) decisions.⁷⁷ The agreements fixed the MIF paid by acquiring banks on each cross-border Visa/Mastercard transaction. On their face, the agreements arguably did not involve a clear and obvious ‘hardcore’ restriction of competition by object, despite the potential nature of the restriction concerned, namely horizontal price fixing. Additionally, the cases demonstrate identical situations of fact, but the Commission uses two diametrically opposed approaches to the object criterion.⁷⁸ On the basis of the Article 81(3) Guidelines, however, the agreements should automatically be seen as having the object of restricting competition as they concerned what is, in essence, a hardcore restriction. In *Visa*, which admittedly was decided prior to publication of the Article 81(3) Guidelines, the Commission concluded that the MIF in the Visa system did not have the object of restricting competition under Article 101(1) TFEU by virtue of its pro-competitive attributes.⁷⁹ Instead, the MIF amounted to an appreciable

⁷⁶ *Ibid*, para 125. This questions the value of arguments relating to administrative cost savings when utilising the orthodox approach. In the past the Commission has also found agreements restrict competition by virtue of both their object *and* effect. See Commission decision *Fine art auction houses*, IP/02/1585, COMP/E-2/37.784. In Commission decision *IAZ/Anseau*, IV/29.995 [1982] OJ L167/39 the Commission also looked at the “purpose or effect” of the agreement and in doing so examined the terms and purpose of the agreement, the impact of the agreement in its context and its effects. The Commission often considers the ‘effect’ of an agreement despite a finding that an agreement is restrictive by object. See eg, Commission Decision 86/398/EEC *Polypropylene*, [1986] OJ L230/1, paras 89 and 90 where the Commission produces evidence of appreciable concrete effects despite finding the concerted practice restricted competition by object and that it was unnecessary to demonstrate such an effect. This can be contrasted with the OFT’s decisional practice, where it does not see the need to subsequently assess the actual effect of an agreement once the object is determined: for example the OFT’s decision of 20 November 2006, ‘Exchange of information of future fees by certain independent fee-paying schools’, Case CE/2890-03. Here the OFT set out its orthodox understanding of the object criterion (paras 1348-1350 and 1387-1388) and, having found the object of the agreement was to restrict competition, specifically stated it made no finding as to the agreement’s effect (para 1388).

⁷⁷ 2002/914/EC *Visa International – Multilateral Interchange Fee*, [2002] OJ L318/17 (*Visa*) and COMP/34.579 *Europay (Eurocard-MasterCard)* [2009] OJ C264/8, 19 December 2007 (*Mastercard*). Both decisions were appealed.

⁷⁸ Also noted by (Jones, 2010), ‘Left Behind by Modernisation?’, p665.

⁷⁹ The Article 81(3) Guidelines were based on already established principles, as demonstrated in the previous version of the Guidelines on Vertical Restraints, OJ C291, 13.10.2000. See to that effect the

restriction of competition by effect, but fulfilled the conditions for an exemption under Article 101(3) TFEU. Such an exemption was granted despite the Commission finding that the MIF restricted the freedom of the banks individually to decide their own pricing policies thereby distorting the conditions of competition on the Visa issuing and acquiring markets.⁸⁰ In its reasoning the Commission found that the MIF was not a restriction of competition by object as the “objective” of the MIF was:

“To increase the stability and efficiency of operation of that system and indirectly to strengthen competition between payment systems by thus allowing four-party systems to compete more effectively with three-party systems.”⁸¹

Regrettably the Commission did not expand further in its analysis of the object of the agreement. Nonetheless, what is clear is that in this case the pro-competitive nature of the agreement trumped the fact that the banks were unable freely to determine their own pricing policies. Even if the Commission was only focusing on the objective aim of the agreement it would not be irrational to assume that in line with the Article 81(3) Guidelines it should have found the object of the agreement was to restrict competition.⁸² Therefore, the question of the Commission’s discretion is of relevance as is the impact of such decision-making on legal certainty.

Conversely in the case of *Mastercard* the Commission was far more detailed in its assessment of the object of the agreement, but took a different approach ostensibly more in-keeping with the Article 81(3) Guidelines.⁸³ Despite acknowledging its finding in *Visa*, the Commission added that the concept of a restriction by object:

accompanying Commission press release of 24 May 2000, which advocated a more economic policy approach as part of the Commission’s modernisation review.

⁸⁰ *Visa* 2002/914/EC, para 64.

⁸¹ *Ibid*, para 69.

⁸² Particularly as the Commission also recognises that restrictions by object can also be achieved by indirect means: see the Vertical Guidelines (1999 and 2010).

⁸³ *Supra* n77, *Mastercard*, paras 403-407. Note that the decision was handed down post the GC’s judgment in Case T-168/01 *GlaxoSmithKline*.

“does not presuppose that the parties to an agreement have the subjective intention of restricting competition. Agreements can be restrictive by object even if the parties to it are able to show that restricting competition was not their (primary) aim, or that they had other laudable motives.”⁸⁴

Notably, it also rejected the idea of taking the positive attributes of an agreement into account in such assessment.⁸⁵ Instead, the Commission argued that such pro-competitive aims and effects should be considered under Article 101(3) TFEU.⁸⁶ The Commission seemingly reinforced its position in the Article 81(3) Guidelines by finding that for an agreement to fall into the category of restrictions by object it “suffices that an agreement has by its very nature the potential for restricting competition, for instance, that it has the obvious consequence of fixing prices”.⁸⁷ Yet, despite these pronouncements the Commission still goes on to determine the actual effects of the MIF in order to ascertain if it “by its very nature” had the potential of fixing prices.⁸⁸ Even though it concluded that the MIF has the consequence of fixing the fees charged by acquirers to merchants and thus acts like a minimum price recommendation for transactions on a domestic level, the Commission decided it was “not necessary to reach a definite conclusion as to whether the MasterCard MIF is a restriction of object” as it had been established that the MIF had the effect of appreciably restricting competition.⁸⁹ This conclusion is baffling as the logical path would have been to find a restriction by object, particularly given the wide discretion that the Commission allows itself in its Article 81(3) Guidelines to expand the category of hardcore restrictions if necessary. Moreover the Article 81(3) Guidelines specifically underline how the effects of an agreement do not need to be proven if the object is to restrict competition.⁹⁰

⁸⁴ *Ibid*, *Mastercard*, para 402, citing Joined Cases C-96/82 and others *IAZ/ANSEAU*, ECR 3369.

⁸⁵ *Supra* n77, *Mastercard*, para 402: citing Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141, para 136 and Case C-19/77 *Miller International Schallplatten v Commission* [1978] ECR 131. Arguably this turnabout was as a result of a change in commercial climate.

⁸⁶ *Supra* n77, *Mastercard*, para 402.

⁸⁷ *Supra* n77, *Mastercard*, para 403, citing its Article 81(3) Guidelines and *supra* n85 C-19/77 *Miller International*.

⁸⁸ *Supra* n77, *Mastercard*, para 405, see also paras 408-665. See also (Bailey, 2012), p584-585.

⁸⁹ *Supra* n77, *Mastercard*, para 407.

⁹⁰ Article 81(3) Guidelines, paras 20 and 21.

A further example of a decision by the Commission, where it does not specifically follow the application of the object criterion set out in the Article 81(3) Guidelines, is that of *Lundbeck*.⁹¹ The decision reflects a careful, more analytical application of the object criterion by the Commission, which is in direct contrast to the formalistic position advocated by the orthodox approach.⁹² The Commission found that reverse payment settlements (also known as ‘pay-for-delay’ patent settlement agreements) that Lundbeck entered into with generic manufacturers to prevent them from competing with it, whilst certain of its manufacturing processes remained patent protected, infringed Article 101(1) TFEU by object. Lundbeck was heavily fined as a result.

This development has caused much surprise within the legal community as such arrangements had never been found in the past to contravene Article 101(1) TFEU by object. Furthermore, the decision caused alarm as it indicated that the Commission had expanded the object box as a means to ensure it could condemn practices using a lower standard of proof. This has also created legal uncertainty.⁹³ As the object concept does not require the actual effects of an agreement to be proven, the Commission has a far less burdensome task in proving an infringement. It has therefore been accused of widening the object category in order to condemn particular agreements rather than risk undertaking an ‘effects’ analysis.⁹⁴ Many commentators have not yet seen the text of the decision, however, and therefore are not aware that in order to condemn the reverse payment settlements the Commission in fact applied the object concept in a way that supports both the

⁹¹ *Lundbeck* IP/13/563, nyr; http://europa.eu/rapid/press-release_IP-13-563_en.htm?locale=en. A confidential version of the decision was seen in order to advise on routes of appeal. The decision is on appeal: Case T-472/13.

⁹² *Lundbeck* IP/13/563. Key issues in the appeal may turn on the Commission’s diversion from the Article 81(3) Guidelines, the parties’ legitimate expectations in this regard (as well as its interpretation of the law on the object criterion), and the quality of the evidence used by the Commission to prove the agreement had an anti-competitive object.

⁹³ Newsletters issued by law firms such as Ashurst, Skadden Arps and Baker & McKenzie argue that the decision marks a shift from the Technology Transfer Guidelines where parties to a settlement agreement are not viewed as competitors where their technologies are in a one-way blocking position. See (Carlin, 2013).

⁹⁴ See generally (Gerard, 2013).

‘hybrid’ and ‘more analytical’ approaches described in this thesis.⁹⁵ Certainly, the assessment of the object criterion was far removed from the application advocated in the Article 81(3) Guidelines. For the purposes of this thesis, it is the application of the law rather than the outcome of the decision that is of interest.

These decisions therefore raise the question as to the continued relevance of the Article 81(3) Guidelines. This is despite the Commission’s subsequent attempts to rationalise its divergent application of the object criterion in its guidance and new Guidelines.⁹⁶ This divergence is also evident in some of its submissions to the CJEU in preliminary references. For instance, the Commission accepts in the case of *BIDS* that regard must be had to the content of the agreement and the legal and economic context.⁹⁷ Furthermore, in paragraph 33 of the judgment it concedes that the concept of object does also apply to restrictions that fall outside the classic hardcore restrictions. It even recognises that agreements with a legitimate objective, crisis cartels and restrictions that are not ‘obvious’ can all be regarded as restrictions of competition by object.⁹⁸ These aspects of its approach to litigation are not reflected clearly within the Article 81(3) Guidelines.

Such disconnect between its Article 81(3) Guidelines and the practical application of the object criterion is also evident in the speech given by Alexander Italianer, Director General for competition, in 2013, which advocated a more contextual approach.⁹⁹ This can be set alongside the revised *De Minimis* Notice and accompanying guidance, which at first glance appears to return to a more orthodox

⁹⁵ However not every aspect of the decision reflects the understanding of the object criterion proposed in the following chapters. For instance, the Commission’s understanding of the relevance of ‘necessary consequence’ bears reflection. The Commission relied heavily on the interpretation of the law by the CJEU in *BIDS*, whereby each economic operator must be free to independently determine its own commercial policy.

⁹⁶ See Guidance on restrictions of competition by object for the purposes of defining which agreements may benefit from the *De Minimis* Notice, 2014, section 1, footnote 10 where the Commission reflects that a restriction of competition by object may in fact come outside Article 101(1) TFEU where it has a legitimate goal or is objectively necessary. See also Vertical Guidelines 2010, paras 60-62 and Horizontal Cooperation Guidelines, para 25.

⁹⁷ *Supra*, n44 *BIDS*, para 23.

⁹⁸ *Ibid.*

⁹⁹ (Italianer, 2013), Fordham, 26 September 2013.

path,¹⁰⁰ but in fact the guidance reveals a number of key changes.¹⁰¹ These changes pertain to the requirement that the legal and economic context “must” be considered when determining the object of an agreement, and that there are “exceptional circumstances” where *prima facie* restrictions by object may come outside Article 101(1) TFEU if they are objectively necessary or pursue a legitimate goal.¹⁰² Though, the *De Minimis* Guidance goes further than the Article 81(3) Guidelines in another respect by stating that when determining if an agreement is restrictive by object it is unnecessary to demonstrate any actual *or* potential effects on the market.¹⁰³ These aspects are not reflected in the Article 81(3) Guidelines, despite the Commission’s best efforts to convey the contrary.¹⁰⁴

These factors all call into question the influence of the Article 81(3) Guidelines on the Commission’s own decision-making.¹⁰⁵ They also highlight the lack of consistency in the Commission’s methodology when applying the object criterion and its evolving framework for applying the object criterion to agreements.¹⁰⁶

2.4. Conclusion

This section sought to establish the characteristics of the orthodox approach. Under the guise of the object box and the Article 81(3) Guidelines the orthodox approach consists of a narrow category of obvious and serious agreements, which

¹⁰⁰ The revised *De Minimis* Notice relies heavily on the judgment in *Expedia*, *supra* n48 which the Commission may come to regret. See chapter 5 for a detailed discussion on the *de minimis* doctrine.

¹⁰¹ See http://europa.eu/rapid/press-release_IP-14-728_en.htm. Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice) OJ 2014/C 291/01;

http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf, Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the *De Minimis* Notice (*De Minimis* Guidance), C(2014) 4136 final, 25 June 2014.

¹⁰² *De Minimis* Guidance, 2014, section 1.

¹⁰³ *Ibid*, emphasis added.

¹⁰⁴ For instance in footnote 10 of the new *De Minimis* Guidance the Commission references para 18 of the Article 81(3) Guidelines as being the authority for this proposition. Para 18 sets out a descriptive account of how agreements should be assessed under Article 101(1) TFEU. Para 19 of the Article 81(3) Guidelines however suggests that the “analytical framework” set out in para 18 is not applicable to the object criterion and certainly para 22 does not support the application of an “analytical framework”.

¹⁰⁵ Contrast this with the obligations on the NCA’s under Regulation 1/2003 to follow the Commission’s rules when determining Article 101 TFEU cases.

¹⁰⁶ This could be attributed to a breakdown in its internal communication as it appears the Legal Services division is not always in agreement with DG COMP.

are presumed to restrict competition by object due to their necessary effect. Such restrictions are labelled as ‘hardcore’ by the Commission. Establishing whether an agreement restricts competition by object is seemingly straightforward as it involves, based on the content of the agreement, the identification of those restrictions set out in the object box or listed as hardcore by the Commission. Traditionally, there was little place for economic analysis as the negative effects of such agreements could be presumed.¹⁰⁷ This is because such restrictions are taken automatically to distort competition in view of their serious nature and experience demonstrating such restrictions are likely to produce negative effects on the market. It could therefore be assumed that this perception of the law would be overwhelmingly supported by the jurisprudence given the impact of the orthodox approach on legal discourse. The orthodox approach continues to have many followers, though in recent years the more nuanced characteristics of the object criterion are increasingly acknowledged.¹⁰⁸

For instance, the influence of an agreement’s ‘legal and economic context’ is now seen as a necessary requirement in any assessment of an agreement’s object.¹⁰⁹ Though to what end, is not particularly clear. Furthermore, the Commission has begun to recognise in its more recent guidelines that presumptions of harm under Article 101(1) TFEU cannot always be absolute.¹¹⁰ These are not the only anomalies.

3. Problems with the orthodox approach

The Commission’s decisional practice demonstrates that not all restrictions by object are ‘obvious’ or *prima facie* pernicious. It is also clear that the Commission does not always follow its own Guidelines, and has taken the opportunity to expand

¹⁰⁷ This is re-enforced by the *De Minimis* Guidance, section 1.

¹⁰⁸ See eg (Waelbroeck & Slater, 2013) and AG Kokott in *T-Mobile* (*supra* n45) and *Expedia* (*supra* n48) who favour the orthodox approach.

¹⁰⁹ “Context” is referred to in the Article 81(3) Guidelines, but not specifically as the ‘legal and economic context’ and it is not seen as a mandatory requirement: para 22. Whish & Bailey endorse the application of the legal and economic context, (Whish & Bailey, 2012), p118.

¹¹⁰ *De Minimis* Guidance, section 1.

the category of object restraints.¹¹¹ Even at this juncture the advantage of a limited category of object restrictions is questionable.¹¹² What is more, judicial support for the assertion that certain restrictions can be automatically found to constitute restrictions by object is notably absent within the Article 81(3) Guidelines.¹¹³ The Commission does not therefore seek to prove its categorisation of the object concept is legally correct by reference to case law. Hence, it could be assumed that the Commission is citing its policy approach. Having described the orthodox approach and shown the Commission's Article 81(3) Guidelines follow it; this section looks more closely at its perceived problems.

The supposed benefit of the orthodox approach is that it is clear which types of agreements contain restrictions that have an automatically anti-competitive object and thus require no analysis of their effects. This is meant to provide undertakings with a degree of legal certainty, ease the burden on resources and simplify the process under Article 101(1) TFEU.¹¹⁴ More particularly, the orthodox explanation of the law does not then expand upon precisely how the object of an agreement is determined or applied.¹¹⁵ Decisions such as *Lundbeck* and *Visa* show that merely identifying an 'obvious' restriction of competition is not enough to taint an agreement with an anticompetitive object, despite the impression given under the Article 81(3) Guidelines. This can be contrasted with decisions such as *Polistil*, which are faithful to the Article 81(3) Guidelines.¹¹⁶ Consequently, there is no

¹¹¹ (Goyder, 2011), p2 I, p5 III and p12 VI. Goyder emphasises that the Commission's power in identifying new object restraints is limited as the category of object restrictions is defined, not by the Commission, but by the CJEU.

¹¹² (Whish & Bailey, 2012), p124.

¹¹³ The Commission cites no case law for its categorisation of horizontal restraints and references T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, para 178 (the other being C-279/87 *Tipp-Ex GmbH v Commission* [1990] ECR I-261), as authority for particular vertical restraints being categorised as restrictions by object. Reading that paragraph does not in fact provide authority for the notion that such vertical restraints always constitute restrictions by object merely that restrictions by object do not require their actual effects to be proved. How the object was determined in that case makes interesting reading as it portrays a more nuanced approach to assessing whether an agreement restricts competition by object in contrast to the Article 81(3) Guidelines: see paras 88-93 of the judgment.

¹¹⁴ See (Bennett & Collins, 2010), p313. See AG Kokott's Opinion, *T-Mobile* (*supra* n45), para 43 and (Bailey, 2012), p567.

¹¹⁵ (Whish, 2009), pp113-122 does not describe in detail precisely how the assessment of object should be carried out.

¹¹⁶ Commission decision IV/30.658 *Polistil/Arbois* (1984).

consistent approach in the Commission's own decisional practice as to how the object criterion will be applied to agreements. Moreover, by adding new restrictions to the object category, not having previously been found restrictive by object, undermines the key principal underpinning the orthodox approach.¹¹⁷ It cannot then be irrefutably stated that experience alone dictates those agreements that are automatically restrictive by object given their known negative effects on competition.

Despite the clear benefit of the orthodox approach being that an economic assessment of an agreement can become superfluous, there is increasing acknowledgment that some form of analytical component is required in any determination of whether an agreement restricts competition by object.¹¹⁸ Though commentators usually limit such instances to when determining whether an agreement is appreciable, assessing whether it affects trade between Member States, or deciding the level of fine.¹¹⁹ What is less clearly articulated is the function of the legal and economic context in this regard, particularly as the Commission provides scant elucidation in its Article 81(3) Guidelines.¹²⁰ The question of whether the orthodox approach over-simplifies the law was brought to light following judgments in *BIDS* and *T-Mobile* due to the way the CJEU expressed the application of the object criterion.¹²¹ Furthermore, the judgments - in particular the GC's judgment in *GSK* - highlighted the importance of the legal and economic context in any assessment of an agreement's object. The Commission has subsequently cited this requirement in its latest Guidelines, Notices and many of its decisions.¹²² In practice, it has already been assessing the effects of those agreements that fall within the object category as demonstrated in its decisions in

¹¹⁷ For instance, new object restrictions were found in *Lundbeck* and in the Horizontal Co-operation Guidelines for particular types of information exchange.

¹¹⁸ (Whish & Bailey, 2012), p120; presentation by Rose on 'Per se infringements of the competition rules' at King's College London (Rose, 24 February 2010).

¹¹⁹ *Ibid*, (Rose, 24 February 2010); (Whish & Bailey, 2012), p120.

¹²⁰ As noted by its absence in the Article 81(3) Guidelines.

¹²¹ *BIDS* (*supra* n44); *T-Mobile* (*supra* n45). See (King, 2011).

¹²² Jones also portrays the limitations of categorisation in the light of the "legal and economic context" requirement, (Jones, 2010), 'Left Behind by Modernisation?', pp663-668.

GSK and Mastercard.¹²³ Such assessment of the effects together with an ill-defined object category undermines the Article 81(3) Guidelines, and thus also the premise of the orthodox approach. Ultimately the correctness of the Article 81(3) Guidelines is powerfully challenged.

An additional concern with the orthodox approach is that it cannot account for a number of anomalies. For instance, not all agreements falling within the object box classification have been held consistently to be restrictions by object: neither all price fixing cases nor all absolute territorial protection cases have been treated as object cases.¹²⁴ Instead, some such have been considered as ‘effect’ cases, while others have been found to fall outside Article 101(1) TFEU altogether.¹²⁵ As such not every agreement containing a restriction of competition necessarily has that object. Additionally, agreements of a type that traditionally lies outside the object box have been found to be restrictive by object, as was the case in *Lundbeck*. As recounted above, the Commission has responded to these anomalies by subtly altering its latest guidelines and Notices.¹²⁶ It can be observed, as noted by Gerber in the past, that modernisation did not just bring about procedural change, but also substantive change.¹²⁷ It would appear that the Commission is continuing this latter practice in relation to the object criterion.

The premise that particular agreements ‘by their very nature’ restrict competition by object due to their known negative effects, and that they carry a presumption of harm in consequence is also questionable.¹²⁸ In its Article 81(3) Guidelines the Commission provides scant judicial support for its contention that the necessary effect of an agreement means that certain restrictions are presumed to be

¹²³ Commission Decision *GlaxoSmithKline* 2001/791/EC; Commission Decision *Europay (Eurocard-MasterCard)* COMP 34.579 (19 December 2007), para 407.

¹²⁴ For example, joint selling rights often involve price fixing. See also Commission Decision 2002/914/EC *Visa International – Multilateral Interchange Fee*, OJ 2002 L318.

¹²⁵ See chapter 2. Also, *inter alia*, Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Order van Advocaten* [2002] ECR I-1577; Case C-262/81 *Coditel v Ciné-Vog Films (No.2)* [1982] ECR 3381.

¹²⁶ The same can be said for a number of commentators: see the literature review in the Introduction.

¹²⁷ (Gerber, 2008).

¹²⁸ See Horizontal Cooperation Guidelines, para 25.

anticompetitive under Article 101(1) TFEU. Despite its prominent use, the phrase ‘by its nature’ is not defined.¹²⁹ Indeed, there is no indication whether any such presumptions of harm are rebuttable within the context of Article 101(1) TFEU. This in turn questions whether it can be emphatically stated that the meaning, application and role of the object criterion under the orthodox approach are clear. The problems identified here would suggest that the object criterion is not as straightforward as the orthodox approach contends.¹³⁰ This is exemplified by the Commission’s failure distinctively to define what is policy and what is law within its Article 81(3) Guidelines. Policy must play an important role within the Article 81(3) Guidelines, therefore an unequivocal confirmation regards where the distinction with the law lies would be welcome.¹³¹

Aside from finding that the Commission does not always follow its own Article 81(3) Guidelines, the above discussion reveals a number of issues that require deeper reflection. These include: (i) the significance that the Article 81(3) Guidelines lack detailed, explanatory assessment criteria, in particular the omission of the ‘legal and economic’ context,¹³² (ii) the lack of general judicial support and citation, (iii) the categorisation of restrictions labelled as hardcore or black-listed automatically constituting restrictions by object,¹³³ (iv) whether restrictions by object must be appreciable, (v) the fact that any assessment of an agreements’ ‘effect’ for the purposes of establishing the object of an agreement is superfluous, and (vi) the role of presumptions.

These aspects are explored in detail in the following chapters. More importantly, the accuracy of the Article 81(3) Guidelines - and hence the orthodox approach – is tested against the case law of the European Courts. It will be seen that the European Courts are also sometimes culpable in fudging the essence of the object

¹²⁹ See chapter 2.

¹³⁰ As noted even Whish described the law on the object criterion as “confused and confusing”, (Whish, 2003), pp108-115.

¹³¹ (Whish & Bailey, 2012), p121.

¹³² Cf the Guidelines on Vertical Restraints, paras 60-64 which discuss circumstances in which hardcore restrictions may come outside Article 101(1) TFEU altogether.

¹³³ Though there is also acknowledgment that such restraints are non-exhaustive leaving open the possibility of future types of by-object restriction being added to the category.

criterion, but that the orthodox approach lacks the legitimacy one would expect to find from the jurisprudence.

Chapter 2: The case law of the European Courts

Part I: How the European Courts have interpreted the meaning and application of the object criterion under Article 101(1) TFEU: establishing the more analytical approach

1. Introduction

Whether the orthodox approach to the object concept, encapsulated most prominently within the Commission's Article 81(3) Guidelines and Whish's 'object box', comprises a sustainable interpretation has been questioned. Nevertheless, that approach still permeates much legal discourse and carries great influence. The argument developed here is that it is also questionable whether the orthodox approach has ever been a faithful interpretation of the jurisprudence of the European Courts. This chapter sets out the legal foundations that underpin the object criterion. It assesses how the European Courts have defined and applied the object concept over the years.

The aims of Chapter 2 are threefold. First, the case law on the object concept is mapped out comprehensively, and the reality that the European Courts have in fact deployed three distinct approaches when determining the object of an agreement is established. With the 'orthodox approach' having been already described, this chapter identifies the two further approaches used by the Courts, termed the 'more analytical approach' and the 'hybrid approach'. The second aim is to determine the essence of the object criterion by focusing on the meaning and application of the object criterion adopted by the Community Courts. Thirdly, it is confirmed that the orthodox approach has persistently failed to attract sustained judicial support. This demonstration provides a basis upon which the Article 81(3) Guidelines can be critiqued. To this end, the chapter is organised into two parts. Part I focuses on the more analytical approach and documents the earlier jurisprudence of the European Courts, whereas Part II is concerned with the advancement of the hybrid approach.

This review of the case law confirms that the concept of object is far more contested than the Article 81(3) Guidelines suggest. It will illustrate the Courts'

analytical - though at times confusing and unspecific - treatment of the object concept, which contrasts with the over-simplified *per se* style approach developed by the Commission in its Article 81(3) Guidelines. Hence, in this chapter the Commission's interpretation of the notion of a restriction of competition by object is criticised on account of its adopting, as almost sacrosanct, one narrow view of the case law.¹ It is concluded that, on the contrary the jurisprudence lends far greater support to a 'more analytical approach'.

To aid the comparison between the judgments of the CJEU and GC and to help map the evolution of the concept of object, Part I is divided into three sections. The first section deals with the CJEU's early case law up until the inception of the GC in 1989. This will demonstrate the CJEU's initial approach to object restrictions, which is still highly relevant today.² The second section will examine the CJEU's application of the object concept following the inception of the GC up until the judgment in *BIDS* (described in Part II).³ This is done to underline the continued prevalence of the more analytical approach. Finally, the third section looks exclusively at the GC's case law. The GC has handed down some of the most incongruent and radical judgments, which bear a disproportionately significant influence on the Commission's interpretation of the law relating to the object criterion.⁴

¹ This is clearly illustrated by its decision in *GlaxoSmithKline* 2001/791/EC, where the Commission decided that the object of the agreement was to restrict parallel trade and therefore was automatically prohibited. Conversely, in the ensuing appeal the GC assessed the agreement within its legal and economic context and held that the agreement did not have the object of restricting competition (despite GlaxoSmithKline admitting it intended to restrict parallel trade). See *infra* section 4.2.1.

² See eg references to Case C-56/65 *Société Technique Minière V Maschinenbau Ulm* [1966] ECR 235, 249 (*STM*) in cases such as Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, [2009] ECR I-4529, para 28 (*T-Mobile*).

³ Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637 (*BIDS*).

⁴ See eg Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141 (*ENS*). The GC has also been viewed as a more specialist competition law court whose judges have greater experience in handling complicated competition law issues: (Wyatt & Dashwood, 2006), p397.

2. Early case law up until the inception of the GC: the European Court of Justice (1965 – 1989)

The ambiguity and misunderstanding surrounding the concept of object is not solely attributable to the Commission. The CJEU must also take responsibility. For example, in this early case law it is possible to count a number of variations of the definition of ‘object’.⁵ Furthermore, the CJEU has not been entirely consistent in its application of object to agreements: it is possible, even during this early stage of the CJEU’s jurisprudence, to identify two approaches to the assessment of object under Article 101(1) TFEU. The discrepancy in approach is arguably compounded by the CJEU’s habit of referring to both ‘object’ and ‘effect’ together when analysing whether an agreement restricts competition.⁶ As will be seen, however, this is because object and effect follow a similar assessment structure. It cannot be contended therefore that the CJEU introduces the perception of the law in terms of the classic orthodox approach. Instead, it is possible to discern where the orthodox approach may have stemmed from, although this is still based on a permutation of the more analytical approach.

To help illustrate this propensity on the part of the early Court, the following section is divided into two main parts: those cases where the Court, adopted a ‘more analytical approach’; and those cases in which agreements were held ‘by their very nature’ to restrict competition.⁷

⁵ Including: “precise purpose” (*supra* n2, *STM*), “purpose” (Joined cases C-96/82 etc, *IAZ v Commission/ ANSEAU* [1983] ECR 3369), “aim” (Joined cases C-29/83, 30/83 *CRAM & Rheinzink v Commission* [1984] ECR 1679), “intention” (Case C-41/69 *ACF Chemiefarma v Commission* [1970] ECR 661, Case C-258/78 *Nungesser v Commission* [1982] ECR 2015), “objective” (Case C-31/80 *NV L’Oréal v De Nieuwe AMCK* [1980] ECR 3775 (*L’Oréal*), also arguably Case C-61/80 *Cöoperatieve Stremselfabrik v Commission* [1981] ECR 811) and “objective function” (Case C-250/92 *Gøttrup-Klim v Dansk Landbrugs Grovvareselskat AmbA* [1994] ECR I-5641 (*Gøttrup-Klim*), per AG Tesouro, para 16). See chapter 3.

⁶ See eg Case C-5/69 *Franz Völk v SPRL Ets J Vervaucke* [1969] ECR 295, Case C-28/77 *Tepea BV v Commission* [1978] ECR 1391, Case C-31/80 *L’Oréal*, Case C-61/80 *Cöoperatieve Stremselfabrik v Commission*, Case C-107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, C-23/67 *Brasserie De Haecht v Wilkin* [1967] ECR 407.

⁷ These headings are not perfect as the CJEU sometimes mixed different approaches when assessing restrictions by object in its judgments. However, the headings allow the reader to appreciate more readily the basic emerging pattern.

2.1. Agreements that incorporate a ‘more analytical approach’: the need for a contextual assessment

2.1.1. Establishing the more analytical approach: *STM*

The CJEU set the bar high in its seminal judgment in *Société Technique Minière (STM)* by elucidating how Article 101(1) TFEU should be applied to agreements.⁸ Despite often being referred to as a case that is pertinent only to restrictions by ‘effect’,⁹ its influence on the perception of the object criterion is now unparalleled. This becomes increasingly evident throughout the thesis.¹⁰ In this case the CJEU adopted what this thesis refers to as the ‘more analytical approach’ (the MAAP). The term ‘analytical approach’ was coined by AG Tesouro in *Gøttrup Klim* and aptly summarises the greater analytical component attributed to assessing the object of an agreement through the consideration of its legal and economic context.¹¹ Given the significance of *STM* in revealing a more analytical approach to object cases at the infancy of the EU’s competition law jurisprudence, it merits separate discussion.

In *STM* an exclusive right of sale was held to be compatible with Article 101(1) TFEU. To arrive at this conclusion, the CJEU made some revealing statements about the interpretation of Article 101(1) TFEU as a whole. The Court considered that in order for an agreement to be prohibited under Article 101(1) TFEU, it must fulfil certain conditions depending “less on the legal nature of the agreement than on its effects...on competition”.¹² Therefore, as Article 101(1) TFEU is “based on an assessment of the effects of an agreement from two angles of economic evaluation [that of assessing the effects on trade between Member States and its effects on

⁸ *Supra* n2, *STM*.

⁹ This is largely due to the nature of the restraint in issue, seen more typically as a restriction by effect.

¹⁰ Despite its 50 year age, *STM* is undisputedly the leading case on restrictions by object, but its status as such was masked for many years, due largely to the unchallenged prominence of the orthodox approach and cases such as *ENS* (*supra* n4). *STM* underlines why cases relevant to the effect criterion may also be highly relevant to understanding the object criterion. Hence the case law reviewed for the purposes of this thesis (not all of which is reported) deals not only with agreements restricting competition by object, but also the general application of Article 101(1) TFEU (and its former incarnations).

¹¹ *Supra* n5 *Gøttrup-Klim*, para 16.

¹² *Supra* n2, *STM*, p248.

competition], it cannot be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature.”¹³ Consequently, the prohibition under Article 101(1) “depends on one question alone, namely whether, taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the said prohibition as set out in Article [85](1).”¹⁴ It can be deduced from the Court’s statement that, certainly at this point in time, there were no preconceptions or presumptions as to the sort of behaviour automatically prohibited under Article 101(1) TFEU by virtue of its object. Moreover, the Court dismisses a form-based interpretation of the law. It stressed that as object and effect are not cumulative, but alternative requirements, the first necessary step is for the precise purpose of the agreement to be considered.¹⁵

The judgment in *STM* sets out a comprehensive test (hereinafter the *STM* Test) in which to determine the object of an agreement and prescribes that:

- (i) The ‘precise purpose’ of the agreement must be considered.
- (ii) The consideration must be in the economic context in which the agreement is to be applied.¹⁶
- (iii) Such purpose (interference with competition) must result from some or all of the actual clauses of the agreement itself.¹⁷
- (iv) Should this analysis not “reveal the *effect* on competition to be *sufficiently deleterious*, the consequences of the agreement should then be considered”.¹⁸
- (v) [When determining the purpose of the agreement] the competition must be understood within the actual context in which it would occur in the absence of the agreement in dispute [the counterfactual].¹⁹
- (vi) Whether a restriction is prohibited by reason of its object [or effect], it is appropriate to take account of:
 - a. the nature and quantity of the products covered by the agreement,

¹³ *Ibid*, p248.

¹⁴ *Ibid*, p248.

¹⁵ *Ibid*, p249.

¹⁶ *Ibid*, p249.

¹⁷ *Ibid*, p249.

¹⁸ *Ibid*, p249. Emphasis added. ‘Consequences’ relates to the ‘effect’ of the agreement.

¹⁹ *Ibid*, p250. This is also relevant for restrictions by effect.

- b. the position and importance of the supplier and distributor on the market for the products concerned,
- c. the isolated nature of the disputed agreement or its position in a series of agreements, and
- d. the severity of the clauses intended to protect the restriction or the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.²⁰

The first three of these elements comprise the main aspects of the *STM* Test. Subsequent judgments have expanded upon these elements over the years and reveal the object concept to be a nuanced legal provision. *STM* therefore lays the foundation for an analytical, economics-based approach towards determining whether the object of an agreement is to restrict competition. Under this methodology the standard of proof required to establish if an agreement is restrictive by object is considerably higher than that of the orthodox approach. The CJEU is less concerned with identifying types of restriction as infringements by object *per se*, but rather in determining the “precise purpose” of the agreement based on an analysis of the terms of the agreement within its economic context. If such an assessment reveals a “sufficiently deleterious” effect on competition the investigation can end there. If not, the “consequences” of the agreement must be considered to determine if the agreement “in fact” has the effect of restricting competition “to an appreciable extent”.²¹

The multi-textured nature of the assessment that the Court demands under the *STM* Test, with particular regard to factors pertaining to the market structure, the position of the parties, the severity of the clauses as well as the use of the counterfactual is notable. This thesis explores a number of the themes introduced

²⁰ *Ibid*, p250

²¹ *Ibid*, pp249-250. Paragraph 3 of the Operative part of the judgment uses slightly different wording. Here the Court states that when assessing the “consequences” of an agreement (that is, the effects) those consequences must be examined and *justify* the conclusion that competition is restricted “to an appreciable extent”. It would appear the Court has thereby decided that the actual or concrete effects need be determined only in the context of the analysis of the effect. This is significant as it suggests that the Court recognises that the object criterion carries a lower standard of proof in comparison with restrictions by effect. This can be contrasted with the orthodox approach, which does not account for a contextual analysis and thus makes the standard of proof even lighter.

by the judgment in later chapters, for instance, whether restraints can be ancillary to a primary pro-competitive purpose.²² At this juncture, however, it is notable how the Court's use of wording lends itself to a more fluid dichotomy between restrictions by object and by effect. For instance, the Court speaks of revealing a sufficiently deleterious "effect" on competition when determining an agreement's object.²³ Versions of the judgment in German and French similarly endorse the English translation of the text. The German version could be directly translated as, "...if the examination of the provisions do not recognise a sufficient impairment of competition then the impact of the agreement must be investigated".²⁴ The French version likewise states, "If the analysis of these terms do not reveal a sufficient degree of harm in relation to competition, the effects of the agreement should then be considered...".²⁵

What is so interesting about this case is that the Court envisages that object and effect share a similar analytical effects-based methodology when determining if an agreement restricts competition. The distinction between object and effect as envisioned by the Court is that it demands the standard of proof for establishing the 'effect' of an agreement is greater, as the Court requires the actual effect to be determined. Moreover, such effect must restrict competition to an appreciable extent. It is therefore arguable that only the potential effects of an agreement need be found in order to satisfy a finding by object, but that those effects must be 'sufficiently' harmful. This is evidently not a precise science and hence the importance of an agreement's own context is paramount.

This conclusion is supported by Paul Lasok QC, who considers "that there is one basic methodology in competition analysis that informs both the object and effect criteria for identifying an anticompetitive agreement".²⁶ He notes that the CJEU in

²² See chapters 3 and 4.

²³ *Supra* n2, p249.

²⁴ "Lässt die Prüfung dieser Bestimmungen keine hinreichende Beeinträchtigung des wettbewerbs erkennen, so sind die Auswirkung der Vereinbarung zu untersuchen."

²⁵ "Qu'au cas cependant au l'analyse des dites clauses ne revelerait pas un degre suffisant de nocivite a l'egard de concurrence, il conviendrait alors d'examiner less effects de l'accord...".

²⁶ (Lasok QC, 2008), who presented his paper to the Law Society on 8 October 2007.

STM and *Consten & Grundig* made it clear that the analysis is essentially “free” in that no assumptions are made about the (anti-)competitive nature of an arrangement on the basis of the type of agreement.²⁷ The key question is whether or not “taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the prohibition set out in Article 101(1)”.²⁸ He notes further that the exercise is “based on an assessment of the effects of the agreement”, which is measured by reference to the counterfactual.²⁹ For Lasok, the object/effect dichotomy “concerns what one looks at when considering the effect of the agreement on competition”.³⁰ By way of explanation, he recounts the *STM* Test, which can be condensed as the following: based on an analysis of the terms of an agreement within its context, the object of an agreement determines the potential effects of an agreement, whereas ‘effect’ determines an agreement’s actual effect.³¹

This position can be contrasted with that of the Article 81(3) Guidelines and its formalistic approach, which bears little resemblance to this more analytical understanding of the law. In *STM* the CJEU makes no mention of obvious or serious restrictions, nor does it talk about categorising agreements that automatically restrict competition. Instead, the *STM* Test places emphasis on determining the ‘precise purpose’ of an agreement; whether the purpose is to restrict competition.³² Thus, object means purpose. As will be demonstrated below, this

²⁷ *Ibid.* Joined Cases 56 & 58/64, *Etablissements Consten SA and Grundigverkaufs-GmbH v Commission*, [1966] ECR 342 (*Consten & Grundig*).

²⁸ *Ibid.*

²⁹ *Ibid.*, citing *supra* n2 *STM*, 248-250.

³⁰ *Ibid.*

³¹ *Ibid.* Should an analysis of the terms of the agreement reveal a sufficiently deleterious effect on competition bearing in mind its context, the investigation can end there. If not, the “actual effect” of the agreement must be considered. See ft 19, where he notes that in *General Motors*, para 66, the CJEU found that when determining the object of an agreement “reference may also be made to the ‘aims’ of the agreement...derived from the terms of the agreement and any contextual evidence”.

³² The German text of the judgment calls it “eigentlichen zweck” which translates as the “actual purpose”.

original methodological approach to the object criterion has been subsequently upheld by numerous judgments and opinions.³³

2.1.2. Confirmation of a more analytical approach

Contemporaneous with the judgment in *STM*, the CJEU in *Consten & Grundig* confirmed that the concrete effects of an agreement do not need to be taken into account once it “appears” that the object of an agreement is to restrict competition.³⁴ The Court did not expound upon this, though the assertion was made in the context of whether the pro-competitive effects of an agreement meant that a restriction will escape the prohibition under Article 101(1) TFEU.³⁵ The CJEU considered that just because an agreement tends to restrict competition between distributors of the same make, it does not follow that it automatically escapes the prohibition because it increases competition between producers. The CJEU decided that this type of argument is irrelevant, however, because if it “appears” the object is to restrict competition, the concrete effects do not need to be considered.³⁶

The more analytical approach advocated by *STM* is supported by the Court when it says “to arrive at a true representation of the contractual position the contract must be placed in the economic and legal context in the light of which it was concluded by the parties”.³⁷ The Court does not thereby imply that certain agreements are presumed to automatically distort competition by object.³⁸ Nonetheless, the judgment is somewhat incongruous with the sentiments set out in *STM*. What is more pertinent is that the CJEU found that the legal and economic context plays a role in the determination of an agreement’s object. The CJEU thus

³³ Though subsequent chapters will show how the emphasis on different elements of the *STM* Test has shifted over the years, which is why the object concept is seen to be so confusing.

³⁴ *Supra* n27, *Consten & Grundig*, p342.

³⁵ *Ibid*, p342.

³⁶ *Ibid*, p342.

³⁷ *Ibid*, p343: “since the agreement thus *aims* at isolating the French market for Grundig products and maintaining, artificially, for products of a very well-known brand, separate national markets within the Community”. Emphasis added. The goal of preserving the single market was an important aspect of the case and considered as part of the agreement’s legal and economic context.

³⁸ It is possible that the ‘no concrete effects’ rule led to the proposition that object restrictions have ‘necessary effect’, ie: certain restrictions are presumed to have a restrictive effect on competition due to their known anticompetitive effects and thus, by their nature, restrict competition.

builds upon the judgment in *STM* by referring, not just to the economic, but also to the *legal* context. Again, the notion that the object concept is based on the classification of particular agreements is absent, though the precise delineation of how the object criterion is applied to agreements is admittedly somewhat vague. What the judgments in *STM* and *Consten & Grundig* attest to, is that the approach of the European Courts is far more nuanced than the Article 81(3) Guidelines suggest.

A further series of cases illustrate how the CJEU expands upon and refines aspects of the *STM* Test. This can be seen in particular when assessing how it proceeds when confronted with agreements that, the orthodox approach would automatically depict as restrictions by object.³⁹ However it is also evident, as aptly highlighted in *STM* and *Consten & Grundig*, that the CJEU has a somewhat haphazard approach.⁴⁰ For instance, the Court does not always differentiate between object and effect despite the clear reference to this requirement in *STM*.⁴¹ Nonetheless, the cases demonstrate how the Court applies an economics-based approach as opposed to automatically condemning agreements as restrictive by object *per se*.⁴²

2.1.2.1. Consideration of market power and market structure

The case of *Völk* involved an exclusive sales agreement reinforced by absolute territorial protection (ATP).⁴³ Far from denouncing such an agreement, the Court held that determining the object or effect of the agreement must be understood by reference to the “actual circumstances of the agreement”.⁴⁴ Consequently “even”

³⁹ Such as absolute territorial protection (ATP), price fixing, sharing of markets. See C-5/69 *Völk v Vervaecke* [1969] ECR 295 (*Völk*).

⁴⁰ See eg *supra* n6 Case C-107/82 *AEG-Telefunken v Commission*.

⁴¹ See for instance *supra* n5, Joined cases C-96-102 & others/82 *IAZ/Anseau* where the Court duplicated the analysis by also considering the actual effect of the agreement despite having determined that the object of the agreement was to restrict competition. However, the Court may not always differentiate between the two elements as it recognises that object and effect follow the same basic methodology.

⁴² See for instance C-5/69 *Völk v Vervaecke* [1969] ECR 295 (*Völk*) and Case C-27/87, *Louis Erauw-jacquéry Sprl v La Hesbignonne Société Coopérative*, [1988] ECR 1999 (*Louis Erauw*).

⁴³ *Ibid*, *Völk*.

⁴⁴ *Ibid*, *Völk* para 5/7.

an agreement containing ATP falls *outside* Article 101 TFEU when it has “only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question”.⁴⁵ This endorses the *STM* Test as it confirms the importance of context and, that the effect on competition may not be ‘sufficiently deleterious’ when the parties have a weak position on the relevant market.

The judgment could be construed to mean that *any* agreement will not restrict competition by object if the effect on the market is insignificant. This conclusion is currently in contention following the CJEU’s judgement in *Expedia* which has called into question whether restrictions by object need be appreciable.⁴⁶ For the purposes of this section, *Völk* is an important judgment as it illustrates an economic rationale behind the competition law rules applicable to both restrictions by object and by effect. The CJEU does not, however, explain whether those effects need be concretely proven in respect of the object criterion. The judgment also flags an important point; to assess the market power of the parties requires a market definition. It is notable that the Commission chose not to follow this judgment in its previous and most recent *De Minimis* Guidelines nor indeed in its Article 81(3) Guidelines in respect of the object criterion.⁴⁷

As in *Völk*, the necessity of a market definition when considering the object of an agreement was raised in the case of *L’Oréal*. While this concerned a selective distribution agreement, which is not typically seen as a restrictive of competition by object under Article 101(1) TFEU, the judgment is significant.⁴⁸ It further supports the requirement of an economic analysis when applying the object criterion. Here, the Court confirmed the application of the more analytical approach. It held that whether an agreement is prohibited by reason of the:

⁴⁵ *Ibid*, para 5/7.

⁴⁶ Case C-226/11, *Expedia Inc v Autorité de la concurrence*, 13 December 2012, nyr. See chapter 5 for an examination of the relationship between the object concept and appreciableness.

⁴⁷ See chapter 5. Commission Notice on agreements of minor importance that do not appreciably restrict competition under article 81(1) of the Treaty establishing the European Community, OJ 2001 C368/13. These were revised following the judgment in Case C-226/11 *Expedia* and came into force on 25 June 2014: OJ 2014 C 291/01.

⁴⁸ C-31/80 *NV L’Oréal* [1980] ECR 3775.

“...distortion of competition which is its object or effect, it is necessary to consider the competition within the actual context in which it would occur in the absence of the agreement in dispute. To that end, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the parties on the market for the products concerned and the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements.”⁴⁹

This it can be sensibly argued that *L’Oréal* not only upholds the judgment in *STM*, but reaffirms the need for a market definition analysis in every case.⁵⁰

2.1.2.2. Taking into account the potential effects of an agreement to prove an anti-competitive purpose: the importance of the economic context

A number of cases that concern the need to assess the market structure in an object assessment, also draw attention to additional factors that the CJEU reflected on when contemplating an agreement’s context.

CRAM and Rheinzink reinforces how the focus in any determination of the object of an agreement centres on uncovering its purpose or aim.⁵¹ The CJEU found that:

“...in order to determine whether an agreement has as its object the restriction of competition, it is not necessary to inquire which of the two contracting parties took the initiative in inserting any particular clause or to verify that the parties had a common intent at the time when the agreement was concluded. It is rather a question of examining the aims pursued by the agreement as

⁴⁹ *Ibid*, para 19. Emphasis added.

⁵⁰ See also C-262/81 *Coditel v Ciné-Vog Films (No.2)* [1982] ECR 3381, which assesses exclusive rights under a licence. The CJEU stated that a copyright holder who grants an exclusive right for a specific period is not subject to Article 101 TFEU, unless, “in a given case the manner in which the right is exercised is subject to a situation in the economic or legal sphere the object or effect of which is to restrict the distribution of films or to distort competition within the cinematographic market with regard to its specific characteristics”.

⁵¹ C-29&30/83 *Compagnie Royale Austrienne des Mines and Rheinzink v Commission* [1984] ECR 1679, (*CRAM and Rheinzink*).

such, in the light of the economic context in which the agreement is to be applied.”⁵²

This assessment highlights that the subjective intention of the parties is irrelevant in determining the object of an agreement. It would be easy for parties to argue that they never intended to restrict competition and thereby excuse their agreements from the remit of Article 101(1) TFEU. The CJEU gives short shrift to such arguments. Instead, the aim or purpose of the agreement based on the objective content of the agreement and viewed in the light of its legal and economic context is the crucial test.

This position is also reflected in *ACF Chemiefarma v Commission* where the Court dealt with a concerted practice involving price fixing and the sharing of markets.⁵³ The CJEU referred to the need to take account of the agreement’s context when assessing the ‘effects’ of the agreement with regard to restrictions prohibited under Article 101(1) TFEU.⁵⁴ To determine the object of the agreement the CJEU took account of, *inter alia*, the parties’ conduct, their importance on the market, sales figures as well as the structure of the market, the duration of the agreements and the general state of the market in relation to that time.⁵⁵

The parties argued the agreement was made during a time when there was a shortage of raw materials and that it had no effect on the market. The Court found, on the facts of the case, that these factors were irrelevant.⁵⁶ The Court held that “such a shortage cannot render lawful an agreement the object of which is to restrict competition”.⁵⁷ Based on its assessment of the economic context, the Court found that the purpose of the agreement was to share markets and fix prices, which therefore amounted to an intention to restrict competition manifested through the faithful expression of the parties’ joint intention as to their conduct.

⁵² *Ibid*, summary, point 3. Emphasis added.

⁵³ C-41/69 *ACF Chemiefarma v Commission* [1970] ECR 661. The case raises the interesting question of how object is assessed in respect of a gentleman’s agreement. The main problem is identifying the restriction and proving it.

⁵⁴ *Ibid*, paras 110-114.

⁵⁵ *Ibid*, also paras 129, 155 onwards. See particularly para 160.

⁵⁶ *Ibid*, paras 127, 157.

⁵⁷ *Ibid*, para 127.

The Court also found that such an object could not be excused or justified by arguments that the agreement had no effect or there was a scarcity of raw materials.⁵⁸ The Court argued that in order to preserve their territorial protection the parties had agreed to restrict their freedom of action and therefore the fact the parties were unable to then act upon such a restriction was deemed irrelevant.⁵⁹ This reasoning demonstrates to what degree the CJEU is willing to consider whether economic factors can assuage a proven anti-competitive purpose.

What is emerging from the case law to this point is that the Court seeks to understand the economic rationale behind the agreement to determine whether its purpose is indeed to restrict competition, despite the parties' protestations to the contrary. Such considerations turn on the facts of the case. The Court therefore appears to ask itself what the rationale is behind the agreement: is it designed to restrict competition and therefore pursue an anti-competitive aim?⁶⁰

Similarly in *Anseau/IAZ* the case centred on the intent and purpose of the agreement as the parties denied they knew they were restricting, let alone intended to restrict, competition.⁶¹ The Court took account of the context of the agreement and its effects on competition when determining whether the use of a conformity label for washing machines and dishwashers amounted to a restriction of parallel imports (a hardcore restriction) and thus had as its object the restriction of competition. The parties contended that the Commission had not met the requisite legal standard of proof when it found the agreement anti-competitive by object.⁶² The Court agreed with the Commission, but noted in its judgment that the agreement made parallel imports of washing machines more difficult, which was exacerbated by the high market shares of the parties.⁶³

⁵⁸ *Ibid*, paras 156-157.

⁵⁹ *Ibid*, para 155-160. This judgment is pertinent when considering the judgment in *BIDS supra* n3.

⁶⁰ See eg, *STM, Völk, ACF Chemiefarma* and *CRAM and Rheinzink*.

⁶¹ Joined cases C-96-102, 104, 105, 108, 110/82 *IAZ International Belgium v Commission* [1983] ECR 3369 (*Anseau/IAZ*). See paras 24 and 25.

⁶² *Ibid*, para 22 and see paras 23 and 25.

⁶³ *Ibid*, para 22.

The Court found that the subjective intention of the parties must be objectively determined when assessing the purpose of the agreement. Any claim that the parties did not intend to restrict competition must be borne out by an analysis of the agreement in its context. In this case the parties argued they did not intend to restrict competition as the agreement's true purpose was to protect the public's health. On analysis, the Court found, based on the agreement's particular circumstances, that this alternative purpose was not sufficient to invalidate the anticompetitive object of the agreement.⁶⁴ Having regard to the content, origin and circumstances of the agreement (that is, its terms and the legal and economic context), the Court held that the agreement had the intention of treating parallel imports less favourably than official imports.⁶⁵ By signing the agreement the parties acted deliberately whether or not they were aware that doing so infringed Article 101(1) TFEU. These factors were evidenced by the conduct of the parties and the procedures they implemented.⁶⁶ This judgment reinforces how any analysis of the object criterion must be fact specific. The context of an agreement thus dictates whether a factor is relevant in one case, but not another.⁶⁷ The parties also argued the agreement did not affect competition. Even though the *STM* Test does not require such effect to be resolved, the Court held that the agreement did have a restrictive effect given the considerable market shares of the parties.⁶⁸

The importance of an agreement's specific context in determining the purpose of an agreement is further underlined in *Louis Erauw*.⁶⁹ The judgment can be usefully contrasted with *ACF Chemiefarma* and *Anseau/IAZ* as here the Court found that a positive purpose was in fact sufficient to ensure the agreement was not restrictive

⁶⁴ *Ibid*, para 22. See also section 2.1.2 below. This is not to say such a factor may not carry more weight in a different context.

⁶⁵ *Ibid*, paras 23-35.

⁶⁶ *Ibid*, para 27.

⁶⁷ For example contrast the views on legitimate objectives: *Pierre Fabre vis-a-vis ACF Chemiefarma* and *BIDS*. See also how the CJEU in C-67/13 P *Groupeement des Cartes Bancaires v Commission*, 11 September 2014, nyr explained the judgment in *BIDS*, para 84.

⁶⁸ *Supra* n61, *Anseau/IAZ*, para 27. The Court held the agreement appreciably restricted competition, notwithstanding its other purpose to protect public health. The question of whether the object criterion must be appreciable is discussed in chapter 5.

⁶⁹ C-27/87 *Erauw-Jacquery v La Hesbignonne* [1983] ECR 1919 (*Louis Erauw*).

by object and, in fact, come outside Article 101(1) TFEU altogether. The case concerned plant breeders' rights. The agreement (a licence) contained a 'no export' clause and a stipulation that there should be no selling below a minimum sales price. The Court held, with regard to the no export ban, that - as plant breeders incur considerable financial costs in developing varieties of basic seed - such persons must be allowed to protect themselves against any improper handling of those varieties of seeds. Therefore, the plant breeder was entitled to "restrict propagation to the growers which he has selected as licensees. To that extent, the provision prohibiting the licensee from selling and exporting basic seed falls *outside...Article [101](1)*".⁷⁰

Therefore an argument as to the positive attributes or 'legitimate goal' of the agreement was held to trump a restrictive object. As such the CJEU held, again, that even absolute territorial protection can come outside the reach of Article 101(1) TFEU. Here, the CJEU was clearly balancing the pro-competitive aim of such a restriction against the negative aspects.⁷¹ This apparent tolerance of the balancing of the positive attributes of an agreement under Article 101(1) TFEU is notable. As will be seen throughout this thesis, however, such balancing is fairly commonplace.⁷² Yet again, the Court's approach highlights the individual nature of each case that comes before it and underlines the importance of assessing the

⁷⁰ *Ibid*, para 10-11 (emphasis added).

⁷¹ Balancing the aims of an agreement can also be seen in *AEG-Telefunken v Commission* (*supra* n6) where the Court considered a selective distribution system. Here the Court looked at the object of the agreement in a positive light, stating that the "object" of the system was to "improve competition". Moreover, it found there are "*legitimate requirements which justify a reduction of price competition in favour of competition relating to factors other than price*". The Court also held that if selective distribution systems did not follow the *Metro* criteria, they would constitute an infringement of Article 101(1). The Court did not clarify that would constitute a restriction of competition by object or effect. However in para 96 the Court made the point that "effecting parallel imports cannot be regarded as an infringement of the rules of competition, whereas undertaking no longer to effect such imports is *manifestly* an infringement of community law since it would allow a manufacturer to wall off national markets..." (emphasis added). The interesting issues raised in this judgment are considered in subsequent chapters.

⁷² See for instance the various selective and exclusive distribution cases; also footnote 34 of the opinion in *BIDS* (*supra* n3), the judgment in Case C-238/05 *Asnef Equifax v Ausbanc* [2006] ECR I-11125 and the Commission's decision in *Visa International – Multilateral Interchange Fee* [2002] OJ L318/17. The distinction between positive aims or attributes and a legitimate objective is moot: see AG Mazák's Opinion in Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence*, [2001] ECR I-9419. These issues are discussed further in chapter 4, section 2.

agreement within its context.⁷³ Had the agreement been assessed in accordance with the Article 81(3) Guidelines, the Commission would not have come up with the same result. More significantly, the Court held the restriction fell outside Article 101(1) TFEU entirely. Unlike in *Völk*, this was due to the Court finding a pro-competitive purpose not because the parties had a low market share.

2.1.3. Interim Conclusion

This section examined the jurisprudence of the CJEU up to the inception of the GC in 1989. It found that the seminal case of *STM* outlined a comprehensive test in order to determine the object of an agreement. The *STM* Test was further fleshed out by subsequent judgments, which all focused on uncovering the rationale behind an agreement drawn from its legal and economic context. Put another way, is the agreement designed to restrict competition? This approach is referred to as the more analytical approach (the MAAP). Under the MAAP, to prove the ‘object’ of an agreement the following factors are taken into account:

- a) The key question is: what is the “precise purpose” of the agreement?
- b) Such purpose is extrapolated from:
 - i) the content of the agreement,
 - ii) the conduct of the parties to the agreement,
 - iii) an objective determination of the purpose of the agreement only drawing on the subjective intention of the parties if appropriate, and
 - iv) the circumstances of the agreement.
- c) The purpose is assessed within the agreement’s specific legal and economic context, which takes account of:
 - i) The effect of the agreement on competition (both potential and even actual),
 - ii) The market structure, markets shares, definition of the market,
 - (1) High market shares can help confirm an anti-competitive purpose whereas very low markets shares can bring an agreement outside Article 101(1) TFEU as the effect on competition is not sufficiently deleterious, and
 - iii) The severity of the clauses needed to protect the (pro-competitive) purpose of the agreement.
- d) If after this analysis it does not “appear” that the agreement has the object, that is, the purpose of restricting competition then the actual effects of the agreement

⁷³ This point is also highlighted by the GC in Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 (GSK).

must be assessed to determine if an agreement in fact has the effect of restricting competition under Article 101(1) TFEU.

- e) Should an agreement be found to be restrictive by object, then the exemption under Article 101(3) TFEU is applicable.

It is clear that the objective purpose of an agreement overrides a subjective intention of the parties not to restrict competition.⁷⁴ The subjective intention and conduct of the parties can, however, be relevant in helping determine whether the purpose of the agreement is to restrict competition. Subjective intention plays a subordinate role to finding an objective aim to restrict competition. It is also not relevant whether the parties did not know that what they were doing restricted competition.⁷⁵ Furthermore, the CJEU has determined that even if an agreement was intended to restrict competition, but was not then implemented, this is not sufficient to remove the agreement from the ambit of Article 101(1) TFEU.⁷⁶ This is a significant point as it shows that the competition rules will kick into action even if a restrictive agreement is not implemented or successful. The case law also makes clear that the object criterion does not require the agreement to have had an actual effect on competition as the potential to affect competition is sufficient.

In the above cases, the orthodox approach has little bearing on how the CJEU applies let alone defines the object criterion. The Court took account those restrictions specifically named under Article 101(1) TFEU as being ‘restrictions of competition’, but did not automatically associate them with having a restrictive object. The foundations of the orthodox approach were thus not apparent at this juncture. To see whether it is possible to pinpoint the origins of the orthodox approach, the following section investigates those cases where the CJEU introduces

⁷⁴ *Supra* n5 Anseau/IAZ.

⁷⁵ *Ibid*, para 6 of the summary: “if the parties to the agreement were aware the agreement as drafted by looking at its terms, the legal and economic context in which it was concluded and to the conduct of the parties, had as its purpose to restrict parallel imports, they acted deliberately by signing the agreement, whether or not they were aware that in doing so they were infringing Article 101(1)”.

⁷⁶ C-277/87 *Sandoz Prodotti Farmaceutici SpA v Commission* [1990] ECR 145, para 3 of the summary. Conversely, in T-168/01 *GlaxoSmithKline (supra* n73 discussed below), GlaxoSmithKline admitted it intended to restrict competition, yet in this instance having undertaken an objective analysis of the agreement the GC did not consider this enough to prove that the object was to restrict competition.

the phrase ‘by its nature’ to its jurisprudence. This phrase is significant as the Commission specifically links it with its interpretation of the object criterion.⁷⁷

2.2. Questionable foundations of the orthodox approach: agreements that ‘by their very nature’ restrict competition: early case law up to 1989

The phrases ‘by their very nature’ and ‘of their nature’ play a prominent role in the determination of restrictions by object under the orthodox approach. The Article 81(3) Guidelines clearly connect both the phrase and the orthodoxy by defining restrictions by object as those that “by their very nature have the potential of restricting competition”.⁷⁸ The use of this phrase also marks, albeit in only a few specific cases, a shift in approach by the CJEU from the more analytical approach to an approach that is more analogous with the orthodox approach. What is notable, however, about the case law of this period is that the CJEU’s reference to ‘of their nature’ is not always in accord with the Commission’s use of that phrase.⁷⁹

Despite the prevalent use of the term and its derivatives throughout the Court’s jurisprudence (both within its earlier and more recent jurisprudence), ‘by their very nature’ has rarely been defined. One of the few instances is by the GC in *GSK*, which it held to mean “independent of any competitive analysis”.⁸⁰ Such interpretation is borne in mind when examining the case law below.

⁷⁷ Article 81(3) Guidelines, para 21. The Commission does not cite any case law in support of its contention. This raises the prospect that paragraph 21 reflects the Commission’s policy as opposed to its interpretation of the law.

⁷⁸ *Ibid*, paras 21 and 23.

⁷⁹ See also Case C-238/05 *Asnef Equifax* (*supra* n72), which concerned a horizontal credit information exchange agreement. Here the Court of Justice focused on the positive attributes of the information exchange system in determining the object and found that the “essential object of credit information exchange systems is to make available to credit providers relevant information about existing or potential borrowers”. Given the positive attributes of the system the register did not “by its very nature” have the object of restricting competition. Ultimately, the purpose of the agreement was not to restrict competition as it had a positive aim. Also noted by (Jones, 2010), ‘*Left Behind by Modernisation?*’, p652.

⁸⁰ *Supra* n73 *GSK*, para 120.

2.2.1. Cases that continue to support the more analytical approach

The judgment in *Brasserie De Haecht* demonstrates how the CJEU has combined the more analytical approach with the use of the phrase ‘by its nature’.⁸¹ The Court confirmed the methodology in *STM* by verifying that in order to determine if an agreement is caught by Article 101(1) TFEU, it must be examined in its ‘legal and economic context’ and not in isolation.⁸² The Court found that exclusive supply agreements are not ‘by their very nature’ incompatible with the Common Market.⁸³ The reference to the phrase implies that certain types of *restriction* may ‘by their very nature’ be incompatible with the Common Market. This statement cannot, however, be interpreted to mean that the object criterion should therefore be automatically associated with such restrictions. Rather it suggests that particular restrictions fall foul of the competition rules (such as those restrictions listed in Article 101(1) TFEU).

Coöperatieve Stremsele endorses this interpretation of *Brasserie De Haecht* by illustrating two issues.⁸⁴ First, it affirms how restrictions not classically categorised as ‘hardcore’ can, upon a market analysis, still be held restrictive by object.⁸⁵ Secondly, that a reference to ‘of its nature’ is not an implicit reference to the orthodox approach. The case concerned the rules of a cooperative and the Court first looked at the object and effect of the agreement together. It held that the rules in respect of exclusive purchasing requirements reinforced by payment for expulsion or resignation “have clearly as their object to prevent members from obtaining supplies from other suppliers” or from making supplies themselves.⁸⁶ As a result, the provisions are “*of such a nature* as to prevent competition at the level of the supply of rennet and colouring agents for cheese between producers holding a large part of the Community market in cheese”.⁸⁷ Notably, the Court makes this

⁸¹ C-23/67 *Brasserie De Haecht v Wilkin* [1967] ECR 407. See also *STM*.

⁸² *Ibid*, p415.

⁸³ *Ibid*, Operative Part of the judgment.

⁸⁴ C-61/80 *Coöperatieve Stremsele-en Kleurselfabriek v Commission* [1981] ECR 851.

⁸⁵ *Ibid*. The agreement may be on a horizontal level, nevertheless, exclusive purchasing obligations are not singled out under the *Article 81(3) Guidelines* or Article 101(1) TFEU.

⁸⁶ *Ibid*, para 12.

⁸⁷ *Ibid*, para 13. Emphasis added.

assessment having undertaken an analysis of the market. It considered the market power of the parties, and thus of the effects of the agreement on the defined upstream market.

2.2.2. *Origins of the orthodox approach*

The *Court's* judgment in *Miller* is symbolic as it is consistently cited as supporting the proposition that, by law, certain restrictions of competition automatically restrict competition by virtue of their object.⁸⁸ This is questionable. The judgment does not, on analysis, offer any such unqualified support. The case concerned restrictions on exports contained in an exclusive dealing agreement and in the terms and conditions of sale (therefore a vertical arrangement), which the Commission found incompatible with Article 101(1) TFEU. The CJEU held that “by its very nature a clause prohibiting exports constitutes a restriction of competition”.⁸⁹ This statement was made, however, in the light of *Miller* claiming that it did not have a blameworthy objective, but that the restriction was adopted at the behest of its customers.⁹⁰ The Court rejected this stating that by its very nature prohibiting exports constitutes a restriction of competition “whether [that clause] is adopted at the instigation of the supplier or of the customer since the agreed *purpose* of the contracting parties is the endeavour to isolate a part of the market”.⁹¹ This statement does not therefore specifically link *object* with the prohibition of exports rather that such a prohibition is a *restriction of competition* under Article 101(1) TFEU. More fundamentally, the Court referred to the objective *purpose* of the parties being to restrict competition, which underlines the interpretation of the object criterion in *STM*.

⁸⁸ C-19/77 *Miller International Schallplatten GmbH v Commission* (1978) ECR 131 (*Miller*). See for example, (Odudu, 2001), ‘*Interpreting Article 81(1): The Object Requirement Revisited*’; (Faull & Nikpay, 2007), paras 3.145, 3.150, 3.152; (Bellamy & Child, 2008), para 2.097. Indeed it is also used to demonstrate that object restrictions are akin to *per se* restrictions: see (Bellamy & Child, 2008), para 2.097 (footnote 391).

⁸⁹ *Ibid*, *Miller* para 7. See also para 3.

⁹⁰ *Ibid*, *Miller*, para 6.

⁹¹ *Ibid*, *Miller*, para 7. Emphasis added.

Upholding its reasoning in *ACF Chemiefarma*, the CJEU found arguments that the parties did not enforce the no-export prohibition did not then denote it had no restrictive effect.⁹² It noted that, as customers knew of the prohibition on exports, a visual and psychological background was created contributing to a division of the market.⁹³ More pertinently, the case is concerned less with the object of the agreement and more with whether the agreement affected trade between Member States. Miller specifically challenged the appraisal of the effects of its behaviour by the Commission. It contended that the export ban cannot have appreciably affected trade between Member States due to its insignificant effect on the market.⁹⁴ This was despite its acknowledgment that prohibitions on exports are not compatible with the common market.⁹⁵ In determining whether the agreement affected trade between Member States the CJEU conducted an analysis of Miller's position on the market so as to dismiss the fact that the parties had an insignificant market share.

Given the focus on the effect on trade element, it is highly questionable whether *Miller* should be cited as such strong authority for the contention that export bans automatically have the object of restricting competition, or indeed, for the more general proposition that there is a category of agreements which have the object of restricting competition.⁹⁶ At best, the judgment provides support for the proposition that an export ban is a restriction of competition.

A case that probably provides better support for the orthodox approach, though is not often cited as such, is *Bureau National v Guy Clair*.⁹⁷ The case concerned an inter-trade organisation (BNIC), which fixed the price of cognac and other wines and spirits in an agreement between its members. The CJEU held that:

⁹² *Ibid*, Miller, para 7.

⁹³ *Ibid*, Miller, para 7.

⁹⁴ *Ibid*, Miller, paras 3 and 6.

⁹⁵ *Ibid*, Miller, para 6.

⁹⁶ This alternative analysis is supported by the GC in Case T-148/89, *Tréfilunion v Commission*, [1995] ECR II-1063 (*Tréfilunion*) when, at paragraph 103, it cites *Miller* as the authority for the affect on trade criteria.

⁹⁷ Case C-123/83 *Bureau National Interprofessionnel Du Cognac v Guy Clair* [1985] ECR 391. Note that it is surprisingly cited in the judgment of 11 September 2014, C-67/13 P *Groupement des Cartes Bancaires v Commission*, nyr (*Cartes Bancaires*).

“For the purposes of Article 101(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition. By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition on that market.”⁹⁸

The passage suggests that, by law, certain restrictions automatically restrict competition by virtue of their object.⁹⁹ Through using the word “intended”, which is taken to refer to the objective intention of the agreement and not the subjective intention of the parties, the CJEU submits that such agreements automatically intend to restrict competition regardless of their actual effects. The inference is that particular restrictions are presumed to restrict competition due to an implied intention to distort competition. The language of the Court would seem to suggest that price fixing has the ‘necessary effect’ of always restricting competition as, by its very nature, fixing minimum prices is intended to restrict competition and should thus be prohibited. Consequently, the judgment raises more questions than it answers.

The orthodox approach, as encapsulated in the Article 81(3) Guidelines, does not refer to an agreement’s ‘intention’. Rather, the Commission claims that particular restrictions by their very nature have the potential to restrict competition owing to the high potential of negative effects on competition, the serious nature of the restriction and on experience showing such restrictions are likely to produce such negative effects on the market.¹⁰⁰ The Commission does not cite any case law in support of this contention. Hence, determining whether an agreement restricts competition by object is based upon an identification exercise.¹⁰¹ *Guy Clair* does not support all these elements of the orthodox approach.¹⁰²

⁹⁸ *Ibid*, *Bureau National v Guy Clair*, para 22. Emphasis added.

⁹⁹ However, the reference to “intention” does not clarify this proposition undisputedly.

¹⁰⁰ Article 81(3) Guidelines, para 21.

¹⁰¹ Para 23 of the Article 81(3) Guidelines claims, “...what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices”.

¹⁰² It is not cited by the Commission in its Article 81(3) Guidelines.

Despite the passage cited above, there is still a question as to whether, as a result of this judgment, the phrase ‘by its very nature’ should automatically be associated with object cases rather than the notion that certain agreements constitute restrictions of competition. In its answer to the referring court, the CJEU merely said that “Article [101](1) must be taken to apply to inter-trade agreements fixing a minimum price for a product concluded by two groups of trades within the framework of, and in accordance with the procedure of, a body such as BNIC”.¹⁰³ On balance, however, it is likely that *Bureau National v Guy Clair* provides the greatest justification to date for the Commission’s approach to object under its Article 81(3) Guidelines.

2.2.3. Necessary consequence/necessary effect

The concept of necessary effect has been raised a few times, particularly in the case of *Bureau National v Guy Clair* as an element, which encapsulates the ‘by its very nature’ approach to the object concept. It has been noted the concept plays an important role in the Commission’s approach to object cases.¹⁰⁴ To recap, necessary effect is based on the assertion that the concrete effects of an agreement do not need to be considered under the object heading, as certain restrictions of competition automatically infringe Article 101(1) TFEU due to their known negative effects derived from experience.¹⁰⁵ Impliedly, there is an irrebuttable presumption of anti-competitiveness.¹⁰⁶ That it is therefore safe to assume particular restraints automatically infringe Article 101(1) TFEU by object, is almost certainly derived from the principal that ‘actual’ effects do not need to be proven in object cases.¹⁰⁷

¹⁰³ *Supra* n97 *Bureau National v Guy Clair*, point 1 of the Operative Part.

¹⁰⁴ Article 81(3) Guidelines, paras 21, 23. See chapter 1.

¹⁰⁵ Article 81(3) Guidelines, para 21. (Odudu, 2001), ‘*Interpreting Article 81(1): the Object Requirement Revisited*’, p379, 384. See also (Black, 2005), p118 and AG Trstenjak’s Opinions in *BIDS* and *GSK* (*supra* n3 and *infra* n186.) Bailey discusses this issue, see (Bailey, 2012), pp564-565 and 571-572.

¹⁰⁶ There is no suggestion in the Article 81(3) Guidelines that such a presumption is rebuttable or even if it were rebuttable which party has the onus of rebutting such presumption, see paras 21-23.

¹⁰⁷ *Supra* n27 above *Consten & Grundig*. It appears there is a missing link between the propositions that *actual* effects need not be demonstrated (arguably because the purpose of the agreement is to restrict competition irrespective of effects, though this purpose needs to be ascertained) and no effects need be demonstrated (because it can be assumed that the effect is to restrict competition).

According to Odudu, *CRAM and Rheinzink* is often cited as supporting the contention that the actual effects of an agreement do not need to be established under the object criterion, because the presumption is that they exist.¹⁰⁸ Odudu is right to assert the judgment does not offer any such unqualified support.¹⁰⁹ The case concerned restrictions on parallel trade usually designated by the Commission as a hardcore infringement. When assessing the agreement, the Court examined the conduct of the parties, the prices charged and the circumstances surrounding the contract. It held as a result of this analysis that the export clauses were “designed” to prevent the re-export of the goods to the country of production so as to maintain a system of dual prices and restrict competition within the common market.¹¹⁰ Such analysis does not support the presumption that particular restrictions automatically have the object of restricting competition. The concept of necessary effect only requires proof that the restriction is contained within the agreement. Here, the Court went further than merely identifying the purported restriction.

2.2.4. *Interim conclusion*

It has been established that, overall, there is little endorsement by the CJEU of the orthodox approach within its early jurisprudence. This is evidenced when the case law that focuses on those agreements that ‘by their nature’ restrict competition do not wholeheartedly align with the orthodox tradition. Instead, the case law focuses more heavily on understanding the aim or purpose of the agreement within its context. One case that bears more resemblance to the Commission’s interpretation of the object criterion is that of *Guy Clair*. However, even here the CJEU refers to the “intention” of the agreement. The value of these cases as precedents for the orthodox approach is therefore questionable. Conversely, the cases demonstrate how the CJEU adopts language that can be construed so as to support a more orthodox meaning. Nevertheless, the Court provides no definition for the phrase

¹⁰⁸ (Odudu, 2001), ‘*Interpreting Article 81(1): the Object Requirement Revisited*’, p384; C-29&30/83 *Compagnie Royal Austrienne des Mines and Rheinzink (CRAM) v Commission* [1984] ECR 1679.

¹⁰⁹ *Ibid*, (Odudu, 2001), p384.

¹¹⁰ *Supra* n108, *CRAM*, para 28.

‘by its nature’. This emphasises the Court’s own shortcomings in terms of clarity of the law and its contribution to the confusion surrounding the object concept.

The lack of case law that unequivocally supports the orthodox approach is further confirmed in the next section, which substantiates the proposition that the MAAP forms the basis of the law on the object criterion.

3. The more analytical approach continues to inform the CJEU’s application of the object concept: 1989 to 2006

This section documents how the MAAP continues to play a significant role in the evolution of the object concept within EU competition law after the inception of the General Court up until 2006. The year 2006 marks a turning point as at that juncture the ‘hybrid approach’ starts to materialise within the European Courts’ jurisprudence.¹¹¹ The case law of the period between 1989 and 2006 reinforces the centrality of the *STM* Test as the foundation of the Court’s application of the object criterion and its constituent parts.¹¹² One particular Advocate General (AG) opinion is pertinent in this respect, that of AG Tesauro in *Gøttrup-Klim*.¹¹³ AGs are not subject to the same constraints as the CJEU, for example, they do not need to form a judgment based on a consensus.¹¹⁴ Therefore their opinions can be influential and helpful in their detail. His opinion is a useful exposition of the judicial thinking at the time. It is apparent that the object concept as interpreted in accordance with the MAAP is not a new phenomenon.¹¹⁵ Nevertheless, despite the orthodox approach lacking the commensurate judicial authority, it is clear just how influential the Commission’s interpretation of the object criterion is. As the cases below demonstrate the CJEU has in fact paid very specific attention to the object criterion.

¹¹¹ Though the hybrid approach materialises at the same time as judgments supporting the MAAP are handed down, see eg *Asnef Equifax* (*supra* n72).

¹¹² For instance the cases concern indirect means in which to achieve an export ban, the positive attributes of an agreement, the defence of a legitimate objective and the assessment of object in the light of those factors.

¹¹³ Case C-250/92 *Gøttrup-Klim* (*supra* n5). The AG’s opinion also provides the basis for the term “more analytical approach”.

¹¹⁴ Whish acknowledges the benefits of AG opinions, (Whish, 2009), p113.

¹¹⁵ A number of commentators claim the MAAP is a recent phenomenon, see eg the paper delivered by Barry Rodger at the ‘*New Challenges in Competition Law*’ conference, UCL, Istanbul, 6 June 2014, (Rodger, 2014).

In *Gøttrup-Klim*, AG Tesauro's opinion cements a number of key features identified in the case law to this point.¹¹⁶ He underlined the importance of the *STM* Test in assessing agreements under Article 101(1) TFEU, and reiterated that to establish whether an agreement is caught by Article 101(1) TFEU a two stage examination is necessary. First, the object of the agreement must be considered. To that end, the "aims pursued by the agreement will have to be appraised in the economic context in which it is to operate. If the agreement seeks to restrict competition, it must be considered to be prohibited automatically and its effects need not be considered."¹¹⁷ Where the object is not anticompetitive, a second stage is undertaken: "the agreement will be prohibited if it appears likely to restrict competition *appreciably*."¹¹⁸ The AG confirmed that object and effect must be viewed in the context of how competition would have operated in the market in question in the absence of that agreement (the counterfactual):

"...according to that *analytical* approach, agreements which, viewed objectively and in the abstract, have no other function than to restrict freedom of competition between parties in a manner considered incompatible with the common market will be regarded as prohibited by virtue of their object".¹¹⁹

Conversely, he considered agreements that are capable of performing more complex functions are not regarded as having an anticompetitive object.¹²⁰ As such, AG Tesauro found the Court usually decides that "no anti-competitive object is contained in clauses which are found in the abstract to be necessary to ensure that contract, which is not in itself harmful to competition, can fully discharge the legal and economic function which it pursues."¹²¹ According to the AG, this explains why non-compete clauses and exclusive supply clauses are not seen to be

¹¹⁶ *Supra* n5, *Gøttrup-Klim*. Opinion of 16 June 1994. The CJEU confirmed the overall stance of the AG.

¹¹⁷ *Ibid*, para 16.

¹¹⁸ *Ibid*, para 16. The role of appreciability is discussed in chapter 5.

¹¹⁹ *Ibid*, para 16. Note the reference to restricting the freedom of the parties. Cf Case C-309/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577.

¹²⁰ *Ibid*, *Gøttrup-Klim*, para 16. The statements in para 16 are further examined in chapters 3 and 4. See also *Asnef Equifax* (*supra* n72) and the AG's Opinion in *BIDS* (*supra* n3).

¹²¹ *Ibid*, *Gøttrup-Klim*, para 16.

restrictive by virtue of their object (presumably as the precise purpose of the agreement is not to restrict competition).

The AG also gave some thought to the reasoning for the distinction between object and effect. He emphasised that the analysis of object and effect are to be clearly distinguished, though acknowledged the distinction is usually disregarded by the Commission, which tends to make an overall assessment for both object and effect, concluding that a particular agreement does or does not infringe Article 101(1) TFEU as a whole.¹²² He consequently recognised that it is not clear the way in which the principle, that object and effect are distinct, is applied.¹²³ The AG understood the dichotomy as follows:

“[To determine whether a particular clause is anticompetitive in intent, the object criterion]...is intended to assess, in the abstract, the objective function of a particular set of conditions in its contractual context. The second, on the other hand, is designed to establish whether, specifically, an agreement whose object is not anti-competitive is nevertheless liable, in the specific market context in which it is to operate, appreciably to affect competition in the common market.’¹²⁴

This version of the distinction is persuasive, to an extent. It is, however, a vital clue in the understanding of the functioning of Article 101(1) TFEU as a whole and underlines the importance of the more analytical approach in legal history. In accordance with this distinction, every agreement must first be assessed to determine if the object is to restrict competition. If this is not established, then the role of effect is to sweep up those agreements that do not intend to restrict competition, but nevertheless have that effect. However, the notion that the object concept is viewed in the abstract is somewhat controversial. The AG does not explain what the term ‘abstract’ means. There is a conflict between assessing an agreement in the abstract, but within its specific context. A contextual analysis cannot be deemed abstract. Arguably, the AG is merely referring to the position

¹²² *Ibid*, footnote 19 of the Opinion.

¹²³ *Ibid*, footnote 19 of the Opinion.

¹²⁴ *Ibid*, para 16. See also the opinion in *Pierre Fabre*, para 26 (*supra* n72).

established in *STM*; that the analysis undertaken when determining the object of an agreement is less intensive than when establishing the actual effect of an agreement. The precise parameters of the object analysis are therefore unclear.

The importance of context is reinforced by AG Tizzano's opinion in *General Motors v Commission*.¹²⁵ The case involved what the Commission would automatically consider to be an object restriction: an export ban. The export ban was 'indirect' and therefore it was not clear on the face of the documentation that the aim or purpose of the agreement was to restrict competition.¹²⁶ The AG held that for there to be a restriction of competition by object, the agreement does not need to have a restriction of competition as its sole aim.¹²⁷ Where an agreement "obviously has an anticompetitive purpose", this renders "irrelevant and uninfluential" the fact that it also pursues other legitimate objectives.¹²⁸ This position can be contrasted with earlier case law where, even in the context of a hardcore restriction, such as the export ban in *Louis Erauw*, such an agreement was considered to fall outside the realms of Article 101(1) TFEU due to justifications to the contrary.¹²⁹ It is submitted the determinative factor as to whether alternative purposes are able to justify particular restrictions turns on the context of the agreement.

To then "ascertain whether an agreement is *capable* of restricting competition" the agreement must be assessed within the actual context in which it would occur in the absence of the agreement in dispute.¹³⁰ Moreover, the AG upheld the principle

¹²⁵ Case C-551/03 P *General Motors Nederland and Opel Nederland v Commission* [2006] ECR I-3173. Here the AG looked at a series of agreements and discussions between the parties in order to decide whether the object was to restrict competition.

¹²⁶ The issue was, *inter alia*, whether excluding export sales from the dealer's bonus policy was a restriction of competition. Note, that the Commission recognises that hardcore restrictions can be achieved through indirect means, though the orthodox approach tends to suggest restrictions by object are 'obvious'. See chapter 1.

¹²⁷ *Supra* n125, *General Motors*, para 67. In *AEG-Telefunken* the Court found it was irrelevant that the agreement had another legitimate purpose (*supra* n6).

¹²⁸ *Ibid*, para 68 of the opinion. This follows *IAZ/Anseau* (*supra* n61).

¹²⁹ In *Louis Erauw* (*supra* n69) the justification was the amount of financial commitment needed to develop the product. See also *Völk* (*supra* n42).

¹³⁰ *Supra* n125, *General Motors*, para 74, ie, the counterfactual. Unfortunately the AG references para 33 of Case C-215/96 *Bagnasco v Banca Popolare di Novara* [1999] ECR I-135, which provides an extremely confused and limited account of the law on Article 101(1) TFEU. Therefore this aspect of the opinion is questionable in its accuracy. The AG should have cited *STM*. See also Joined cases C-

that the object of an agreement is deduced from the content of its clauses, the intention of the parties “as it arises from the ‘genesis’ of the agreement or manifests itself in the circumstances in which it was implemented” and the conduct of the undertakings concerned.¹³¹ Thus, the characteristics of the measure, as well as the objectives pursued by the manufacturer inferred from its general strategy, were relevant.¹³² Finally, it is notable that the AG found it irrelevant that the objective pursued was not attained and therefore did not produce anticompetitive effects.¹³³

Notably the CJEU confirmed much of the AG’s opinion. When making an assessment of object the CJEU held that:

“...account must be taken not only of the terms of the agreement, but also of other factors, such as the aims pursued by the agreement in the light of the economic and legal context, in order to determine whether an agreement has a restrictive object.”¹³⁴

The CJEU affirmed that such an objective can be achieved through direct and indirect means.¹³⁵ The CJEU therefore held that the agreement had the object of restricting competition even though it was not *explicitly obvious* that the agreement had that object.¹³⁶ In making its assessment, the CJEU looked at the conduct of the parties and considered what the competitive situation in the market would have been if, as in this case, export sales had not been excluded from the bonus policy. Proof of intention was not seen as a necessary factor in determining the object of the agreement.¹³⁷ Such intention, however, may be taken into account when assessing the object of the agreement.

238/99 & others P *Limburgse Vinyl Maatschappij v Commission* [2002] ECR I-8375 on the relevance of the economic context.

¹³¹ *Supra* n125, *General Motors*, para 78.

¹³² *Ibid*, para 81.

¹³³ *Ibid*, footnote 52. See also C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, para 125.

¹³⁴ *Ibid*, *General Motors*, paras 64-66.

¹³⁵ *Ibid*, para 68.

¹³⁶ This can be contrasted with the case law of the General Court in *ENS* (*supra* n4). See section 4.

¹³⁷ *Supra* n125, *General Motors*, para 77. The CJEU cited *Miller* (*supra* n88) and *CRAM* (*supra* n108) in support of this point. This finding upheld the opinion, paras 77-78. Intent could also be attributed to the conduct of the parties.

The need to ascertain the true objective of an agreement and the significance of an agreement's context was again reinforced by the judgment in *Asnef Equifax*.¹³⁸ Here, the issue concerned a horizontal credit information exchange agreement. Information exchange systems raise intriguing questions under Article 101(1) TFEU as they involve a form of collusion. Therefore, the assessment of whether such an arrangement is a restriction by object is an important and revealing one. Horizontal agreements to exchange information have been held to constitute restrictions by object when they concern future pricing intentions or where the commercial independence of an undertaking is compromised.¹³⁹ The CJEU focused on the positive attributes of the information exchange system when dismissing the suggestion that the object of the agreement was anticompetitive.¹⁴⁰ Instead it found that the "essential object of credit information exchange systems is to make available to credit providers relevant information about existing or potential borrowers".¹⁴¹ The CJEU considered the positive benefits of such credit information systems, such as the lender being able to foresee the likelihood of repayment, and decided that they are in principle capable of improving the functioning of the supply of credit.¹⁴² Therefore, the register did not "by its very nature" have the object of restricting competition.¹⁴³

The impact that the positive benefits of the agreement had on the outcome of the judgment is significant. The CJEU weighed, albeit briefly, the positive benefits (arguably the positive effects and aims) of the agreement against the negative aspects. As a result of this exercise, it found that the "essential object" of the agreement was not anticompetitive.¹⁴⁴ This supports the view that the object criterion is concerned with identifying the precise purpose of the agreement by determining what the rationale behind it is, and specifically whether the agreement

¹³⁸ *Supra* n72 *Asnef Equifax*. Judgment of 23 November 2006.

¹³⁹ See for example Case C-204/00 P etc *Aalborg Portland v Commission* [2004] ECR I-123 and more generally see (Whish, 2009), p120.

¹⁴⁰ *Supra* n72 *Asnef Equifax*, paras 46-48.

¹⁴¹ *Ibid*, para 46.

¹⁴² *Ibid*, para 47.

¹⁴³ *Ibid*, para 48.

¹⁴⁴ *Ibid*, para 46.

is designed to restrict competition. More interestingly, the judgment leads to the conclusion that the object criterion can accommodate the consideration of the positive attributes of an agreement. Hence, if an agreement's purpose is pro-competitive then it does not have the object of restricting competition.¹⁴⁵ This conclusion was certainly evidenced in *Louis Erauw*. However, this position is controversial. Having a legitimate aim or objective, indeed an objective justification as a reason for entering into a potentially restrictive agreement did not convince the CJEU in a number of cases.¹⁴⁶ Therefore, where the distinction lies between these concepts requires further reflection.

3.1. Conclusion: 1989-2006

The case law of this period continues to support the application of the MAAP when determining an agreement's object. Based on the *STM* Test, the CJEU assesses whether the objective aim or purpose of an agreement within its specific legal and economic context is to restrict competition.¹⁴⁷ There is little evidence of the orthodox approach being applied to agreements. Instead, the AG's outline more nuanced aspects of the object criterion. This highlights how the Court seeks to understand the rationale behind an agreement: whether it seeks to restrict competition. The case law does, however, expose that the object criterion lacks absolute consensus and clarity relating to all its aspects. For instance, the defining factor between a pro-competitive purpose and a legitimate objective is unclear. A positive purpose is purportedly able to circumvent the application of the object concept whereas a legitimate objective is not. Additionally, the AG in *Gøttrup-Klim* referred to agreements performing more complex functions coming outside the remit of the object criterion, which are assessed in the abstract. These are all factors that require further scrutiny.¹⁴⁸

¹⁴⁵ This approach is also seen in a number of selective and exclusive distribution agreements.

¹⁴⁶ See eg *IAZ/Anseau* (*supra* n61).

¹⁴⁷ This includes considering the conduct of the parties and the circumstances surrounding the contract.

¹⁴⁸ See chapters 3 and 4.

This thesis rationalises the law as follows. It is clear that actual effects do not have to be demonstrated in order to find an anti-competitive object. Rather, the role of the object criterion is to tease out those agreements that are designed to restrict competition, hence there being no requirement that an agreement is successful or in fact has a physical effect on competition.¹⁴⁹ *STM* requires that the effect on competition is “sufficiently deleterious”, which is conceivably why judgments often show the Court taking account of the potential and indeed actual effects of a restriction.¹⁵⁰ Nevertheless, the standard of proof under the object heading is less onerous than when determining an agreement’s actual effect on competition. What is not resolutely clear from the Court’s perspective is the question of precisely why no actual effects need be shown under an object analysis. It is contended that the reason, certainly at this juncture, is less dependent on the necessary effect of the agreement and more on the fact the agreement itself intends, or has the ‘purpose’ of ‘restricting competition’. Such purpose to restrict competition, objectively determined based on the agreement’s content and its particular legal and economic context is sufficient alone to satisfy the object requirement. In contrast, the effect criterion captures those agreements that may not have the objective intention to restrict competition, but nevertheless have a restrictive effect. This interpretation of the case law is consistent with Arved Deringer’s earliest works deciphering Article 101 TFEU.¹⁵¹

Deringer is one of the early pioneers of EU competition law and therefore drawing on his insightful early interpretation of the Treaty is helpful in understanding the competition law rules. The English version of his German text describes Article 101 infringements as those “whose *purpose* or effect” is to restrict competition.¹⁵² Deringer saw the wording “purpose or effect” to indicate that there are “two independent and equally important possibilities”.¹⁵³ Accordingly, it is sufficient if an agreement results in a restraint of competition, even if it was not intended to have

¹⁴⁹ Hence why restrictions by object do not have to be ‘obvious’.

¹⁵⁰ This is conceivably why agreements that are *de minimis* may come outside Article 101(1) TFEU.

¹⁵¹ (Deringer, 1968).

¹⁵² *Ibid*, para 130.

¹⁵³ *Ibid*, para 130, 17.

this effect. It is also sufficient that the agreement “aimed at” restricting competition, but fails to achieve that result. As such, it is not necessary that the agreement expressly states the intention to restrict competition, but that the content of the agreement conclusively indicates such a purpose.¹⁵⁴ The fact that the agreement pursues other objectives is unimportant.¹⁵⁵ It is the illegal purpose of the agreement that renders an agreement illegal, not the agreement itself.¹⁵⁶ Deringer considers that the Court requires the purpose of an agreement to be determined first. This purpose must be a direct result of the agreement. When ascertaining this purpose the economic circumstances surrounding the implementation of the agreement should be taken into account in accordance with the *STM* Test. If the result of this examination is that the agreement is “designed” to restrict competition, there is no need to evaluate its *actual* effects.¹⁵⁷ The examples listed in Article 101(1) TFEU are thus illustrations of the concept of a “restraint of competition”.¹⁵⁸ They are not necessarily automatically synonymous with restrictions by object.

Deringer’s assessment of the law is compelling. It lends weight to an interpretation of the law on the object criterion as following a more analytical approach as opposed to the orthodoxy. However, certain case law from this period marks an alternative approach to the object concept, particularly evident in the case of *Bureau National v Guy Clair*. These cases contend that the agreement ‘by its very nature’ restricts competition. The CJEU does not elaborate on this terminology, though does not subscribe to the orthodox approach as it does not categorise the object concept as applying only to hardcore or obvious restrictions of competition. Therefore defining the phrase as ‘independent of any competitive analysis’ appears wide of the mark. A more appropriate definition is the recognition that actual effects do not need to be proven. Such terminology does, however, permeate more profoundly the jurisprudence of the European Courts going forwards.

¹⁵⁴ *Ibid*, para 131.

¹⁵⁵ *Ibid* paras 130-131.

¹⁵⁶ *Ibid*, para 168.

¹⁵⁷ *Ibid*, para 163.

¹⁵⁸ *Ibid*, para 149.

It is apparent at this juncture that the judgment in *ENS* is not reflective of the CJEU's case law to that point. This can be contrasted with the GC's judgment in *GSK*, which looks rather less surprising.

4. Case law of the General Court

The GC assesses the legality of the Commission's decisions in the first instance. Its judgments can be appealed to the CJEU on points of law only.¹⁵⁹ The GC has taken a robust approach to EU competition law and its judgments have helped shape the competition law landscape. That is not to say it has been consistent. Since its inception in 1989 and in contrast to the CJEU, the GC's jurisprudence expresses most clearly the stark dichotomy between the orthodox approach and the MAAP. Four seminal judgments are selected for review, which best demonstrate this diversity in approach to the object criterion. It becomes evident from this analysis that the GC has exerted the most influence on the orthodox approach. However, the dominance of the orthodox approach is again challenged as the GC subscribes to the MAAP in two key cases.¹⁶⁰ This raises the question of why the orthodox approach has become so dominant within legal discourse. It may be that the Commission has given its policy in respect of the object criterion an inflated status over the law. Certainly, the Commission failed openly to acknowledge the existence of a more analytical approach in its Article 81(3) Guidelines: it has not distinguished its policy approach from the law. Hence, the repercussions are that the MAAP was overshadowed by the orthodox approach. This has had far-reaching consequences on the legal landscape.

4.1. 'Per se' infringements: a new dimension to agreements that 'by their very nature' restrict competition

The GC was evidently keen to adopt a more formalistic approach in its early case law, but also confirmed a number of principles in respect of the object criterion established by the CJEU. In *Tréfilunion v Commission*, the parties to a concerted

¹⁵⁹ (Whish & Bailey, 2012), p55.

¹⁶⁰ Ibáñez Colomo went so far as to claim the orthodox approach is "made up": LSE lunchtime lecture, 2013.

practice engaged in price fixing amongst other hardcore cartel activity.¹⁶¹ The court confirmed that even if undertakings participate with others in meetings at which decisions are taken concerning prices, but do not then observe the agreed prices, such inaction will not change the fact that the object of those meetings was anticompetitive. As a result, an undertaking that participated in the agreement has no defence in saying it did not then implement the agreement.¹⁶² This is because the concrete effects of an agreement do not need to be accounted for where “it appears” that an agreement has as its object the prevention of competition within the common market.¹⁶³ Participation is therefore only relevant to the culpability of the party.

Moreover, when considering the object of the agreement, the GC stated that as the infringement of Article 101(1) TFEU - in particular sub-paragraphs (a) to (c) - was “clear”, it “necessarily precludes the rule of reason since in that case it must be regarded as an infringement *per se* of the competition rules”.¹⁶⁴ This statement is fascinating. Aside from the wholly inappropriate use of US antitrust terminology, it is one of the first times that object has been linked so obviously with the fact certain restrictions (such as those listed in Article 101(1) (a) to (c) TFEU) automatically infringe Article 101 TFEU. In this respect, the GC breaks new ground. Critically, the GC relied on *Montedipe SpA v Commission* when making this statement.¹⁶⁵ This is because it was unable to rely on a Court of Justice judgment: there are none supporting such an interpretation. To exacerbate the absence of judicial support for its reasoning, in *Montedipe* the GC merely repeated the same statement utilised in *Tréfilunion*, though provided no citation supporting its statement.¹⁶⁶ Therefore the GC was relying on its own unsubstantiated jurisprudence.

¹⁶¹ Case T-148/89 *Tréfilunion v Commission (Welded Steel Mesh)* [1995] ECR II-1063.

¹⁶² *Ibid*, para 79.

¹⁶³ *Ibid*, para 79.

¹⁶⁴ *Ibid*, para 109.

¹⁶⁵ Case T-14/89 *Montedipe SpA v Commission* [1992] ECR II-1155, para 265.

¹⁶⁶ *Ibid*, para 265.

The GC reiterated the same reasoning in *European Night Services (ENS)*.¹⁶⁷ While the case concerned proof of effects of an agreement under Article 101(1) TFEU, the GC held that when assessing an agreement under Article 101(1) TFEU:

“...account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets [reference to Case T-148/89 *Tréfilunion v Commission*, paragraph 109]. In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1).”¹⁶⁸

This extraordinary statement reveals a number of points. First, the GC was, again, using its own case law to support a statement of law, without noting the conflict between its position and that of the CJEU. Secondly, the GC’s approach in *Tréfilunion* and *ENS* creates a clear analytical distinction between object and effect analyses: the former relying solely on whether the restriction of competition is ‘obvious’, and all economic analysis is being reserved for the effects analysis. Thirdly, the GC acknowledges that even agreements restrictive by object may be allowed, on the basis of Article 101(3) TFEU. These two cases provide unequivocal judicial support for the orthodox approach. Their status is questionable, nonetheless, in view of the CJEU’s case law described in the previous sections and the lack of creditable judicial citation.¹⁶⁹

4.2. The return to a more analytical approach

Despite its stance in *Tréfilunion* and *ENS*, the GC subsequently adopted a more analytical approach in *Volkswagen* and *GSK*. Both cases involved ‘obvious’ restrictions of competition, yet the GC undertook an effects-based approach to the

¹⁶⁷ *Supra* n4 *ENS*. See chapter 1.

¹⁶⁸ *Ibid*, para 136.

¹⁶⁹ Particularly in *ENS* the comments regards the object criterion are probably *obiter dicta*.

cases by looking at the market and economic context to determine the agreement's object.

In *Volkswagen* its dealers in Italy were told to sell cars to customers in Italy only. In addition, Volkswagen implemented a split-margin system on registration of vehicles and a bonus payment cancellation for cars sold outside Italy.¹⁷⁰ The GC held that it was clear from the documents taken as a whole the Commission was entitled to conclude that, as a result of the agreements, Volkswagen had the express aim of hindering re-exportation from Italy and therefore partitioning the Italian market.¹⁷¹ The imposition of the quotas and bonus system was “of such a nature” to induce Italian dealers to only sell cars in Italy.¹⁷²

The GC confirmed it is settled case-law that there is no need to take account of the actual effects of an agreement when the object is to restrict competition. The Court expressed the rule differently, however, by stating that “it is not necessary to show actual anticompetitive effects where the anticompetitive object of the conduct is proved”.¹⁷³ Previously, the case law focused on whether it ‘appears’ that the object is to restrict competition or that the effect on competition is ‘sufficiently deleterious’ before the ‘consequences’ are considered.¹⁷⁴

The significance of this divergent terminology is unclear, but could be rationalised as follows: under the approach in *Tréfilunion* and *ENS*, an agreement of a particularly pernicious type, such as price fixing, automatically restricts competition by object. In *Volkswagen*, the GC apparently requires proof of anticompetitive effects to demonstrate an anticompetitive object. The GC’s proof requirement seems to rest on two elements. First, the judgment focuses on the aims of the agreement based on its content in order to satisfy that the object was to restrict competition. Secondly, the GC considers the agreement in its relevant economic context. This may be inferred from the Court’s consideration of the need for a

¹⁷⁰ T-62/98 *Volkswagen AG v Commission* [2000] ECR II 2707.

¹⁷¹ *Ibid*, para 88.

¹⁷² *Ibid*, para 89.

¹⁷³ *Ibid*, para 178.

¹⁷⁴ See *STM* and *Consten & Grundig* (*supra* n2 and n27).

market definition. The GC held that when applying Article 101 TFEU, the reason for defining the market, *if at all* (emphasis added), is to determine whether the agreement or concerted practice is liable to affect trade and has as its *object or effect* the restriction of competition.¹⁷⁵ It found the Commission is thus obliged to define the market where it is impossible without such a definition to determine whether the agreement has as its *object or effect* the restriction of competition.¹⁷⁶ This appears directly to contradict the judgment in *ENS* where it was held that obvious restrictions require no such analysis.¹⁷⁷

As a result of the GC's reasoning, it can be implied that in order to prove the object of an agreement is to restrict competition, it is not enough to state that certain restrictions automatically infringe competition by object.

4.2.1. *GlaxoSmithKline*

In view of the impact that the GC's judgment in *GSK* had on the general perception of restrictions by object, it warrants careful consideration.¹⁷⁸ The judgment triggered an intense, though overdue, academic debate on the legal interpretation of the object criterion and also encapsulated the GC's more ambitious assertions.

Here the GC reversed the Commission's decision that GlaxoSmithKline's general sales conditions restricted competition by reason of their object, though it upheld the finding that the agreement was a restriction of competition by effect. The case concerned the general sales conditions of GlaxoSmithKline in respect of its wholesalers in Spain. In particular, clause 4 (which was contained within the general sales conditions) provided for a dual pricing system. This meant that there was a distinction between prices charged to Spanish wholesalers in the case of

¹⁷⁵ *Supra* n170, *Volkswagen*, para 230.

¹⁷⁶ *Ibid*, para 230. The GC then cites *ENS*, paras 93 to 95 and 105 in support. The GC does not refer to para 136 of *ENS*, which directly contradicts this. Alternatively, the GC may not have intended any real significance to be placed on its use of wording: arguably all it meant was that no actual effects need be taken into account when the object of an agreement is to restrict competition.

¹⁷⁷ *Supra* n170, *Volkswagen*, para 178. By using the word "proved" the GC raised the bar in terms of the standard of proof required to determine the object of an agreement. This also implies it is imperative that the object element is fully discharged before turning to the effects of an agreement.

¹⁷⁸ *Supra* n73 *GSK*.

domestic resale and higher prices charged in the case of exports to any other Member State.¹⁷⁹

The GC examined in detail whether clause 4 of the general sales conditions was a restriction of competition.¹⁸⁰ To give a context to its findings, the GC made some bold assertions. It held that the competition referred to in Article 101 TFEU “is taken to mean effective competition, that is to say, the degree of competition necessary to ensure the attainment of the objectives of the Treaty”.¹⁸¹ It reaffirmed that price competition is not the only effective form of competition or that to which all absolute priority must be given.¹⁸² As such:

“...a restriction of competition within the meaning of Article 101 must take account of the actual framework and, therefore, of the legal and economic context in which the agreement to which that restriction is imputed is deployed. Such an obligation is imposed for the purpose of ascertaining both the object and effect of the agreement.”¹⁸³

It went on to say that, when the examination of the clauses within the agreement, carried out in their legal and economic context, reveals in itself the “alteration of the existence of competition, it may be presumed that that agreement has as its object the prevention, restriction or distortion of competition”.¹⁸⁴

This context is crucial. Effectively, the GC confirmed the majority of the CJEU’s case law set out in the sections above. It reaffirmed the need for an examination of the agreement within its ‘legal and economic context’. The GC also underlines that assumptions regarding certain types of anticompetitive behaviour, such as hardcore restrictions, which even the parties themselves acknowledge they intend to impose, is not enough to ensure that those sorts of restrictions are automatically restrictive by object. Therefore, any presumption that a particular type of restriction is a

¹⁷⁹ Article 1 of Decision 2001/791/EC, OJ L 302 of 17.11.2001.

¹⁸⁰ *Supra*, n73 *GSK*, para 109 onwards.

¹⁸¹ *Ibid*, para 109.

¹⁸² *Ibid*, para 109, see also C-26/76 *Metro v Commission* [1977] ECR 1875, paras 20 and 21.

¹⁸³ *Ibid*, para 110. Citing *STM, Consten and Grundig* (*supra* n2 and n27), Case C-399/93 *Oude Luttikhuis and Others v Verenigde Melkindustrie* [1995] ECR I-4515.

¹⁸⁴ *Ibid GSK*, para 111.

restriction by virtue of its object is rebuttable under Article 101(1) TFEU. The GC explained that:

“...having regard to the legal and economic context, the Commission could not rely on the mere fact that Clause 4 of the General Sales Conditions established a system of differentiated price intended to limit parallel trade as the basis for its conclusion that that provision had as its object the restriction of competition.”¹⁸⁵

However, the Court’s subsequent requirement that an agreement requires an analysis to determine whether the object or effect of the agreement is to restrict competition to the detriment of the final consumer was, correctly, rejected by the Court of Justice on appeal.¹⁸⁶ Notably, the CJEU did not reject the requirement that regard must be had to the ‘legal and economic context’ within an object assessment.¹⁸⁷

What is so fascinating about the GC’s judgment is that, despite its general reception as anomalous, within the context of much of the Court of Justice’s case law the GC’s reasoning is not unusual. The court also proffered an interesting way of describing the analysis of object stating that, it “may be abridged when the clauses of the agreement reveal in themselves the existence of an alteration of competition...[though] must on the other hand, be supplemented, depending on the requirements of the case, where that is not so”.¹⁸⁸

The relevance of the ability to undertake an abridged analysis of object is also underlined by the judgment in *Consten & Grundig*. The GC found in *GSK* that the Court of Justice in *Consten & Grundig* never held that an agreement intended to limit parallel trade must be considered ‘by its nature’ (which, for the first time, is defined as “independently of any competitive analysis”) to have as its object the

¹⁸⁵ *Ibid*, para 117.

¹⁸⁶ *Ibid*, para 119. See C-501/06 P *GlaxoSmithKline Services Unlimited v Commission (GSK)* [2009] ECR I-9291, paras 63-64. Lasok QC considers that proof of the anticompetitive nature of an agreement generates a rebuttable presumption of consumer detriment: (Lasok QC, 2008).

¹⁸⁷ *Ibid* C-501/06 P *GSK*, para 58.

¹⁸⁸ *Supra* n73, *GSK*, para 119. This is also in line with the judgment in *Volkswagen supra* n170, para 230.

restriction of competition.¹⁸⁹ The GC stated that the Court of Justice in *Consten & Grundig* carried out an analysis of the agreement that was “abridged but real”.¹⁹⁰ The GC makes clear that it is not enough to presume that certain agreements automatically restrict competition, though it alludes to the fact there is a rebuttable presumption of harm.¹⁹¹ Instead, an evaluation of the terms of the agreement, within its legal and economic context, is required to determine if the object is indeed to restrict competition. The GC also gave the Commission short shrift for merely drawing parallels with its previous decisional practice as the basis upon which it found the agreement restrictive by object.¹⁹² Doing so ignores the elements of a legal and economic context, “which are not present in the decisions adopted pursuant to Article [101](1) to which the Commission referred”.¹⁹³

The GC also carried out an analysis of the main characteristics of the legal and economic context by examining how the medicines were priced and noting the significant price differentials between Member States due to the lack of harmonisation.¹⁹⁴ The Commission is even criticised by the GC for not examining the “specific and essential characteristic of the sector, which would show that medical products are significantly shielded from the free play of supply and demand unlike the prices of other consumer goods”. This means that it cannot be that presumed parallel trade has an impact on the prices charged to the final consumer.¹⁹⁵ The examination of the legal and economic context undertaken by the GC of clause 4 does not therefore reveal *in itself* that competition is restricted.¹⁹⁶

As a result, the GC found that it could not uphold the Commission’s decision that clause 4 of the general sales conditions constituted an infringement of Article

¹⁸⁹ *Ibid*, para 120. It has been generally considered that *Consten & Grundig* is authority for the contention that agreements limiting parallel trade are automatically restrictive by object.

¹⁹⁰ *Ibid*, para 120.

¹⁹¹ *Ibid*, paras 116-122.

¹⁹² *Ibid* para 138.

¹⁹³ *Ibid* para 138.

¹⁹⁴ *Ibid*, paras 124 to 136.

¹⁹⁵ *Ibid*, para 133 to 134.

¹⁹⁶ *Ibid*, para 136.

101(1) by reason of its object.¹⁹⁷ It held that due to the nature of the pharmaceutical market it cannot be taken for granted at the outset that parallel trade tends to reduce prices and therefore increase the welfare of final consumers. The GC does, however, add a caveat to its judgment. It states that this is a “largely unprecedented situation”.¹⁹⁸ Thus most agreements intending to restrict parallel trade are likely still to be found to have the object of restricting competition.

Ultimately, the GC’s judgment in *GSK* takes the principles set out in the *STM* Test and confirms the assessment that should be undertaken when determining the object of an agreement. It emphasises the application of the legal and economic context, the importance of uncovering the *purpose* of the agreement and assessing each case on its merits. The judgment is a salutary reminder that past precedent alone cannot condemn an agreement as restrictive by object.

Whether the GC was correct to hold that the agreement did not restrict competition by object is moot. Rather, the significance of the judgment is that it legitimately questions the orthodox approach and as such the position taken by the Commission in its Article 81(3) Guidelines. Certainly, the GC went out of its way to hold that the agreement did not restrict competition by virtue of its object, despite agreeing with the Commission that the agreement had the effect of restricting competition. This alone stresses the importance of the distinction between object and effect.

4.3. Conclusion: case law of the General Court

The four GC judgments discussed above clearly illustrate the GC’s divergent approach to object cases. The GC veers between applying the more analytical and the orthodox approaches, the latter of which it has apparently devised on its own accord.¹⁹⁹ The reason behind such diversity is unclear, but the judgments leave it

¹⁹⁷ *Ibid*, para 147.

¹⁹⁸ *Ibid*, para 147.

¹⁹⁹ The MAAP is also reflected in judgments such as Joined Cases T-68/89 etc *Società Italiana Vetro SpA v Commission* [1992] ECR II-01403 and T-29/92 *SPO v Commission* [1995] ECR II-289. In *SPO* the GC held that when applying Article 101, the reason for defining the market is to determine whether

unsurprising that the object criterion is subject to so much confusion and misunderstanding. These cases also raise some interesting issues. These relate, *inter alia*, to the role of legal presumptions, the significance of the requirement that concrete effects do not need to be demonstrated (and as such the distinction between object and effect) as well as the categorisation of ‘obvious’ restrictions. The judgments in *Tréfilunion* and *ENS*, in particular, are anomalous and their legal basis precarious. Hence, the emphasis placed on these cases is questionable given their lack of credible judicial support.

What this means for the Commission’s approach in its Article 81(3) Guidelines is further cause for concern. Although the Commission does not cite any GC case law in its Article 81(3) Guidelines (aside from an incorrect citation of *Volkswagen* in paragraph 23), it would seem clear from its tenor that *Tréfilunion* and *ENS* are the source of the Commission’s stance.²⁰⁰ Furthermore, it is increasingly clear that the Commission does indeed sympathise with and follow the principles of the more analytical approach.²⁰¹ Where this then leaves the Article 81(3) Guidelines is uncertain. Both the GC and the CJEU, rendered judgments concurrent with the Commission’s drafting of the Article 81(3) Guidelines that follow the more analytical path. Hence, the foundations of the Commission’s stance on the object concept are not obvious. The only sensible answer is that they reflect a policy approach; the Guidelines are certainly not an accurate reflection of the law.

5. Conclusion: Part I

This review of the jurisprudential back-catalogue of the European Courts demonstrates that the CJEU devised an analytical approach to the object criterion, which the GC has largely upheld. The *STM* Test sets out a clear basis upon which to determine an agreement’s object and the judgment has constituted a significant part of the legal landscape since the CJEU’s earliest proclamations on Article 101 TFEU. Furthermore, the case law of both Courts reveals that the MAAP reflects the

the agreement is liable to affect trade and has as its object or effect the restriction of competition: para 74.

²⁰⁰ Demonstrated most prominently in paras 21 and 22 of the Article 81(3) Guidelines.

²⁰¹ See for eg its submissions to the CJEU in *BIDS* (*supra* n3) *infra* n214.

most prominent interpretation of the law on the object concept. Conversely, the orthodox approach enjoys less judicial support and what support it does have is easily challenged. Whether this conclusion still stands in the light of an examination of the CJEU's more recent case law, and the subsequent emergence of the 'hybrid approach' to the object criterion is considered in Part II of this chapter.

Part II: How the European Courts have interpreted the meaning and application of the object criterion under Article 101(1) TFEU: the metamorphosis of the more analytical approach

1. Introduction

Part II of chapter 2 undertakes a more focused examination of the jurisprudence of the CJEU following the judgment of the GC in *GSK*. It investigates how the concept of object has evolved and the degree of influence (if any) that the GC imparts on the CJEU. It will become evident that there is little reliance on the GC's case law. Instead, the most influential case in the evolution of the object concept continues to hark back to the earliest days of the Community's jurisprudence: *Société Technique Minière (STM)*.²⁰² The discord between the jurisprudence and the eminence of the orthodox approach is exemplified by the identification of a third key approach to the object criterion, which emerges more clearly during this period. This is the 'hybrid approach'.

The hybrid approach is a crude amalgamation of the orthodox and more analytical approaches.²⁰³ The case law in Part II therefore confirms a significant finding first revealed in Part I: that the more analytical approach garners greater support in law than the orthodox approach. This queries the origins of the orthodox approach as a legal methodology. The judgments reviewed in Part II continue to emphasise the concern that the Commission fails to distinguish between its preferred policy approach and the law in its Article 81(3) Guidelines.²⁰⁴ It is imprudent simply to dismiss the orthodox approach, however, as it has shaped a key element of the hybrid approach. A more intriguing issue, therefore, is how far the Commission's policy has influenced the CJEU's interpretation of the law in recent years, given the CJEU's increased use of orthodox terminology.

To demonstrate the emergence of the hybrid approach, Part II focuses on three prominent judgments. These drew long overdue attention to the mechanics and

²⁰² *Supra* n2, Case C-56/65 *STM*.

²⁰³ It draws on some of the language of the orthodox approach and the methodology of the analytical approach.

²⁰⁴ Equally, that the Commission does not always follow its own Guidelines.

interpretation of the object concept. More particularly, the judgments signalled a shift in academic debate and a growing consensus that the orthodox approach, adopted by the Commission in its Article 81(3) Guidelines, is too limited and formalistic.²⁰⁵ Hence, these cases are referred to as the ‘Game Changer Cases’.

2. The European Court of Justice: the dawn of the hybrid approach

2.1. The Game Changer Cases

In conjunction with the GC’s judgment in *GSK*, the CJEU’s judgments in *BIDS*, *T-Mobile*, and *GSK* signalled a greater appreciation of the nuances of the object criterion by the academic community. Unlike much previous case law, these cases revolve specifically around the concept of object. Given the specific need in these cases for the CJEU to rule directly on ‘object’, the expectation was that the Court would take the time to clarify the more uncharted and complex areas of this substantive element of Article 101(1) TFEU.²⁰⁶ Some commentators assumed the CJEU would confirm the orthodox approach to object restrictions, in particular, by “rectifying” the General Court’s judgments in *GSK*.²⁰⁷ To a limited extent, this has been the case.²⁰⁸ However, the lasting legacy of these cases is to devise a hybrid approach. In terms of the position adopted in this thesis, the cases reaffirm the significance of the MAAP adopted in *STM*. They also accord a certain legitimacy to the orthodox approach, which consequently continues to linger within the case law.

²⁰⁵ The debate previously centred on the contents of the object category, rather than its application. Note that judgments subsequent to the ones detailed in Part II are examined more appropriately in the ensuing chapters as the function of this Part II is to establish the hybrid approach.

²⁰⁶ In *BIDS* (*supra* n3) the following question was referred: “...for the purposes of application of Article 81(1) EC, to have an appreciable effect on trade between Member States, is such arrangement to be regarded as having as its object, as distinct from effect, the prevention, restriction or distortion of competition within the common market and therefore, incompatible with Article 101(1)?”. In *T-Mobile* (*supra* n2), the question was “...when applying Article 101(1), which criteria must be applied when assessing whether a concerted practice has as its object the...restriction of competition?”.

²⁰⁷ This position was extracted from various comments made at the Vertical Block Exemption conference at UCL in 2009.

²⁰⁸ A case in point is the CJEU’s understanding of the distinction between object and effect: *T-Mobile* (*supra* n2), para 28. Also the CJEU’s judgment in *GlaxoSmithKline* (*supra* n186) would seem to support this position.

Although there was ample scope to conduct a careful assessment of the object criterion, the level of analysis and clarification undertaken by the CJEU was largely disappointing, despite detailed opinions being offered by the AGs. This was compounded by its contradictory handling of the object criterion in so far as the CJEU appeared to be genuinely confused about what the object concept is there to achieve.²⁰⁹ By referencing *STM*, the CJEU demonstrated its recognition of the analytical approach to object cases, but then used language which seemingly endorsed and gave legitimacy to the orthodox approach.²¹⁰ This uneasy tug of war between the two key approaches to restrictions by object underlines the importance of uncovering the fundamental essence and constituent elements that form the object concept.

2.1.1. *BIDS*

On 4 September 2008, AG Trstenjak handed down a comprehensive and compelling opinion in *Beef Industry Development Society Ltd (BIDS)*.²¹¹ The opinion superbly demonstrates the complexities, inconsistencies and confusion surrounding the concept of object in contrast to the simplicity of the orthodox approach, which is why it is recounted in some detail. The Supreme Court in Ireland made a preliminary reference to the CJEU and asked the Court to interpret the “notion of restriction of competition by object”.²¹² *BIDS* is an important case as it does not concern a classic ‘object box’ restriction, but rather a number of what are more typically seen as restrictions by effect, such as non-compete clauses and other restrictions on the parties’ freedom to act.²¹³

²⁰⁹ This is evidenced by the way the CJEU describes how object should be applied to agreements versus the reasoning it provides for the distinction between object and effect (see below). This correlates with the question of what competition law is there to protect or achieve.

²¹⁰ See *BIDS*, para 17 (*supra* n3).

²¹¹ *BIDS* (*supra* n3). The case concerned the Irish beef processing industry, whereby the processors wished to reduce the overcapacity in the Irish processing industry through agreements developed by BIDS (whose members produce about 93% of the beef sold in Ireland). BIDS was set up to implement a market study commissioned by the Irish government. Paras 23 to 33 of AG Trstenjak’s opinion give a flavour of the different opinions on how object should be interpreted.

²¹² *Ibid*, para 1 of the opinion. Preliminary references are important as the CJEU must give its interpretation of the law.

²¹³ See eg *Wouters* (*supra* n119).

The opinion highlights that the assessment criteria put forward by the Commission in its Article 81(3) Guidelines are deficient.²¹⁴ The permeation of the orthodox approach throughout the various Member States is evident at the outset of the case. When the Irish Competition Authority challenged the legality of the agreements devised by BIDS to reduce the over-capacity in the Irish processing industry, the Irish High Court held that the agreements did not fall under Article 101(1) TFEU because the agreements did not have as their object the restriction of competition as the agreements were “not aimed at fixing prices, sharing customers, or limiting production for the purposes of Article 101(1)(a) to (c) TFEU”.²¹⁵

In stark contrast, AG Trstenjak advocated an analytical and economic approach to assessing object cases.²¹⁶ She confirmed that in order to assess whether an agreement has as its object the restriction of competition, “regard must be had to the content of the agreement in the light of its legal and economic context”.²¹⁷ If the object of an agreement is to restrict competition, then it is irrelevant whether “it actually has as its effect the restriction of competition”.²¹⁸

Turning to the meaning and purpose of restrictions of competition by object, she referred to the “anti-competitive aim or tendency of an agreement”.²¹⁹ This is found “in particular” where the “necessary consequence” of the agreement is the restriction of competition, and “in principle” the parties may not argue they did not intend any restriction or that the agreement pursued a different aim.²²⁰ Significantly, the AG did not define what she meant by ‘necessary consequence’ though she used

²¹⁴ Despite the wording of the Article 81(3) Guidelines, this can be contrasted with the Commission’s own submissions in the case. It agreed in paragraph 23 of the opinion that “in examining whether there is a restriction of competition by object, regard must be had not only to the content of the agreement, but also to the *legal and economic context*” [emphasis added]. It also found that the concept of restriction of competition by object is not limited to hardcore restrictions, but also encompasses agreements which have a “legitimate objective” and that restrictions do not need to be “obvious”.

²¹⁵ *BIDS (supra n3)*, para 16 of the opinion.

²¹⁶ *Ibid*, paras 62 onwards.

²¹⁷ *Ibid*, para 43.

²¹⁸ *Ibid*, para 37.

²¹⁹ *Ibid*, para 44.

²²⁰ *Ibid*, para 44.

Miller as a case citation.²²¹ The choice of wording suggests that the AG recognised that the object criterion relates to the aim of the agreement. Such aim usually, but not exclusively, relates to situations where the anticompetitive effects of certain types of agreement are known. She also recognised that it is not a defence for parties to contend they did not intentionally infringe the rules. Moreover, the AG made an interesting analogy: she suggested that object is designed as a form of inchoate offence and that regard is to be had *not* solely to the necessary consequences of an agreement.²²² Therefore, the parties to the agreement do not need to put into practice their restrictive actions in order to infringe Article 101(1) TFEU by object.

As a result, the AG considered that “it is clear that the category of restrictions of competition by object cannot be reduced to agreements which obviously restrict competition”.²²³ Likewise, there is no exhaustive list of object restrictions. Object is not limited to restrictions of competition covered in Article 101(1)(a) to (c) TFEU and is not reduced to price-fixing, market sharing or control of outlets.²²⁴ Merely because the Community Courts have considered hardcore restrictions in many object cases “does not mean that agreements with another purpose cannot [also] have as their object the restriction of competition”.²²⁵ This was one of the first times that the categorisation of the object criterion was so obviously rejected.

In order to examine whether an agreement has as its object the restriction of competition:

“First of all it must be considered whether such agreements have restrictions of competition as their necessary consequence or are aimed at limiting the freedom of the parties to determine their

²²¹ The problems with the judgment in *Miller* (*supra* n88) were described in section 2.2 of Part I.

²²² *BIDS* (*supra* n3), para 46. According to the Crown Prosecution Service inchoate offences are those where a substantive offence may not have come to completion, but nevertheless an offence has been committed because of actions or agreements in preparation for the substantive offence.

²²³ *Ibid*, para 47.

²²⁴ *Ibid*, paras 48 and 49.

²²⁵ *Ibid*, para 49. The AG also criticised Whish, to an extent, by finding his interpretation of object was “very restrictive” (and stated she considered it doubtful whether a category of restrictions of competition exist *per se*). She stated her position more firmly in her opinion in *GSK*, (*supra* n186) paras 108 and 109.

policy on the market independently and thereby at affecting market conditions. Subsequently it must be examined as part of an overall assessment whether the restrictive elements are necessary in order to achieve a pro-competitive object or a primary objective which does not come under the fundamental prohibition contained in Article 101(1).”²²⁶

At the time, this was seen as an extraordinary statement. The case law review shows, however, that AG’s Trstenjak’s interpretation of the law is not without merit. Moreover, her opinion highlighted the limited role assigned to the object criterion by the Commission in its Article 81(3) Guidelines. The value of the legal context, which includes past precedent and thus its necessary effect, is not conclusive when determining an agreement’s object in accordance with its actual legal *and* economic context.²²⁷

2.1.1.1. *The judgment*

The judgment in *BIDS* is significant, as it cited *STM* as authority for the proposition that first the precise purpose of an agreement must be considered within its economic context and should “an analysis of the clauses” not reveal the “effect on competition to be sufficiently deleterious, its consequences should then be considered”.²²⁸ It thus reinforced the need for the object of an agreement to be determined within its economic context.²²⁹ To that end, the CJEU found that based on the contents of the agreement within its economic context, the essence of the object criterion goes to determining “the objectives which [the agreement] is intended to attain”.²³⁰ Therefore, finding that the parties lacked the subjective intention to restrict competition or indeed intended to remedy, in this case, the failing Irish Beef industry, may be irrelevant if the contents of the agreement within

²²⁶ *Ibid BIDS*, para 60. The AG is possibly drawing on the AG’s opinion in *Gøttrup Klim*.

²²⁷ *Ibid*, in para 104 the AG states that the content of an agreement must always be examined against the background of its legal and economic context. Comparing agreements is not always the correct approach and may fail to address the question of when a restriction by object exists.

²²⁸ *BIDS*, judgment (*supra* n3), para 15.

²²⁹ *Ibid*, paras 15-16.

²³⁰ *Ibid*, para 21.

its legal and economic context establishes a restrictive object.²³¹ Repeating the understanding handed down in *General Motors*, the CJEU held that “an agreement *may* be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives. It is only in connection with Article 81(3) EC that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article 81(1) EC”.²³²

The CJEU found that as the agreements did not allow each undertaking to determine independently the policy which it intended to adopt on the common market, the agreements had the object of restricting competition.²³³ In reaching this conclusion, however, the CJEU took account not only of the structure of the market and the position of the parties on it, but also the potential effects of the BIDS arrangements.²³⁴ For instance, the CJEU considered that as “the investment necessary for the construction of a new processing plant is much greater than the costs of taking over an existing plant, those restrictions are obviously intended to dissuade any new entry of competitors throughout the island of Ireland”.²³⁵

One of the most striking elements of the judgment is the CJEU’s interpretation of the distinction between object and effect, which despite AG Trstenjak’s opinion, it decided to describe in its own terms. This was said to arise “from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”.²³⁶ This contrasts with the view of the AG who argued that the aim of an agreement usually,

²³¹ *Ibid BIDS*, para 21. Also paras 22-40. The parties argued the aim was to improve the overall profitability of undertakings supplying more than 90% of the beef/veal processing services on the Irish market (note that the market was defined for this purpose, para 32).

²³² *Ibid*, para 21 (emphasis added); *General Motors* (*supra* n125), para 64 and the case-law cited.

²³³ *Ibid BIDS*, paras 34 and 36. According to the CJEU, this confirms long established case law such as C-96/82 *IAZ/Anseau* and C-235/92 P *Montecatini v Commission* (*supra* n61 and n133). The judgment in *BIDS* also confirms that it is irrelevant that the parties did not intend to restrict competition (para 21).

²³⁴ *Ibid BIDS*, in particular paras 29-38.

²³⁵ *Ibid*, para 38.

²³⁶ *Ibid*, para 17. The CJEU does not clarify what any of the elements of this statement mean, such as “normal competition”.

but not exclusively, relates to situations where the anticompetitive effects of a certain type of agreement are known.²³⁷ The CJEU did disagree, however, with BIDS' submission that:

“...the concept of infringement by object should be interpreted narrowly. Only agreements as to horizontal price-fixing, or to limit output or share markets, agreements whose anti-competitive effects are so obvious as not to require an economic analysis come within that category.”²³⁸

Instead, it held that the types of agreements covered by Article 101(1)(a) to (e) TFEU do not form an exhaustive list of prohibited collusion.²³⁹ The inherent contradiction, though, between the CJEU's depiction of the distinction between object and effect and its rejection of the submission that object should be interpreted narrowly is ultimately unhelpful and simply fuels speculation. The Court's failure to provide judicial support for its understanding of the object/effect dichotomy means that it is impossible to say definitively how the dichotomy should be interpreted, particularly as the judgment emphasises the importance of *STM*.²⁴⁰

2.1.2. *T-Mobile*

For the purposes of this chapter, the significance of *T-Mobile* is that the Court concludes that *STM*, is to be treated as the leading case when assessing an agreement to determine its object.²⁴¹ Again, the CJEU finds that “since *STM*, it has been *settled case law* and it is necessary first to consider the precise purpose of the concerted practice, in the economic context in which it is to be pursued”.²⁴² Where “an analysis of the terms of the concerted practice does not reveal the *effect* on competition to be *sufficiently deleterious*, its *consequences* should then be

²³⁷ *Ibid*, opinion, paras 44, 46. Also see para 104 where AG Trstenjak warns against the comparison of agreements.

²³⁸ *Ibid*, *BIDS* judgment, para 22.

²³⁹ *Ibid*, para 23 confirming the AG's opinion.

²⁴⁰ These issues will be considered in the ensuing chapters.

²⁴¹ *Supra* n2 *T-Mobile*, para 28; also *GSK* (*supra* n186), para 55. This reinforces the judgment in *BIDS*.

²⁴² *Ibid*, *T-Mobile*, para 28 (emphasis added). See also para 27 (referring to *IAZ/Anseau* para 25 and *BIDS* paras 16 and 21): when assessing a concerted practice, the CJEU reaffirmed that “close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context”.

considered and, for it to be caught by the prohibition, it is necessary to find that those factors are present which establish that competition has *in fact* been...restricted...to an appreciable extent”.²⁴³ Therefore, there is “no need to take into account the *actual* effects once it is apparent that its object is to...restrict competition within the common market”.²⁴⁴

Notwithstanding the clear endorsement of the judgment in *STM* as a case that informs the application of the object criterion, the CJEU again chooses to express the distinction between object and effect in the same terms as in *BIDS*.²⁴⁵ The CJEU thereby reinforced the statement’s significance. As highlighted above, the statement is confusing. *STM* suggests that there are no absolute presumptions about the anti-competitiveness of any agreements. Therefore, theoretically, object is not limited to hardcore or obvious restrictions of competition. It is thus in one sense contradictory for the CJEU to refer to “certain forms of collusion...by their nature...being injurious to the proper functioning of competition”.

One explanation for the CJEU’s reasoning is that it is actually referring to the fact that object is distinguished from effect, because it does not require the actual or concrete effects of an agreement to be determined. The rationale for this is that it is known that certain restrictions have a high potential for negative effects on competition due to experience gleaned over the years. Therefore, such restrictions automatically restrict competition regardless of their actual effects. They are injurious by their very nature. Conversely, it could be argued that concrete effects do not need to be demonstrated, because if an agreement has the aim or purpose of restricting competition that in itself is sufficient to infringe Article 101(1) TFEU.

²⁴³ *Ibid*, *T-Mobile* para 28. However, the CJEU used *BIDS* para 15 as its citation as opposed to *STM*.

²⁴⁴ *Ibid*, para 29. The CJEU cites *Consten & Grundig* para 342; C-105/04 P *Nederlandse Federatieve Vereniging* [2006] ECR I-08725, para 125; *BIDS* para 16.

²⁴⁵ *Ibid*, *T-Mobile* para 29. The CJEU cites *BIDS* as the authority, which itself cites no authority for the proposition.

This is a complex issue and therefore the merits of these arguments will be pursued in subsequent chapters.²⁴⁶

In *T-Mobile*, the CJEU found that for a concerted practice to have the object of restricting competition, it is sufficient that it has the “*potential* to have a negative impact on competition”. That is, “the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the...restriction of competition within the common market.”²⁴⁷ Not that it must restrict competition. This propensity to affect competition is a condition which must be satisfied under the object criterion.²⁴⁸ The statement in *T-Mobile* is arguably a derivative of the principal first established in *STM*: that if the effect on competition is not “sufficiently deleterious” then the actual consequences of the agreement require determination and that an agreement does not need to be successful.²⁴⁹ In *T-Mobile*, the Court held that if it is found that such anticompetitive effects do result from the agreement, then the actual effects are only relevant when determining the amount of any fine and assessing any claim for damages.²⁵⁰ The implication of this finding is controversial. Some commentators interpreted the judgment in *T-Mobile* as implying that standard of proof was reduced further for restrictions by object.²⁵¹ Such a conclusion is not, however, necessarily implicit as can be seen in more recent CJEU judgments.²⁵²

More particularly, the case concerned a horizontal exchange of information and the CJEU held that an exchange of information which is *capable* of removing uncertainties between participants of a concerted practice regarding the “timing,

²⁴⁶ For the first time the CJEU seemingly elucidated on this very issue in *Cartes Bancaires* (*supra* n97), where it favoured the rationale of the necessary effect of certain types of agreement, para 51. However, the judgment requires careful consideration.

²⁴⁷ *Supra* n2, *T-Mobile*, para 31.

²⁴⁸ Hence the importance of a contextual analysis. Though the agreement does not need to be successful, as held in *Miller* (*supra* n88), *General Motors* (*supra* n125) and *Sandoz* (*supra* n76). Issues such as the neutrality of an agreement or that an agreement is incapable of effecting competition (because it is *de minimis*) and hence the significance of market power are considered in chapters 4 and 5.

²⁴⁹ *Supra* n2, *STM*, p249.

²⁵⁰ *Supra* n2, *T-Mobile*, para 31.

²⁵¹ As noted at the BIICL conference on ‘Object/Effect’ held on 6 October 2010.

²⁵² See *Cartes Bancaires* (*supra* n97).

extent and details of the modifications to be adopted by the undertaking concerned” will have an anti-competitive object.²⁵³ Nevertheless, in its assessment the CJEU made reference to the nature of the products, the size and number of undertakings involved and the volume of that market.²⁵⁴ The judgment therefore confirms the emergence of the hybrid approach as, despite upholding a number of key principles established in earlier case law supporting the MAAP, it references the *BIDS* object/effect distinction. The implications of this are investigated in the following chapters.

2.1.3. *GlaxoSmithKline*

The final case reported in this section is the CJEU’s judgment in *GSK*.²⁵⁵ In light of the GC’s controversial judgment, this judgment was highly anticipated. Disappointingly, the CJEU did not rise to the challenge of rigorously examining the GC’s analysis of object.²⁵⁶ Instead, it would appear that the CJEU’s main objective was to reject, with strong evidential support, the GC’s proposition that proving an “agreement entails disadvantages for final consumers being a prerequisite for a finding of object”.²⁵⁷ Furthermore, the judgment substantiates the place of the hybrid approach alongside the orthodox approach and the MAAP.

The pre-eminence of *STM* as the leading case on determining restrictions by object is referred to as “settled case-law”.²⁵⁸ The CJEU reverts, however, to language more suited to the orthodox approach (as it did in *BIDS* and *T-Mobile*). The CJEU refers to how the “anti-competitive *nature*” of an agreement should be assessed, but then reiterates the *STM* Test.²⁵⁹ More intriguingly given that GlaxoSmithKline

²⁵³ *Supra* n2, *T-Mobile*, para 41.

²⁵⁴ *Ibid*, para 33.

²⁵⁵ *Supra* n186, *GSK*.

²⁵⁶ The CJEU had a wide remit in which to assess restrictions by object as it was examining whether the General Court committed an error of law in its assessment of the anti-competitive object of the agreement. Para 57 of the judgment demonstrates that the CJEU’s purpose is to ascertain if the GC’s assessment of object is “in accordance with the principles extracted from the relevant case-law”. This also highlights why the case law analysis within this chapter is so crucial in understanding the concept of object versus the Commission’s approach to object cases.

²⁵⁷ *Supra* n186, *GSK*, para 64.

²⁵⁸ *Ibid*, para 55. Note that the CJEU also refers to the “aim” of the agreement in para 59.

²⁵⁹ *Ibid*, para 58.

admitted it had the intention of deterring parallel imports, it is significant that this factor alone was deemed insufficient to determine the object of the agreement. Instead the CJEU recounted the well-known principal that the parties' subjective intention is not a necessary factor in the objective assessment of an agreement's object, but can be taken into account.

When reflecting on the issue of parallel trade, the Court is unclear on the question of whether there is a rebuttable (or irrebuttable) presumption that agreements aiming to restrict parallel trade have the object of preventing competition. This is because of a lack of consistency in the CJEU's turn of phrase.²⁶⁰ Instead it finds, correctly, that the GC committed an error of law as "requiring *proof* that the agreement entails disadvantages for final consumers as a prerequisite for a finding of anti-competitive object".²⁶¹ The CJEU takes this a step further, however, by finding that the GC also committed an error in law as it did not find that the agreement had the object of restricting competition.²⁶² Other than a reliance on the fact that the Court has "on a number of occasions" held that an agreement aimed at limiting parallel trade is a restriction of competition by object, this statement of the CJEU is fairly weak in light of its historical case law which has not always supported such a contention.²⁶³ Nevertheless, it is notable that the CJEU does not overturn the GC's references to *STM* and hence the MAAP.

The judgment thus upholds the hybrid approach as it endorses the categorisation of the object criterion as per the orthodox approach, but approves the methodology postulated under the more analytical approach in view of its references to *STM*. Unhelpfully, the CJEU chooses not to examine the concept of necessary effect, nor the reason for the distinction between object and effect or the role of the object criterion under Article 101(1) TFEU. Instead, the judgment leaves the impression

²⁶⁰ For instance, despite confirming the importance of *STM*, in paragraph 60 of the judgment, the Court states that agreements "aimed" at prohibiting or limiting parallel trade have "*in principle*" as their object the restriction of competition. The Court then muddies this statement by asserting "*that principle*, according to which an agreement aimed at limiting parallel trade is a restriction of competition by object".

²⁶¹ *Ibid*, para 64.

²⁶² *Ibid*, para 64.

²⁶³ *Ibid*, para 61. See eg, *Louis Erauw (supra n69)*.

that the CJEU wanted swiftly to end speculation over the consumer detriment aspect of the GC's judgment, and thus glossed over more pertinent issues.

2.2. Conclusion: the Game Changer Cases

Even though the Game Changer Cases reflect a relatively brief period of the CJEU's jurisprudence,²⁶⁴ they ignited an important debate regarding the assessment and function of the object criterion. They do not, however, signal a ringing endorsement of the orthodox approach advocated within the Article 81(3) Guidelines, nor do they blur the lines between restrictions by object and by effect. Rather, they confirm an aspect of the CJEU's jurisprudence that had been largely overlooked: that of the more analytical approach. Following the case law review in Part I, the judgment in *STM* is seen to continue to influence the CJEU to a greater degree than, for instance, the GC's judgment in *ENS*. However, the Game Changer Cases did initiate a key development in the evolution of the MAAP. This was by formalising a third approach to the object criterion, the hybrid approach.²⁶⁵

The hybrid approach emerged as all three judgments found that the methodology applied to determine if an agreement is restrictive by object did not depart dramatically from the original *STM* Test, but despite this acknowledgment, the distinction between object and effect was presented in orthodox terms. Hence the language of the orthodox approach, through the use of phrases such as 'by its very nature', was revitalised. The concern with the hybrid approach stems from the fact the CJEU did not explain, at this juncture, its rationale for such description of the dichotomy. Furthermore, this blend of the orthodox and more analytical approaches appears contradictory if the application of the legal and economic context is taken seriously. The judgment in *BIDS*, in particular, exposes this paradoxical approach when the CJEU recognises the limitations of an exhaustive category of agreements.

²⁶⁴ The CJEU's judgment in *BIDS* was rendered on 20 November 2008, *T-Mobile* on 4 June 2009 and *GSK* on 6 October 2009.

²⁶⁵ See also AG Kokott in *T-Mobile* and AG Trstenjak's subsequent opinion in *GSK*. See chapter 4 for a more in-depth discussion of the scholarly commentary on this issue.

Therefore it must be surmised that the hybrid approach is more fluid than the orthodox approach. In particular, any categorisation of agreements automatically seen to restrict competition by object must be deemed a rebuttable presumption under Article 101(1) TFEU owing to the analysis of the ‘legal and economic context’ required under *STM*. Notably, the AGs in these cases were better orientated towards providing more detailed elucidations of the more complex characteristics of the object criterion.

The fact the CJEU overturned the GC’s judgment in *GSK* in the respect that it held the agreement was indeed restrictive by object is not of great concern, as the more important factor is how the CJEU recounted the application of the law. It upheld the requirement that an agreement’s legal and economic context plays the central role when determining its object and, upon its own application, decided that the GC was wrong. Such a requirement had been overshadowed by the Article 81(3) Guidelines, which do not reference the legal and economic context determinatively. More recent case law continues to uphold the hybrid approach, which also highlights the unsatisfactory nature of the Article 81(3) Guidelines, particularly as the Commission tends to follow the hybrid approach in its decisional practice as opposed to its own Article 81(3) Guidelines.²⁶⁶

3. Overall conclusion: Parts I and II

The purpose of this chapter was to scrutinise how the meaning and application of restrictions by object had been applied to agreements by the European Courts. Such an analysis of the case law would thereby allow the testing of the accuracy of the orthodox approach as portrayed under the Article 81(3) Guidelines. To this end, a comprehensive review of the case law emanating from both the CJEU and GC was undertaken.

What materialised from this review is that the Courts have approached object in two key ways, though a third hybrid approach has evolved as an amalgamation of

²⁶⁶ This case law is therefore investigated further in the next chapters. The evolution of the Commission’s approach to the object criterion was mapped out in chapter 1. The Commission has veered between applying the orthodox approach and the hybrid approach.

the two.²⁶⁷ One method is based on categorising those agreements that “by their very nature” restrict competition. This approach has had the greatest influence on the orthodox approach, which is reflected in the Commission’s Article 81(3) Guidelines. The other key method identified from the case law was the more analytical approach, based on the seminal case of *STM*. One of the most striking aspects of this review was that the more analytical approach has greater judicial support. The language of the orthodox approach has been found to permeate the case law, however, particularly more recently through the development of the hybrid approach. This is confusing.

The key differentiation is that the objective of the assessment of an agreement’s object is different under the three approaches. The orthodox approach prescribes that a narrow category of agreements (which are usually ‘hardcore’, ‘serious’ or ‘obvious’) are presumed to automatically restrict competition by object.²⁶⁸ If it is proved that the agreement contains such a restriction, then the agreement has the object of restricting competition. This is deemed an irrebuttable presumption under Article 101(1) TFEU.²⁶⁹

On the other hand, the more analytical approach is ‘free’ insofar as there are no preconceptions about the anti-competitiveness of an agreement. Instead, the focus is on establishing whether the aim or purpose of the agreement is to *restrict competition*. To ascertain that purpose an assessment of the specific ‘legal and economic context’ in accordance with the *STM* Test is required. As such, the process is flexible and the case law demonstrates that the level of economic analysis depends on the facts of the case and its particular context. There are no absolute presumptions as to the anti-competitiveness of an agreement from the outset. Therefore, potentially any restriction of competition could be a restriction

²⁶⁷ Arguably AG Trstenjak advanced a similar argument in her opinion in *GSK* (*supra* n186), where she refers to the “standardised approach” and an alternative approach required to assess whether there is a “sufficiently deleterious effect on competition” for those agreements that do not come within the standardised approach: paras 91-92.

²⁶⁸ Though the Commission reserves itself the ability to extend the object category, Article 81(3) Guidelines, para 23.

²⁶⁹ (Whish, 2009), pp117-118.

by object. As such, categorisation does not exist. Under this more analytical method, in theory, agreements that could be seen to contain hardcore restrictions of competition may be excused under the object heading or even come outside Article 101(1) TFEU as a whole.²⁷⁰ Conversely, those agreements that do not contain hardcore restrictions could be held to have an anti-competitive object. The case law of the CJEU and GC upholds this interpretation: there are ample examples where *prima facie* hardcore restrictions of competition have not been held to be restrictive by object and,²⁷¹ conversely, agreements which do not contain obvious or hardcore restrictions have been found to restrict competition by object.²⁷²

Despite the delineation between these approaches, the case law also reveals that the object criterion's role under Article 101(1) TFEU is ambiguous. This lack of clarity is also demonstrated by the fact that the most consistent message from the Community Courts is that *STM* provides the legal foundation for the application of the object element. Hence how the MAAP, as advocated in *STM*, relates to the orthodox approach requires further investigation. The case law also demonstrates that the object concept encompasses a number of subtleties and complexities.²⁷³ For instance, indirect restrictions can be anticompetitive by object. Conversely, an assessment of an agreement's object can consider its pro-competitive aspects or whether it pursues a legitimate goal or has an objective justification. As such, the use of the object criterion as a legal tool to determine whether an agreement restricts competition has a far greater function than that allocated to it by Commission in its Article 81(3) Guidelines. The categorisation of the object criterion under the orthodox approach has meant its assessment under Article 101(1) TFEU has been confused, unclear and over-simplified.

What can be said with certainty is that the Commission's approach to restrictions by object in its Article 81(3) Guidelines is an extremely limited exposition of the

²⁷⁰ Of course, having established that an agreement does not have the object of restricting competition it may still be found to have that effect (unless the agreement is not appreciable).

²⁷¹ See eg, various ATP cases such as *Louis Erauw* (*supra* n69), *GSK* (GC judgment, *supra* n73).

²⁷² See eg, *BIDS* (*supra* n3).

²⁷³ Such as the issue of showing the positive benefits of an agreement (*Asnef Equifax*, *supra* n72) contrasted against the legitimate objective of an agreement (*BIDS*, *supra* n3).

correct position in law.²⁷⁴ Within the Article 81(3) Guidelines, the Commission has failed to highlight that the assessment of object should be undertaken within the legal and economic context. Furthermore, it neglected a significant portion of the case law, particularly that emanating from the CJEU.²⁷⁵ Instead, the Commission has embarked on a redefinition of the case law without alluding to the volume of jurisprudence supporting an alternative approach to restrictions by object. This meant that the more complex nature of the object criterion was largely ignored. Identifying restrictions of competition by object is not as straightforward as the orthodox approach suggests and thus the Commission belies the technical difficulty in establishing whether an agreement is anticompetitive by object for those less obvious cases. Therefore, the orthodox approach is unable to explain the anomalous case law where agreements that would be condemned under the orthodox approach are found not to restrict competition by object and vice versa. The MAAP is able to explain such anomalies by reference to the agreements' context and the objective aim to restrict competition.

The detail in which this chapter recounts the law is justified as it has sought to prove overwhelmingly that the orthodox approach is not fully reflective of the case law. In order to provide a platform from which to examine the impact this assessment of object has on Article 101 TFEU as a whole, the following chapters will conduct a deeper investigation into the various characteristics of the object criterion identified in this chapter. Given the prominence of the MAAP within the jurisprudence of the Community Courts, chapters 3 and 4 will focus more closely on explaining what the object concept means under than approach. To this end, more recent case law of the European Courts is drawn upon to further demonstrate how the object criterion has evolved and ascertain whether the hybrid approach now informs how the European Courts, and indeed the Commission, applies the object criterion.

²⁷⁴ An intriguing question is the degree of influence imparted by the Commission on the European Courts following the publication of the Article 81(3) Guidelines, particularly as the hybrid approach is far more prominent post the entry into force of the Guidelines.

²⁷⁵ Note para 7 of the Article 81(3) Guidelines, which states that the guidelines outline the current state of the case law of the Court of Justice. Moreover, the Article 81(3) Guidelines would have been drafted prior to the case of *BIDS*: see Part I.

Chapter 3: Identifying the concept of object

1. Introduction

The following two chapters are both designed to probe the features comprising the legal structure of the object criterion, identified in chapter 2, in greater depth. This exercise enables a comprehensive legal account of the true meaning, application and role of the object criterion to be drawn. Having restated the case law,¹ chapter 3 has two main tasks. First, it identifies the core principles of the object criterion that are a common thread in each of the orthodox, more analytical and hybrid approaches. These key themes are consistently upheld by the Community Courts and are applicable irrespective of which approach is followed. Secondly, it examines whether it is possible to elicit a clear definition of the object concept from the case law.

2. Universal legal principles of the object criterion

It is possible to elicit from the case law a number legal principles or rules relating to the object criterion. These principles, as general statements, are rarely disputed by either the European Courts or in academic texts. They are universally applied no matter how the Courts scrutinise the object of an agreement. The devil, however, is in the detail, which gives rise to a great deal of contention as regards the precise interpretation of these core principles.

2.1. 'Object' and 'effect' are distinct concepts

The European Courts have consistently reiterated the basic principle that an agreement falls within the prohibition under Article 101(1) TFEU when it has as its 'object *or* effect' the prevention, restriction or distortion of competition.² Therefore, whether an agreement restricts competition under Article 101(1) TFEU

¹ See chapter 2.

² See Joined Cases C-403 & 429/08, *Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd*, [2011] ECR I- 9083 (FA), para 135 and Case C-56/65 *Société Technique Minière V Maschinenbau Ulm* [1966] ECR 235, (STM) para 249.

can be as a result of either its object or its effect and hence both elements do not need to be proven. Consequently, object and effect are not cumulative concepts, which need to be applied together, but disjunctive ones.³

2.2. Object does not require the concrete effects of an agreement to be examined

Closely interwoven with the principle that object and effect are distinct and not cumulative concepts, is the principle that the concrete effects of an agreement do not need to be proven under the object criterion.⁴ The General Court described this when stating that “it is not necessary to show actual anticompetitive effects where the anticompetitive object of the conduct is proved”.⁵ As discussed previously, this principle is consistently upheld by the Community Courts. Object is therefore an incredibly powerful tool: determining the actual effects of an agreement demands a higher and thus more intensive and costly level of economic analysis.⁶

The ‘no actual effects’ rule has been the source of much of the confusion and misinterpretation surrounding the object criterion. It has often been construed to mean that any form of effects assessment is superfluous and has no place in determining the object of an agreement. This misunderstanding has sometimes been exacerbated by the Courts handling of this principle. The use of the words ‘actual’ or ‘concrete’ have often been omitted when setting out the principal in judgments despite the reference to cases such as *STM*. For instance, in *Pierre Fabre* the Court omits to use the words ‘actual’ or ‘concrete’ effects and cites *GSK* as its

³ Confirmed in Case C-219/95P *Ferrière Nord v Commission* [1997] ECR I-4411, “it is not necessary that an agreement should have both an anti-competitive object and an anti-competitive effect”, para 6; (Bellamy & Child, 2008), para 2.096. See also (Whish, 2009), p118.

⁴ *STM* (supra n2) and *Joined Cases 56 & 58/64, Etablissements Consten SA and Grundigverkaufs-GmbH v Commission*, [1966] ECR 342 (*Consten & Grundig*).

⁵ T-62/98 *Volkswagen AG v Commission* [2000] ECR II 2707, para 178.

⁶ See (Bennett & Collins, 2010).

authority.⁷ *GSK* does not use the words either, but cites *T-Mobile*, which then does use the word 'actual'.⁸

The omission of one vital word has had a huge impact on the interpretation of this principle. There is a subtle distinction, often missed, between the propositions that *actual* effects need not be demonstrated under the object criterion versus no effects need be demonstrated at all. The case law does not prescribe that effects must never be demonstrated under the object criterion. Therefore, demonstrating potential (or even in some cases actual) effects is allowed, not least desirable, when determining the object of an agreement.⁹ Certainly, much, if not all, of the case law of the Community Courts has involved some form of analysis of effects under the object heading.¹⁰ How those effects are in fact utilised is dependent on the context of the agreement. This is seen, in particular, in various selective distribution cases where the Courts have recognised restrictions are necessary in order to promote competition. The no-effects rule raises important issues that require deeper reflection.¹¹ These are examined in chapter 4.

2.3. Object must be considered first

Having established that object and effect are disjunctive, a pertinent issue is whether object and effect are true alternatives: can the effect of an agreement be determined without having first considered its object?¹² On the basis of the leading case on object, *STM*, this issue would seem to be settled. The Court held that, *first*,

⁷ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence*, [2001] ECR I-9419 (*Pierre Fabre*), para 34.

⁸ Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, [2009] ECR I-4529, para 29.

⁹ See AG Trstenjak in C-501/06 P *GlaxoSmithKline Services Unlimited v Commission (GSK)* [2009] ECR I-9291, paras 89 to 95 for a robust discussion of this issue.

¹⁰ In Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 the GC noted that even in *Consten & Grundig* a limited analysis had been undertaken (*Joined Cases 56 & 58/64, Etablissements Consten SA and Grundigverkaufs-GmbH v Commission*, [1966] ECR 342). See also *Joined Cases C-96/82 etc, IAZ v Commission/ ANSEAU* [1983] ECR 3369 and Case C-41/69 *ACF Chemiefarma v Commission* [1970] ECR 661.

¹¹ For instance, what is the rationale behind the no actual effects rule, and how are the effects of an agreement incorporated within an object assessment.

¹² See (Faull & Nikpay, 1999), para 2.60. Black states object is often evidence of effect, but not vice versa, (Black, 2005), p115.

the precise purpose (the object) of the agreement needs to be considered.¹³ Then, where such analysis of the clauses of the agreement does not “reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered”.¹⁴ This suggests that the object criterion should be determined before ‘effect’ can be considered.

This interpretation has been upheld by numerous commentators and Court judgments.¹⁵ The pragmatic rationale for this is that affirming an agreement’s object avoids the examination of practical effects, “which is considerably more difficult”.¹⁶ An inference that can be drawn from this principle is that testing for object is different from testing for effect. The object concept encapsulates those agreements which aim to restrict competition, but fail.¹⁷ Additionally, it is not necessary for the agreement expressly to state the intention to restrict competition. Instead, it is sufficient if the content of the agreement conclusively indicates such a purpose.¹⁸ Effect then captures those agreements that do not necessarily aim to restrict competition, but nonetheless have (or could have) that effect.¹⁹ According to Black, object captures agreements not caught by effect and vice versa.²⁰

The issue then is whether object *must* be applied first and what the implications are should this not be done. Put another way: is a finding of effect alone without first having recourse to the object of an agreement sufficient for the purposes of discharging obligations under Article 101(1) TFEU. The answer is somewhat fudged in Court statements.

¹³ *Supra* n2, *STM*, para 249.

¹⁴ *Ibid* para 249. Upheld in *Pierre Fabre* (*supra* n7).

¹⁵ See (Goyder & Albors-Llorens, 2009), p118. Only if the purpose of the agreement does not appear to restrict competition is it necessary to consider the effects; *Pierre Fabre*, para 34 (*supra* n7); *GSK* (*supra* n9), paras 55-56; (Deringer, 1968), p35, para 163.

¹⁶ (Deringer, 1968), footnote 94, p35, para 163. This highlights the administrable savings of applying the object criterion.

¹⁷ (Black, 2005), p115.

¹⁸ (Deringer, 1968), p20, para 131.

¹⁹ (Black, 2005), p115.

²⁰ (Black, 2005), p115.

In *FA*, even though the CJEU agreed that object and effect are alternative criteria, it said this meant:

“that it is appropriate, first and foremost, to determine whether just one of them is satisfied, here the criterion concerning the object of the agreement. It is only secondarily, when the analysis of the content of the agreement does not reveal a sufficient degree of impairment of competition, that the consequences of the agreement should be considered...”²¹

The Court’s statement does not fully support the principle that the object criterion needs to be decided first before the effect of an agreement can be considered. This is despite the Court citing cases, which in turn cite *STM* as authority.²² Thus, the effect of an agreement can be assessed without having recourse to object first. Conversely, in *GSK* the CJEU described why it is important that object is considered before effect: because if that assessment is held to be an error of law then the effect analysis will be dismissed.²³

From a procedural perspective, there have been a number of notable instances where the Commission has not determined the outcome of its object assessment before considering the effect of an agreement.²⁴ It has also been seen how both the European Courts and the Commission have considered both object and effect together in Article 101(1) TFEU assessments.²⁵ Given that the onus is on the Commission to prove that an agreement restricts competition under Article 101(1) TFEU, whether it chooses to tackle the object or effect of an agreement first may appear to be irrelevant. In more practical terms, however, the importance of

²¹ *Supra* n2, *FA*, para 135.

²² For instance, *supra* n9, *GSK*, para 55.

²³ *Ibid* *GSK*, para 56. See also *supra* n7, *Pierre Fabre*, para 32.

²⁴ See in particular the decision in *Europay (Eurocard – Mastercard)* [2009] OJ L318/17. Alternatively in *GlaxoSmithKline 2001/791/EC*, the Commission found the object was to restrict competition, but still assessed the effects of the agreement.

²⁵ The CJEU has often referred to both concepts together in its judgments, for example, Case C-5/69 *Franz Völk v SPRL Ets J Vervaecke* [1969] ECR 295; Case C-28/77 *Tepea BV v Commission* [1978] ECR 1391; Case C-31/80 *L’Oréal NV and L’Oréal SV v De Nieuwe AMCK PVBA* [1980] ECR 3775; Case C-61/80 *Cöoperatieve Stremsel-en Kleurselfabriek v Commission* [1981] ECR 811; Case C-107/82 *AEG-Telefunken v Commission* [1983] ECR 3151. See in particular opinion of AG Tesauro in Case C-250/92 *Gøttrup-Klim v Dansk Landbrugs Grovvarselsskat AmbA* [1994] ECR I-5641 (*Gøttrup-Klim*) who condemned this practice. See also (Slot & Johnston, 2006), p59.

considering object first is that: (i) an object assessment does not require actual effects to be proved, which reduces the burden on administrative resources, (ii) even if an agreement is not implemented or successful does not negate a finding by object,²⁶ (iii) a finding of object is usually perceived as a more serious offence given the higher level of fines attributed to restrictions by object,²⁷ (iv) the availability of an Article 101(3) TFEU exemption is statistically more unlikely for agreements found restrictive by object,²⁸ (v) parties have less inclination purposefully to restrict competition by colluding if they know it is prohibited regardless of effect (the preventative nature of the law), and (vi) the application of the object criterion can result in an agreement falling outside Article 101(1) TFEU altogether without the need to determine its actual effects.²⁹

For the Commission to ignore these practical consequences and insist on a full effects analysis demonstrates how the advantages of applying the object criterion are considerably weakened.³⁰ In light of *STM*, it is sensible that the “precise purpose” of the agreement is considered first.³¹ This means that the alternatives of object and effect involve a two-stage examination in so far as if the object of an agreement is not to restrict competition, then it must be determined whether it then has that effect.³²

2.3.1. When is the object criterion satisfied?

Having determined that the object of an agreement should be examined first under Article 101(1) TFEU, this sub-section considers at what point that obligation is discharged before the concrete effects of the agreement are considered. In other

²⁶ C-277/87 *Sandoz Prodotti Farmaceutici SpA v Commission* [1990] ECR I-45; C-246/86 *Belasco v Commission* [1989] ECR 2117. But upholding the judgment in *STM*, the CJEU in *T-Mobile* held that an agreement must be “capable” of restricting competition, para 31 (*supra* n2 and n8).

²⁷ Even though the Commission is at liberty to fine undertakings equally as harshly should they restrict competition by effect.

²⁸ See the Article 81(3) Guidelines.

²⁹ See eg, *Völk* (*supra* n25).

³⁰ Certainly it seriously undermines arguments regarding the savings on administrative resources.

³¹ *STM*, para 250 (*supra* n2); *T-Mobile*, para 28 (*supra* n8), where the CJEU found it “necessary” to first consider the precise purpose of the agreement and then consider the effect should it not be possible to reveal the effect on competition to be sufficiently deleterious.

³² See eg, the opinion in *GSK*, para 89 (*supra* n9). Though determining an agreement’s object may bring the agreement outside Article 101(1) TFEU altogether.

words, when is the object of an agreement satisfied? It is an important issue, as once the object of an agreement is proved, it is presumed anticompetitive: no further evidence of an agreement's restrictive effects needs to be produced.³³ The European Courts have not particularly focused on this issue: the jurisprudence reveals itself to be inconsistent and discordant. In *STM*, the Court held that if the analysis of the clauses of the agreement does not "reveal the effect on competition to be *sufficiently deleterious*, the consequences of the agreement should *then* be considered".³⁴ Conversely in *Consten & Grundig* the CJEU found the concrete effects of an agreement do not need to be taken into account once it "appears" the object of the agreement is to restrict competition.³⁵ Alternatively, in *Pierre Fabre*, the Court held that "where the anticompetitive object of the agreement is *established* it is not necessary to examine its effects on competition".³⁶

The jurisprudence therefore suggests an element of discretion when proving whether an agreement's object to restrict competition is satisfied. Arguably, the standard of proof is flexible and depends on the nature of the case.³⁷ This is underlined by the use of expressions such as when an agreement "appears" to have the aim of restricting competition.³⁸ This discretion ties in with the argument that in EU competition law a judge decides less as to what the standard of proof is, but instead to the persuasiveness of the evidence without being bound by pre-determined evidentiary or probability "thresholds".³⁹ Hence, the object criterion is satisfied when the evidence is persuasive enough.⁴⁰ The 'effect' criterion does not suffer from the same level of uncertainty in this regards as proving actual effects on a market is less subjective and far more measurable. It is therefore helpful to

³³ (Jones, 2010), '*Left Behind by Modernisation?*', p656. Also, opinion in *GSK*, para 89 (*supra* n9); *Volkswagen*, para 178 (*supra* n5).

³⁴ *Supra* n2, *STM*, para 249 [emphasis added]. See also *GSK*, para 55 (*supra* n9): "where, however, the analysis of the content of the agreement does not reveal a *sufficient degree of harm to competition* [emphasis added], the consequences of the agreement should then be considered...".

³⁵ *Supra* n10 *Consten & Grundig*, p342.

³⁶ *Supra* n7, *Pierre Fabre*, para 34. Emphasis added. The word "established" is also echoed in the EU Commission's 81(3) Guidelines, para 20.

³⁷ (Gippini-Fournier, 2010), p207.

³⁸ *Supra* n10, *Consten & Grundig* and see eg *supra* n8, *T-Mobile*, para 31.

³⁹ (Gippini-Fournier, 2010), p188.

⁴⁰ *Ibid*, p207.

understand the types of indicators that aide the determination that an agreement restricts competition by object.⁴¹ One of those indicators is the subjective intention to restrict competition.⁴²

2.4. Subjective intention is not determinative when assessing object

Subjective intention relates to whether the parties to an agreement themselves intend to restrict competition by entering into such agreements. The European Courts have consistently found that subjective intention is not determinative when assessing the object of an agreement. However, subjective intent can be taken into account as part of that determination: evidence of subjective intent on the part of the parties to restrict competition is a relevant factor, but not a necessary condition.⁴³ Conversely, a lack of subjective intention whereby the parties argue they did not intend to restrict competition is not a defence.⁴⁴ This is analogous with ignorance of the law being no defence. Instead, whether an agreement has the object of restricting competition depends on the content of the agreement and its extenuating circumstances (such as its implementation, and the parties' conduct).⁴⁵

That the object of the agreement is dependent on objective manifestations supporting that aim is logical. This is because the notion of subjective intention has complexities. *IAZ/Anseau* is a good example of this.⁴⁶ In that case, the parties denied they knew they were restricting competition, let alone had the intention of doing so. The factual scenario concerned the restriction of parallel trade by use of a conformity label for washing machines and dishwashers. The parties argued that

⁴¹ See generally, eg (Bailey, 2012), (Jones, 2010), '*Left Behind by Modernisation*'.

⁴² Other factors, such as the conduct of the parties, content, circumstances and context of the agreement were discussed in chapter 2.

⁴³ Article 81(3) Guidelines, para 22. Though no supporting citation provided. See *IAZ/Anseau* (*supra* n10); C-551/03 P *General Motors v Commission* [2006] ECR I-3173.

⁴⁴ C-19/77 *Miller International Schallplatten GmbH v Commission* (1978) ECR 131 (*Miller*). The CJEU held that subjective intention was irrelevant in determining the level of fine as the applicant should have known an export ban had the object of restricting competition. According to the Court, an infringement of Article 101 TFEU is considered to have been committed intentionally if the person concerned is aware that the act in question had as its "object the restriction of competition". It is irrelevant to establish whether the person concerned also knew he was infringing Article 101 TFEU.

⁴⁵ See *supra* n25 *Tepea BV*; *supra* n10 *IAZ/Anseau*; C-29&30/83 *Compagnie Royale Austrienne des Mines and Rheinzink (CRAM) v Commission* [1984] ECR 1679 and *supra* n43 *General Motors*.

⁴⁶ *Supra* n10 *IAZ/Anseau*.

the purpose of the agreement was to protect public health, not to restrict competition. The CJEU rejected this argument. It held that, if the parties who drafted the agreement were aware that the agreement, by looking at its terms, the legal and economic context in which it was concluded and to the conduct of the parties, had as its purpose the restriction of parallel imports; they acted deliberately by signing it. This was regardless of whether or not they were aware that in so doing they were infringing Article 101(1) TFEU.⁴⁷ In this case the Court found the legal and economic context did not support the argument raised by the parties that the purpose of their agreement was to protect public health.

2.4.1. *Odudu and intent*

The role of subjective intention has been extensively analysed by Odudu. According to his early formula, subjective intention alone is proof of a restrictive object.⁴⁸ This view was later modified: Odudu subsequently asserted that allocative inefficiency established by legal presumption has the object of restricting competition if it is based on either the concept of necessary effect, or if an outcome is intended (which he terms “intent based presumptions”).⁴⁹ It is this latter contention that is of interest here. Odudu claims that “if an outcome is intended it is more likely to occur than if that same outcome is not intended”.⁵⁰ Therefore, intent is relevant, because undertakings are more likely to restrict competition when they intend to restrict competition.⁵¹ The use of the word ‘intention’ therefore has great significance in this context, particularly in view of its correlation with English criminal law. Thus, the consideration of whether the intention needs to be subjective or objectively determined is pertinent.⁵²

⁴⁷ *Ibid*, paras 23–25.

⁴⁸ (Odudu, 2001), ‘*Object as subjective intention*’. See also the AG’s opinion in Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637 (*BIDS*), which supports Odudu’s interpretation, paras 44–46.

⁴⁹ (Odudu, 2006), pp114, 127.

⁵⁰ *Ibid*.

⁵¹ *Ibid*, p121.

⁵² For analogies with UK criminal law and the requirement of the ‘mens rea’ being satisfied by oblique intent see *R v Moloney* [1985] 1 All ER 1025; (Smith & Hogan, 2011) state that: (1) A consequence is intended when it is the accused’s purpose. (2) A court or jury may also infer that a

According to Norrie when it is claimed a person intends to do something what is actually meant is that it is seen to be a virtually certain result of their action.⁵³ This means that an outcome can be predicted if it is intended.⁵⁴ For Odudu, this is sufficient to decide that ‘intent-based presumptions’ have the object of restricting competition.⁵⁵ Odudu goes further, claiming that such intent based presumptions are irrebutable under Article 101(1) TFEU.⁵⁶ This is not a comfortable conclusion. Technically, Odudu’s research may reveal that (based on outcomes) such intent-based presumptions exist.⁵⁷ However, the European Courts have not alluded to this phenomenon of intent based presumptions as a conclusive indicator that, by law, an agreement restricts competition by object.⁵⁸ Instead, subjective intent is one of a number of factors that may be taken into account depending on the legal and economic context of the agreement. It is understandable why Odudu submits that intent carries a predictive nature and thus justifies a legal presumption that “collusion with the intention to contrive a scarcity of output will lead to contrived scarcity of output”.⁵⁹ From an economic perspective this formula may make sense, but irrebutable intent based presumptions ultimately detract from a legal analysis of an agreement in its own context in accordance with the test established in *STM*. A more compelling argument that could be deduced from Norrie’s hypothesis is that intent based presumptions form a useful policy basis for establishing a rebuttable presumption that Article 101(1) TFEU is infringed by object.

More fundamentally, it is easy for parties to argue that an outcome was not intended. Odudu recognises this problem and therefore agrees that intent should

consequence is intended, though it is not desired, when (a) the consequence is a virtually certain result of the act, and (b) the accused knows that it is a virtually certain consequence.

⁵³ (Odudu, 2006), p121 citing Norrie, ‘*Oblique Intention and Legal Politics*’ [1989] CrimLR 793-807, 800-802. Additionally, failure of that intention means that such a person will continue with a scheme until it succeeds.

⁵⁴ (Odudu, 2006), p122. See also AG Trstenjak in *BIDS* (*supra* n48), para 45.

⁵⁵ *Ibid*, p127.

⁵⁶ *Ibid*, p127.

⁵⁷ *Ibid*, pp121, 127. Though he qualifies his conclusion by stating that the content of such intent based legal presumptions must therefore be paid great attention.

⁵⁸ Rather judgments focus on the extenuating circumstances, content of the agreement, conduct of the parties etc.

⁵⁹ (Odudu, 2006), p121.

be objectively determined from “external manifestations”.⁶⁰ Odudu reasons that to enhance deterrence, Article 101(1) TFEU must prohibit unsuccessful attempts, hence the presumption of intent is conclusive, and in particular, ex post conduct cannot be rebutted.⁶¹ This reasoning is more persuasive, though could be explained alternatively: that the prohibition of unsuccessful attempts to restrict competition is merely an elucidation of why the concrete effects of an agreement need not be demonstrated under the object heading. As, based on its content and context, an agreement *aimed* to restrict competition. This explanation better reflects the jurisprudence.⁶²

2.4.2. Conclusion

It is clear from the case law that subjective intention can play a key role in establishing whether an agreement restricts competition by object. However, in *GSK* the GC held that the agreement to restrict parallel trade, which was the admitted intention of the parties, did not have the object to restrict competition. Even though the Court of Justice overturned this by holding the agreement did have such an object, it highlights that basing a finding of object on subjective intent alone is insufficient. Jones agrees, stating that “intention is determined objectively, so that the parties’ subjective intent cannot be relied upon to exculpate otherwise unlawful behaviour”.⁶³

2.5. Success and non-implementation of an agreement are extraneous

As seen above, the jurisprudence demonstrates that for a finding of object under Article 101(1) TFEU it is not necessary to show an agreement is successful, nor that it was implemented, applied or enforced.⁶⁴ This enhances the role of the object

⁶⁰ *Ibid*, p123. Though scant detail is provided on how this is done.

⁶¹ *Ibid*, pp123-124. That competition law must have an element of deterrence is prudent, hence the nature of fines, unenforceability of an agreement under Article 101(2) TFEU and that an agreement need not be successful. Deterrence assists ‘actors’ in guiding their own conduct: (Odudu, 2006), p1, describing a “self-enforcing legal obligation”.

⁶² Cf, Odudu is supported in his contentions by the AG Trstenjak in *BIDS* (*supra* n48), paras 44-47. However, the AG modified her views slightly in her opinion in *GSK* (*supra* n9), para 93.

⁶³ (Jones, 2010), ‘*Left Behind by Modernisation*’, p664

⁶⁴ See *supra* n44 *Miller*, paras 7-9; *supra* n26 *Sandoz*.

criterion as a deterrent factor against undertakings seeking to restrict competition.⁶⁵

2.6. An agreement that restricts competition by object can still benefit from an Article 101(3) TFEU exemption.

Technically, all agreements that infringe Article 101(1) TFEU can be exempted under Article 101(3) TFEU if all the conditions of Article 101(3) TFEU are met.⁶⁶ Hence, restrictions by object have the possibility of exemption under Article 101(3) TFEU. The relationship between the object criterion and Article 101(3) TFEU is considered in chapter 5.⁶⁷

2.7. Burden of proof

Under Article 101(1) TFEU, the burden of proof is on the plaintiff, therefore usually the Commission. The burden is shifted to the defendant under Article 101(3) TFEU.⁶⁸ The question whether, when determining if the object of an agreement is to restrict competition, the burden can be shifted on to the defendant under Article 101(1) TFEU, is discussed in chapter 4.

2.8. Conclusion

Even though common principles can be drawn out from the case law that are applicable under the three key approaches to the object criterion, this section highlights that they entail a degree of complexity. Therefore, a deeper consideration of the issues is required in order to draw out the legal characteristics of the object criterion as well as reveal areas that still require clarity from the Courts. The multifaceted legal nature of the object criterion has long been

⁶⁵ It also supports the understanding of the object criterion under the MAAP: that the object criterion is not dependent on necessary effect, but on the objective aim of the agreement to restrict competition. Alternatively, the orthodox approach could similarly argue experience dictates certain pernicious agreements tend to harm competition and therefore are automatically prohibited regardless of success.

⁶⁶ T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, para 85 and T-168/01 *GSK* (*supra* n10), para 58. See also (Italianer, 2013), Fordham Competition Law Institute.

⁶⁷ See (Jones, 2010), '*Left Behind by Modernisation*', p669 onwards. Cf, in its BERs the Commission assumes object would not benefit from Article 101(3) TFEU.

⁶⁸ (Jones, 2010), '*Left Behind by Modernisation*', p656.

concealed by policy and indeed economic and legal desires for ‘bright lines’. The case law exposes a far more nuanced substantive provision. Teasing these issues out and investigating their properties is an important step in revealing the legal essence of the object criterion.

3. The definition of ‘object’: what does it mean?

Given the centrality of the legal term ‘object’, it would be reasonable to assume that the Courts would have taken some trouble to define it.⁶⁹ Having reviewed the case law, this assumption is unfounded. On the contrary, defining the term has not been high on the Courts’ agenda. Instead, the case law reveals that, depending on how the Courts approach the object criterion, the way it has been defined differs. Goyder notes that “it is hard to discern clear outlines of the concept of ‘object restriction’...no meaningful over-arching definition has emerged”.⁷⁰ By using the three key approaches, how the Community Courts have tackled the meaning of the object criterion is illustrated in this section. How legal presumptions and the concept of necessary effect impact on such definitions is also investigated, and a view as to which meaning should be given priority and why is proposed.

3.1. The more analytical approach

Under the more analytical approach the Community Courts place a greater onus on the term ‘object’ itself. As highlighted in chapter 2, however, there is no single, absolute definition of the object concept in the case law of the Community Courts. Instead, the case law reveals at least seven different variants. These terms are based on derivatives of the term ‘object’. References to the object of an agreement have thus included the “precise purpose”,⁷¹ “purpose”,⁷² “aim”,⁷³

⁶⁹ This can be contrasted with the Court’s clear definition of an “effect on trade between Member States”: (Jones & Sufrin, 2014), p181.

⁷⁰ (Goyder, 2011), section I.

⁷¹ *Supra* n2, *STM*.

⁷² *Supra* n10 *IAZ/Anseau*.

⁷³ *Supra* n45 *CRAM & Rheinzink*.

“intention”,⁷⁴ “objective”,⁷⁵ “objective function”,⁷⁶ and the “design” of an agreement.⁷⁷

Under the MAAP, the definition of ‘object’ is intricately linked with the phraseology of Article 101(1) TFEU as a whole.⁷⁸ As such, the term itself is nonsensical without reference to the context in which it operates. Hence, ‘aim’ or ‘purpose’ relates intrinsically to the question of whether an agreement ‘aims’ to *restrict competition*. The literal wording of Article 101(1) TFEU therefore plays a key role in the definition of object restraints.⁷⁹ This may seem an obvious point, but in the light of the dominance of the orthodox approach even this simple statement of fact has become muddled. The inter-relationship with what constitutes a ‘restriction of competition’ therefore heavily influences the outcome of the application of this definition.⁸⁰ For instance, what constitutes a restriction of competition is determined by, *inter alia*, competition law goals, economics, as well as those restrictions of competition identified in Article 101(1)(a)-(c) TFEU.⁸¹ In one sense, any so-called categorisation would encompass those restraints that are defined as a ‘restriction of competition’, not what is contained in an ‘object box’.

Establishing the aim of an agreement is an objective concept based on the content of the agreement in its specific legal and economic context, though - as described previously - the subjective intention of the parties may be relevant as may extenuating circumstances and conduct. Therefore, defining object as the objective aim or purpose of an agreement to restrict competition provides a good degree of flexibility as opposed to the formalistic nature of the orthodox approach. Conversely, such flexibility brings its own degree of complexity. This becomes apparent when the purpose of an agreement is said to be a positive or pro-

⁷⁴ *Supra* n10 *ACF Chemiefarma*, Case C-258/78 *Nungesser v Commission* [1982] ECR 2015.

⁷⁵ *Supra* n25 *L’Oréal*, also arguably *supra* n25 *Cöoperatieve Stremsel-en*.

⁷⁶ *Supra* n25 *Gøttrup-Klim*, as per AG Tesouro, para 16.

⁷⁷ *Supra* n2 *FA*, para 140.

⁷⁸ As evidenced in *STM* (*supra* n2).

⁷⁹ See (Goyder, 2011) who also raises a similar point.

⁸⁰ This relationship will be discussed further in Chapter 5.

⁸¹ See chapter 5.

competitive one. This conundrum was evident in *Asnef*.⁸² Here, despite being a horizontal credit information exchange agreement, the Court focused on determining the ‘essential object’ of the agreement. The Court found that its aim was to make relevant information on borrowers available to credit providers and therefore the agreement did not have the object of restricting competition.⁸³

The case law reviewed in chapter 2 revealed, that in some cases, an overriding positive aim can trump or discharge a *prima facie* finding of restriction by object under Article 101(1) TFEU. This, arguably, is the view taken by the Courts in selective distribution cases.⁸⁴ Conversely, in *General Motors* and cases such as *BIDS*, an agreement may be regarded as having a restrictive object even if does not have the restriction of competition as its sole aim, but also pursues other legitimate objectives which, in some cases, are also pro-competitive.⁸⁵ This discrepancy could be attributed to the specific legal and economic context of an agreement. Hence, better sense of the law would be gained by defining ‘object’ as the ‘precise purpose’ of an agreement.⁸⁶ Taking account of the content, circumstances and context of the agreement, the object concept inquires whether the primary purpose of the agreement is to restrict competition. The definition of ‘object’ is thereby interwoven with its application. Whether an agreement is or is not successful, or not even implemented, is unimportant if the true purpose is to restrict competition. What matters most is understanding the rationale behind the agreement.⁸⁷

3.2. The orthodox approach

Defining ‘object’ under the orthodox approach is challenging. In *ENS*, the GC deemed that when assessing an agreement containing “obvious restrictions of

⁸² Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, [2006] ECR I-11125 (*Asnef*).

⁸³ See also (Jones, 2010), *Left Behind by Modernisation*, p652 and (Lasok QC, 2008), p8.

⁸⁴ This issue is not straightforward. See the analysis of the judgment in *Pierre Fabre* (*supra* n7) in chapter 4 below.

⁸⁵ *Supra* n43, *General Motors*, para 64. This was also argued in *BIDS* (*supra* n48). See also *Pierre Fabre* (*supra* n7), Case C-107/82 *AEG-Telefunken v Commission* [1983] ECR 3151.

⁸⁶ As defined in *STM* (*supra* n2).

⁸⁷ These issues, such as balancing the aims of an agreement, are considered more fully in chapter 4.

competition” such as price-fixing, market sharing or control of outlets, such assessment does not require that account be taken of the legal and economic context.⁸⁸ Subsequently, it can be reasoned that the orthodox approach suggests that object means ‘obvious restrictions of competition’ or in the Commission’s terms ‘hardcore restrictions’.⁸⁹ The inference is that price fixing, market sharing and other similar ‘hardcore’ restrictions can be understood as being automatic or *prima facie* restrictions by object as they form part of a category of object agreements.

Waelbroeck and Slater define the object concept as follows:

“According to established case law, restrictions of competition by object are those which due to their very nature are highly likely to restrict competition, in other words ‘manifest’ or ‘patent’ restrictions which display a sufficient degree of harm.”⁹⁰

In support of this contention they cite one case, namely, the GC’s judgment in *GSK*.⁹¹ As demonstrated in chapter 2, this case does not support such a definition of the object concept. This only serves to highlight the entrenchment of the orthodox approach. Hence, the concept of object encompasses ‘obvious’, serious and easily identifiable restrictions of competition. This is further corroborated by commentators such as Bennett and Collins for whom the object concept simply reflects their belief in the categorisation of the particular restraints.⁹² It is therefore “sufficient to demonstrate that the agreement fits into the object category and hence breaches Article 101(1)”.⁹³ Likewise, Goyder asserts that the object concept is based on a category of restrictions, the precise scope of which is a crucial issue in

⁸⁸ Cases T-374/94 etc *European Night Services v Commission* [1998] ECR II-3141 (*ENS*), para 136, referencing Case T-148/89 *Tréfilunion v Commission (Welded Steel Mesh)* [1995] ECR II-1063, para 109.

⁸⁹ Article 81(3) Guidelines, para 23. In para 21 the Commission defines the object concept as agreements “that by their very nature have the potential of restricting competition”.

⁹⁰ (Waelbroeck & Slater, 2013), p140, C.

⁹¹ *Ibid*, footnote 33.

⁹² (Bennett & Collins, 2010), p313. Note, no citation is provided in support of their explanation of the legal framework.

⁹³ *Ibid*, p314. The authors do however agree that the presumption of anticompetitive harm is, in theory rebuttable “if compelling evidence is adduced that the agreement does not have an anticompetitive object or effect given the overall context of the agreement”.

any given case.⁹⁴ To determine whether an agreement then restricts competition by object, the party alleging the infringement “need only show the presence of an agreement including such a restriction, and so does not need to establish the relevant market, or the degree of market power held by the undertaking concerned”.⁹⁵

The categorisation of object restrictions under the orthodox approach is thus its defining characteristic. Understandably, the question regarding which restrictions are contained within the category features heavily in debate. This is due, in particular, to its subsequent expansion over the years, which thereby questions how influential and/or important the concept of necessary effect is on the category.⁹⁶

3.3. The hybrid approach

The hybrid approach draws heavily from the orthodox approach in terms of its interpretation of the legal nature of the object criterion. In *BIDS*, notwithstanding the AG’s opinion, the Court described the distinction between object and effect in its own terms, which was a replication of its statement in *T-Mobile*.⁹⁷ To reiterate, this was said to arise:

“...from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”.⁹⁸

Like the orthodox approach, this statement implies that there is a category of agreements that automatically restrict competition by object, ostensibly based on the notion of their necessary effect. As noted in chapter 2, this contention was not wholly supported by the AG, who argued that the aim of an agreement usually, but *not exclusively*, relates to situations where the anticompetitive effects of a certain

⁹⁴ (Goyder, 2011), VI.

⁹⁵ (Goyder, 2011), VI.

⁹⁶ See generally (Bennett & Collins, 2010).

⁹⁷ *Supra* n8 *T-Mobile*, para 29. The Court cites *BIDS* (*supra* n48) as the authority, which itself cites no authority for the proposition.

⁹⁸ *Supra* n48 *BIDS*, para 17.

type of agreement are known.⁹⁹ Though the CJEU acknowledged in its judgments that agreements covered by Article 101(1)(a) to (e) TFEU do not form an exhaustive list of prohibited collusion.¹⁰⁰

This distinction drawn by the CJEU between object and effect has been replicated in nearly every judgment concerning the object concept post *BIDS*.¹⁰¹ Up until 11 September 2014, the rationale behind this distinction was purely speculative, as the CJEU did not cite any case law in support of such distinction nor expound upon it. Ostensibly, the CJEU has now provided clarification on this point in *Cartes Bancaires*.¹⁰² The facts of the case relate to various pricing measures introduced by Groupement des Cartes Bancaires (CB) to balance the issuing and acquiring activities within the CB payment system in France. CB was set up by the French banks to manage a system for bank card payments and withdrawal. The measures largely consisted of a series of fees paid by CB members that varied depending on the type of membership. Both the Commission and GC found the agreement restricted competition by object. The CJEU, however, disagreed.

The CJEU held that the case law shows “certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found there is no need to examine their effects”.¹⁰³ That case law “arises from the fact that certain types of coordination can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.”¹⁰⁴ Therefore:

⁹⁹ *Ibid BIDS*, para 46 of the opinion. In para 104 of AG Trstenjak’s opinion, the AG finds that the content of an agreement must always be examined against the background of its legal and economic context. She says that comparing agreements is not always the correct approach and may fail to address the question of when a restriction by object exists.

¹⁰⁰ *Ibid BIDS*, para 23 of the judgment confirming the AG’s opinion.

¹⁰¹ See eg *supra* n8 *T-Mobile*, *supra* n9 *GSK*, *supra* n7 *Pierre Fabre*, Case C-32/11, *Allianz Hungária Biztosító Zrt v Gazdasági Versenyhivatal*, 14 March 2013, nyr (*Allianz Hungária*), *supra* n2 *FA*, Case C-226/11, *Expedia Inc v Autorité de la concurrence*, 13 December 2012, nyr (*Expedia*), Case C-67/13 P, *Groupement des Cartes Bancaires (CB) v Commission*, 11 September 2014, nyr (*Cartes Bancaires*).

¹⁰² *Supra* n101. Judgment of 11 September 2014. A detailed consideration of this judgment is outside the scope of this thesis, however its potential significance merits that it is referenced as it will re-ignite the debate on the object criterion as evidenced in the various conferences being held, eg “Restrictions of Competition ‘by object’ after *Cartes Bancaires* and the Commission’s Initiatives”, Academy of European Law, 11 December 2014.

¹⁰³ *Ibid, Cartes Bancaires*, para 49.

¹⁰⁴ *Ibid, Cartes Bancaires*, para 50.

“it is established that certain collusive behaviour, such as that leading to horizontal price fixing by cartels, may be considered so likely to have negative effects...that it may be considered redundant... to prove that they have actual effects on the market. [Citing *Guy Clair*, para 22] Experience shows such behaviour leads to falls in production and price increases resulting in poor allocation of resources to the detriment...of consumers”.

Moreover the object concept “can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.”¹⁰⁵

The CJEU therefore finds that the concept of necessary effect provides the rationale behind the distinction between object and effect first elucidated in *BIDS*. It also berates the GC for finding that the object concept should not be given a strict interpretation, but does not then go on to define precise parameters for the categorisation of the object concept, acknowledging that Article 101(1) TFEU does not provide an exhaustive list of prohibited collusion.¹⁰⁶ In fact, despite finally articulating the concept of necessary effect within its jurisprudence, the CJEU does not specifically cite any case law supporting its finding that experience leads to an apparent presumption of effects other than its reference to *Guy Clair*.¹⁰⁷ Furthermore, the CJEU has openly shifted emphasis on to a condition first established in *STM*, that to be restrictive by object an agreement must have a ‘sufficient degree of harm’.

At first blush, the CJEU suggests that this requirement is satisfied by certain types of collusion whose injurious effects on competition and indeed consumers are already known. As such, only those types of collusion are able to satisfy a finding that they are restrictive by object as they entail a sufficient degree of harm. Moreover, the CJEU reasoned that it is not enough merely to find that an agreement has the ‘potential’ or is ‘capable’ of restricting competition, rather it must entail a sufficient

¹⁰⁵ *Ibid*, *Cartes Bancaires*, para 58.

¹⁰⁶ *Ibid*, *Cartes Bancaires*, para 58.

¹⁰⁷ See chapter 2 for a discussion on *Guy Clair* which refers to an agreement’s ‘intention’ (Chapter 2 ft97).

degree of harm.¹⁰⁸ The CJEU distinguishes these notions and thus on its own understanding raises the standard of proof on the Commission.

Therefore, under the hybrid approach, the CJEU has seemingly refined the definition of 'object' as meaning certain types of collusion that by their nature are injurious to competition as they entail a sufficient degree of harm. This is owing to experience and explains why the effects of an agreement do not need to be demonstrated. To summarise, object means presumption of effects.¹⁰⁹ An important question is how this impacts on the application of the object criterion. As was clear in chapter 2, a reliance on necessary effect alone is not considered sufficient to explain this distinction between object and effect, nor to provide the justification for why the concrete effects do not require determination under the object heading.

Placing so much emphasis on necessary effect creates problems. Moreover, under the hybrid approach, any presumption of harm must be capable of rebuttal owing to the assessment of the agreement's legal and economic context as prescribed in the *STM* Test. These issues are considered below.

3.4. Legal Presumptions

Before turning to the legal application of the object criterion, it is pertinent to comment more fully on the relationship between legal presumptions and the object criterion.¹¹⁰ The debate over legal presumptions and their association with the object qualification is particularly unclear and ill-defined. One reason for this is the amount of differing and undefined terminology associated with this area. For instance, legal presumptions under the object criterion are often inter-linked with the concept of 'necessary effect', 'categorisation' of object restraints, and agreements that 'by their very nature' restrict competition.

¹⁰⁸ *Supra* n101, *Cartes Bancaires*, para 55. Cf *T-Mobile* (*supra* n8).

¹⁰⁹ See (La Madrid de Pablo, 2014).

¹¹⁰ See (Gerard, 2012).

This section will concern itself with the fundamental question of whether the concept of object embodies a presumption of anticompetitive effects as a result of necessary effect or for alternative reasons. Then, if such presumption exists, such restrictions embody a category of rebuttable or irrebuttable presumptions of effect.¹¹¹ The position adopted in this thesis is perhaps a controversial one: it is contended that even the most ‘serious’ restrictions of competition carry no absolute presumption of harm and hence do not automatically restrict competition by object.¹¹² As such, any presumption of effect is rebuttable within the context of Article 101(1) TFEU, and not just under Article 101(3) TFEU. To this end, the following issues are examined: first, the definition of a ‘legal presumption’; then whether ‘hardcore’ restrictions are synonymous with restrictions by object; next the concept of necessary effect and its influence on the debate; and finally, the framework in which any legal presumptions are rebuttable under Article 101(1) TFEU.

3.4.1. Definition of a ‘legal presumption’

Legal presumptions have a number of functions and are created to support decision-makers.¹¹³ Presumptions can be evidential, substantive or procedural.¹¹⁴ An evidential presumption is one where a party will typically need to prove certain facts in order for another fact to be inferred. The result of such a presumption is to shift the burden of proof to the other party to prove the contrary is true, though the legal burden of proof is not necessarily shifted and remains with the party that it is originally held by.¹¹⁵ Substantive presumptions are often grounded in administrative or judicial experience in applying the law and are often “an expression of mainstream economic theory”.¹¹⁶ They may also be rebuttable or

¹¹¹ See (Gerard, 2012) www.kluwercompetitionlawblog.com/2012/02/17 who poses similar questions to those addressed in this thesis.

¹¹² This stance is becoming more commonplace amongst commentators, such as: Jones, Bailey, Ibáñez-Colomo.

¹¹³ (Bailey, 2010), p363(C). See also section D.

¹¹⁴ *Ibid.* Also supported by (Svetlicinii, 2008), p122(C).

¹¹⁵ (Bailey, 2010), p363, C,I,1.

¹¹⁶ *Ibid* p363, C, II.1.

conclusive.¹¹⁷ A procedural presumption is one where for procedural reasons, usually convenience, a presumption can be made, for example, under Article 10(6) of the EU Merger Regulation a merger is presumed compatible with the internal market if the Commission has not taken a decision on the merger within the prescribed time limits.¹¹⁸ From a procedural perspective, legal presumptions can also indicate the shift of the burden of proof from the party who has proved the fulfilment of the presumption to the party who could rebut such presumption.¹¹⁹

Whether competition law in the EU has developed legal presumptions under Article 101(1) TFEU in general is contested. Bailey asserts that “legal reasoning creates presumptions in order to assist a decision-maker. A fact or conclusion may (provisionally) be presumed because experience shows it is self-evident, or for reasons of public policy or procedural convenience”.¹²⁰ Such presumptions can then be conclusive or rebuttable. An oft-made analogy is the connection between hardcore restrictions and the object concept, which is examined below.

3.4.2. *Hardcore restrictions*

Whether ‘hardcore’ restraints (as determined by the Commission in its Article 81(3) Guidelines) are synonymous with restrictions by object is an issue that appeared to be largely resolved, though following the definition of the object criterion provided in *Cartes Bancaires* the question may have reopened.¹²¹ The Commission has long placed significance on the term in its soft law instruments and therefore it has strong associations with the object criterion. Furthermore, the Commission claims hardcore restrictions of competition are presumed to restrict competition by object given their high potential for negative effects and serious nature based on experience.¹²²

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 367 III.1.

¹¹⁹ (Svetlicinii, 2008), p122(C).

¹²⁰ (Bailey, 2010), p363(C).

¹²¹ See (Goyder, 2011).

¹²² Article 81(3) Guidelines, paras 21 and 23. See (Jones, 2010), ‘*Left Behind by Modernisation*’, p656 and (Goyder, 2011).

Chapter 2 evidenced that the case law on the whole does not support the notion that object and hardcore restrictions are one and the same. *STM* suggests that any restriction of competition can infringe Article 101(1) TFEU by object. Moreover, there are cases where apparent ‘hardcore’ restrictions have been held not to infringe Article 101(1) TFEU by object and conversely restrictions that are not usually seen to be ‘hardcore’ have been found restrictive by object.¹²³ Goyder lends support to this view.¹²⁴ She neatly summarises the position: “object restrictions of competition are conceptually different from ‘hardcore’ restrictions, even if the types of restriction they refer to overlap to a large extent...the Commission’s 2010 Guidelines on Vertical Restraints conflate the two concepts”.¹²⁵

Despite such criticism of the Commission, Goyder labels the object concept as a category of agreements that have the necessary consequence of restricting competition.¹²⁶ Even though the necessary consequence of an agreement forms the basis of her understanding of what constitutes an object restriction, she acknowledges - but moreover emphasises - that it is not sufficient simply to identify a restriction as a type that has been found to be ‘by object’ before.¹²⁷ This is because she recognises that the analysis of an agreement’s object must go further and such considerations may “negate the presumption of infringement arising because the type of clause in question appears to be an object restriction”.¹²⁸ More importantly, Goyder does not base the categorisation of object on the Commission’s understanding of the object concept, but rather on how object has been determined by the CJEU.¹²⁹ Goyder is therefore an advocate of the hybrid approach.

¹²³ See eg C-27/87 *Erauw-Jacquery v La Hesbignonne* [1983] ECR 1919 (*Louis Erauw*), *BIDS* (*supra* n48), *Pierre Fabre* (*supra* n7) etc.

¹²⁴ (Goyder, 2011), p1. Though she does uphold the categorisation of the object concept.

¹²⁵ (Goyder, 2011), p5.

¹²⁶ (Goyder, 2011), pp1-3.

¹²⁷ (Goyder, 2011), p3.

¹²⁸ (Goyder, 2011), p3.

¹²⁹ (Goyder, 2011), p5. Overall, Goyder underlines that it is the CJEU that interprets and makes the law and not the Commission.

It befell the Court in its *Pierre Fabre* judgment to settle the matter of whether hardcore restrictions and the object concept are synonymous. The question referred to the CJEU for a preliminary ruling was whether “a general and absolute ban on selling contract goods to end-users via the internet...in fact constitutes a “hardcore” restriction of competition by object”.¹³⁰ The CJEU swiftly recast the question pointing out that neither Article 101 TFEU nor Regulation No 2790/1999 refers to the concept of ‘hardcore’.¹³¹ The Court reframed the question as whether the contractual clause at issue amounts to a restriction of competition by object.¹³²

Consequently hardcore restrictions and the object criterion are distinct concepts, though they do of course at times overlap.

3.4.3. *Necessary effect/necessary consequence/prior belief*

Closely linked with the concept of hardcore restraints is the tricky issue of necessary effect. Chapter 2 briefly recounted what the concept means, but did not resolve whether it forms an absolute presumption of harm.¹³³ A presumption of anti-competitiveness is said to arise in respect of certain agreements, which have the inevitable consequence of restricting competition.¹³⁴ The concept of necessary effect is thus consistently used to justify two propositions: first, that it is the reason why the actual effects of an agreement do not need to be demonstrated under the object criterion, and secondly, that as a result there is a category of agreements

¹³⁰ *Supra* n7, *Pierre Fabre*, para 31.

¹³¹ *Ibid*, para 32. Also note the excellent AG opinion, paras 24-25.

¹³² *Ibid*, para 33. Though the CJEU then erroneously looks at the “*classification* of the restriction...as a restriction of competition by object” [emphasis added]. Note some commentators have argued, incorrectly, that in *Pierre Fabre*, the CJEU indicated that ‘restrictions by object’ and ‘hardcore restriction’ mean the same thing: (Svetlicinii & Sad, 2011), III (3). In *Cityhook Limited v OFT* [2007] CAT 18, the CAT found that ‘object’ and ‘hardcore’ were not synonymous.

¹³³ See (Odudu, 2001) ‘*Interpreting Article 81(1): the Object Requirement Revisited*’, p384; (Black, 2005), p118, AG Trstenjak’s opinions in *BIDS* (*supra* n48) and *GSK* (*supra* n9); (Goyder, 2011), 1-2; and AG Mazák, *Pierre Fabre*, para 27 of the opinion (*supra* n7). Justifications for the concept of necessary effect are found in (Waelbroeck & Slater, 2013), p144-145. Though much of the analysis is erroneously based on the Article 81(3) Guidelines.

¹³⁴ (Odudu, 2009).

that are presumed to restrict competition by object. Often these two concepts are not distinguished. It is submitted that these propositions are not uncontentious.¹³⁵

The examination of the case law undertaken in Chapter 2, demonstrated that there is greater judicial support for the approach adopted in *STM* than that advanced in *ENS*.¹³⁶ The approach in *STM* does not support the idea of legal presumptions, or alternatively, does not support irrebuttable legal presumptions of anti-competitive effect under Article 101(1) TFEU. It is also clear from *Consten & Grundig* that the concept of necessary effect was not considered to justify the rule that no actual effects need be demonstrated under an object assessment. The simple reason for this is that at the time of the judgment there was no body of case law or experience to draw on. Moreover, the wording of Article 101(1) TFEU does not specifically link 'object' with particular restrictions. Instead, Article 101(1)(a)-(e) TFEU lists a number of examples of the types of agreements that *restrict competition*. Therefore it is unclear how some commentators argue the wording of Article 101(1) TFEU endorses the categorisation of those restrictions within an object category.¹³⁷

In fact, until the judgment in *Cartes Bancaires* the CJEU never offered a sufficient explanation for the no actual effects rule.¹³⁸ Even the Commission offers no judicial support for the proposition. In *Cartes Bancaires* the CJEU expanded upon the now well-known delineation between object and effect: that the case law shows "certain types of coordination reveal a sufficient degree of harm to competition that it *may* be found there is no need to examine their effects".¹³⁹ It went far further than in cases such as *BIDS* as it expressly used the concept of necessary effect as the rationale behind the object concept and the no actual effects rule.¹⁴⁰ Moreover the CJEU reiterates that the coordination must result in a 'sufficient degree of harm', which it pointedly differentiated from the 'potential' to restrict

¹³⁵ See, in particular, AG Kokott in *T-Mobile*, para 43 (*supra* n8).

¹³⁶ See (Jones, 2010), '*Left Behind by Modernisation?*', pp663-668 for her interpretation of whether the presumption of anticompetitive effects can be rebutted.

¹³⁷ See eg, (Goyder, 2011), sections I and III.

¹³⁸ *Supra* n101, *Cartes Bancaires*, para 48-51; Article 81(3) Guidelines, para 21.

¹³⁹ *Ibid*, *Cartes Bancaires*, paras 49-51.

¹⁴⁰ *Ibid*, paras 50-51.

competition.¹⁴¹ However, the CJEU's choice of citation in support of these statements includes *STM*, *BIDS* and *Guy Clair*, which chapter 2 evidences do not unequivocally support the concept of necessary effect as the only rationale for the no actual effects rule.¹⁴²

The CJEU also muddies the water by using ambiguous phraseology, for example, that certain agreements “*may be considered*” harmful.¹⁴³ Coupled with its requirement that an “analysis” of the coordination must reveal a sufficient degree of harm to competition determined on the basis of its content, objectives and economic and legal context, this suggests that any prior belief is capable of rebuttal.¹⁴⁴ Therefore, relying purely on ‘necessary effect’ cannot be the only explanation for the no actual effects rule. To date, the CJEU has not provided a convincing explanation.

An alternative explanation for the rule is proffered in *STM*: if the *agreement* itself intends or has the ‘purpose’ of *restricting competition*, then that is enough to satisfy the object requirement. This is based on the notion that EU competition law is also preventative or *ex ante* in nature. Hence, it is irrelevant whether or not an agreement is successful.¹⁴⁵ How this purpose is proven is objectively determined and relies heavily on what constitutes a ‘restriction of competition’ and thus the *STM* Test. This means that even if an agreement contains an apparent ‘restriction of competition’ as listed in Article 101(1)(a) to (c) TFEU, it may not have that object when assessed in accordance with the principles of *STM*.¹⁴⁶ The determinative question is whether the agreement is designed to restrict competition.¹⁴⁷ The case law is unequivocal in demonstrating that even supposed hardcore restrictions of

¹⁴¹ *Ibid*, paras 55-56 citing *T-Mobile* (*supra* n8). Though notably the judgment in *T-Mobile* also refers to the need for ‘sufficient harm’, para 28.

¹⁴² *Ibid*, paras 49-51.

¹⁴³ *Ibid*, see in particular, para 51.

¹⁴⁴ *Ibid*, para 52.

¹⁴⁵ (Deringer, 1968), para 131. As previously noted, AG Kokott and AG Trstenjak have compared this notion to risk offences or inchoate offences: see *T-Mobile*; *BIDS*.

¹⁴⁶ *STM*, *supra* n2, paras 162-172.

¹⁴⁷ (Deringer, 1968), para 163. See *FA*, para 140 (*supra* n2).

competition have been found to come outside Article 101(1) TFEU or been found to be restrictive by effect and vice versa.¹⁴⁸

This alternative vision of the law as described under the MAAP is favoured over the concept of necessary effect as the only sustainable explanation of the object concept's no actual effects rule. The case law proves that prior experience of negative effects is not enough to taint an agreement with an anticompetitive object. The Courts have, naturally, gained experience in applying Article 101(1) TFEU over the decades, so it is axiomatic that certain types of agreement tend to infringe competition by object more often than other types, in particular those agreements which are seen to be the most serious forms of collusion.¹⁴⁹ As such, it makes sense that necessary effect plays a role in the assessment of object restraints and gives rise to legal presumptions of harm. However, such presumptions are not absolute or determinative.¹⁵⁰

This view was shared by AG Mazák in *Pierre Fabre* who pointed out that “the anticompetitive object of an agreement may not...be established solely using an abstract formula”.¹⁵¹ Moreover:

“...while certain forms of agreement would appear from past experience to be *prima facie* infringements by object, this does not relieve the Commission or a national competition authority of the obligation of carrying out an individual assessment of any agreement...while the inclusion of [hardcore] restrictions in an agreement would give rise to concerns regarding the conformity of that agreement with Article 81(1) EC and indeed, after examination of, *inter alia*, the particular agreement and the economic and legal context of which it forms a part, may in fact result in a finding of a restriction by object, there is no legal

¹⁴⁸ See eg *Cartes Bancaires* (supra n101), C-27/87 *Erauw-Jacquery v La Hesbignonne* [1983] ECR 1919 (*Louis Erauw*).

¹⁴⁹ This experience is often indirectly referred to eg, *FA*, para 139 (*supra* n2).

¹⁵⁰ See AG Trstenjak in *BIDS*, para 44 (*supra* n48). Also *ibid*, *FA*, para 140.

¹⁵¹ *Supra* n7, *Pierre Fabre*, para 26 and generally paras 25–30 of the opinion. This is because “while a finding of infringement by object with respect to an agreement will not require a demonstration of its anticompetitive effect in order to establish its anticompetitive nature, the Court has held that regard must be had, *inter alia*, to the content of the provisions of the agreement, the objectives it seeks to attain and the economic and legal context of which it forms part”, (para 25).

presumption that the agreement infringes Article 81(1) EC...a individual examination is therefore required in order to assess whether an agreement has an anticompetitive object even where it contains a restriction which falls within the scope of [the Vertical Block Exemption Regulation].”¹⁵²

In *BIDS*, AG Trstenjak, was also clear that the necessary consequence of an agreement was not the only factor to be taken into consideration in an object assessment.¹⁵³ She sided more closely with Odudu’s interpretation, finding that “when acting rationally undertakings will expect the agreement to have the effects which can reasonably be assumed according to the circumstances, with the result that they intended those effects at least to some extent.”¹⁵⁴ Overall, the question of necessary effect requires a degree of sensibleness. The case law does not uphold the notion that the object concept is based entirely on the concept of necessary effect. It would, of course, be ludicrous to deny that necessary effect has any place in an object assessment. However, it is not the sole nor overriding consideration in any assessment of an agreement by object under Article 101(1) TFEU. That role is left to the ‘legal and economic context’.¹⁵⁵

3.4.3.1. Categorisation

Associated with the concept of necessary effect is the ensuing belief that a category of agreements exist, which are ‘by their very nature’ restrictive by object.¹⁵⁶ How this category of agreements is constituted is controversial,¹⁵⁷ and in particular the question of whether it is narrow or widely construed. Any widening of the object category is deemed concerning as raises the prospect of abuse should the

¹⁵² *Supra* n7, *Pierre Fabre*, paras 27–30 of the opinion.

¹⁵³ *Supra* n48, *BIDS*, para 46.

¹⁵⁴ *Ibid*, *BIDS*, paras 45 and 46 of the opinion. See, eg (Odudu, 2009).

¹⁵⁵ AG Kokott also acknowledges this, *T-Mobile*, para 48 (*supra* n8). Note presumptions of harm can be seen to form part of the legal and economic context.

¹⁵⁶ See (Mahtani, 2012).

¹⁵⁷ See also (Jones, 2010), ‘*Left Behind by Modernisation*’, p663 who believes the principles underlying object classification are not always clearly set out or explained in the case law as they could be.

authorities be able to expand the category of nefarious agreements and thereby disengage in an effects assessment.¹⁵⁸

The interpretation of the law on the object concept as consisting of a category of agreements is a false friend. It conveys an impression that is not consistently upheld by the CJEU. In *BIDS*, the CJEU did not agree that the object concept relates to an exhaustive list of prohibited forms of collusion.¹⁵⁹ Furthermore, the AG in *BIDS* did not support the argument that it can be inferred from *ENS* that the notion of restriction of competition by object is limited to ‘obvious’ cases.¹⁶⁰ This is compounded by the case law which shows that agreements can indirectly restrict competition by object.¹⁶¹

Categorisation is a useful policy tool as it gives undertakings guidance as to the types of agreement that are generally restrictive by object, but to rely on it as a legal mechanism is imprudent. The judgment in *Cartes Bancaires* shows that “relying on pigeon holes or formal categories to identify object restrictions can often be misleading.”¹⁶² The interpretation of the law offered under the MAAP ensures that there is no emphasis on categorisation, particularly in view of how the object of an agreement is determined.¹⁶³ The constant reference by the Courts to agreements that ‘by their very nature’ harm competition also gives an artificial impression. Ideally, the term should be struck from the vocabulary of the object concept. The case law shows that that it does not conclusively mean “independently of any competitive analysis”.¹⁶⁴ If it merely refers to the ‘no effects’ rule, then the CJEU should clarify this. What is clear is that the question of categorisation will continue to be debated. The judgment in *Cartes Bancaires*

¹⁵⁸ See generally (Jones, 2010), ‘*Left Behind by Modernisation*’, (Goyder, 2011), (Bennett & Collins, 2010), (Gerard, 2013). Note, cases such as *T-Mobile* (*supra* n8) and *Pierre Fabre* (*supra* n7) seemingly added new restrictions to the object category.

¹⁵⁹ *Supra* n48, *BIDS*, para 23 confirming the AG’s opinion. This was upheld in *Cartes Bancaires*, para 58 (*supra* n101).

¹⁶⁰ *Ibid*, *BIDS*, para 47 of the opinion. See chapter 2.

¹⁶¹ See *supra* n43, *General Motors*.

¹⁶² (Ibáñez Colomo, 2014) ‘*Groupement des Cartes Bancaires and the resilience of the case law on restrictions by object*’.

¹⁶³ See chapter 4.

¹⁶⁴ *Supra* n9, *GSK*, para 120.

exacerbates this. Indeed, some practitioners have hailed the judgment as confirming a narrow interpretation of restrictions by object.¹⁶⁵

3.4.4. Rebuttable legal presumptions versus no legal presumptions under Article 101(1) TFEU

Having acknowledged the relationship between the concept of necessary effect and the object criterion, this section examines whether legal presumptions of harm are rebuttable under Article 101(1) TFEU.¹⁶⁶ It is clear that any such presumptions are not absolute. This position owes itself partly to the conflict between the concept of necessary effect and the definition of the object criterion under *STM*, but in particular to the consideration of the legal and economic context. The object criterion is thus context driven and fact specific. Jones agrees that there are “undoubtedly possibilities of rebutting a presumption of illegality under...Article 101(1) TFEU”.¹⁶⁷ Those situations are “rare and hard to identify” and therefore could lead to a perception of *per se* illegality.¹⁶⁸ For Jones, the starting point in an assessment of whether an agreement restricts competition by object is that:

“...the restraints identified in past precedents have, in principle, as their object the restriction of competition, and it is only in exceptional circumstances that an analysis of the purpose of the agreement in its economic and legal context may indicate that the presumption of anticompetitive effects is inappropriate”.¹⁶⁹

Though this position improves on the orthodox approach, it diminishes the role of an agreement’s context. Jones is correct to say that it is difficult to determine when

¹⁶⁵ (Bell & Heilpern, 2014). Conversely, the Commission has interpreted the judgment as finding it requires ‘novel’ restrictions to have their object assessed more carefully and fully within their legal and economic context than those restrictions that benefit from experience: (Italianer, 10 December 2014), ‘*The object of effects*’, CRA conference, Brussels, 10 December 2014.

¹⁶⁶ (Odudu, 2001), ‘*The Object Requirement Revisited*’, p384. See also (Black, 2005), p118.

¹⁶⁷ (Jones, 2010), ‘*Left Behind by Modernisation*’, p663.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid*, p668.

the presumption can be rebutted given the confused status of the case law.¹⁷⁰ For her the answer to this question remains obscure.¹⁷¹

The question of which agreements could give rise to a legal presumption of a restriction by object is a pertinent one. An easy answer is that the concept of necessary effect plays a key role in identifying those restraints most likely to infringe Article 101(1) TFEU by object. Odudu has a more sophisticated answer, contending that “legal presumptions developed from experience or based on party intent that certain collusive conduct will result in allocative inefficiency”.¹⁷² Jones also has a two-pronged approach to what she terms the “categorisation” of object restraints, which have the “presumption of illegality” attached to them.¹⁷³ She argues that the category of object restraints constitutes specific restraints that experience shows are likely to be anticompetitive, and “other arrangements whose anticompetitive nature is apparent from the objective it pursues and/or the context in which it operates”.¹⁷⁴ Therefore she believes that “the category does not... comprise a finite list of conduct based on past precedent” as highlighted by the AG in *BIDS*.¹⁷⁵

The fact that legal presumptions can be rebutted under Article 101(1) TFEU (and not just under Article 101(3) TFEU) begs the question of who has that task: whether the burden of proof under Article 101(1) TFEU is reversed to fall onto the defendant.

3.4.4.1. Reversing the burden of proof within Article 101(1) TFEU

As discussed above, the definition of the object criterion under the MAAP does not support presumptions of illegality. Conversely, the hybrid approach does. Hence,

¹⁷⁰ *Ibid*, p668.

¹⁷¹ *Ibid*, p676.

¹⁷² (Odudu, 2006), p127.

¹⁷³ (Jones, 2010), ‘*Left Behind by Modernisation?*’, p656.

¹⁷⁴ *Ibid*, p657.

¹⁷⁵ *Ibid*, p657, ft 43. Jones does not, however, fully endorse the more analytical approach: her definition of ‘object’ is not the same as the definition set out in *STM*. She would seem to define object as conduct, which is “by its very nature injurious to competition or anticompetitive in nature”, p656.

the following question of rebuttal is more pertinent to an understanding of the law postulated under the latter approach.

It is clear that the onus of proof as regards a finding that an agreement restricts competition under Article 101(1) TFEU rests on the plaintiff, usually the Commission.¹⁷⁶ Whether the burden of proof can then be shifted onto the defendant to disprove a presumption of illegality by object under Article 101(1) TFEU is tricky. Under the MAAP, the onus arguably remains at all times on the Commission to prove to the requisite level that the object of the agreement is to restrict competition. An incorrect or incomplete assessment would open the Commission up to challenge. The burden and standard of proof under the MAAP is clearly more demanding than under the orthodox approach. The extent to which it is more demanding depends on the facts of the case.¹⁷⁷ That is not to say, however, that the defendant cannot influence the outcome.

Bailey submits that the *legal* burden remains on the competition authority to prove the infringement it is asserting. However, the *evidential* burden of proving the facts in issue may shift between the parties.¹⁷⁸ A number of commentators support the proposition that the defendant plays a role in rebutting a presumption under Article 101(1) TFEU. Andreangeli interprets AG Trstenjak in *BIDS* as accepting that “a party seeking to disprove the allegations of an infringement to prove the existence of ‘elements of legal and economic context which could cast doubt on the existence of a restriction of competition’”.¹⁷⁹ Odudu also supports this by stating that the effect of the presumption is to shift the burden of proof within Article 101(1) TFEU.¹⁸⁰ He considers that it is for those engaged in the practice to demonstrate the absence of detrimental consequences.¹⁸¹

¹⁷⁶ (Bailey, 2010), B.I.

¹⁷⁷ See chapter 4.

¹⁷⁸ (Bailey, 2010), B.I.

¹⁷⁹ (Andreangeli, 2011), p225. See also (Odudu, 2009), p14: “The ability to ‘cast doubt’ on the applicability of the presumption that competition is restricted makes it clear that the presumption of necessary consequences is rebuttable rather than conclusive”.

¹⁸⁰ (Odudu, 2009), p15.

¹⁸¹ *ibid.*

This interpretation is supported by the CJEU in *FA*.¹⁸² The Court did not believe the defendant (in this case the *FA*) to have provided sufficient evidence of circumstances within the legal and economic context to justify a finding that the agreement did not restrict competition by object.¹⁸³ Mahtani surmises that the Court did not clarify precisely when a *prima facie* breach by object will not result in a restriction by object, “although it seems to have been the *FA*’s burden to discharge”.¹⁸⁴ Thus, the shift in the evidential burden of proof is a valid argument: in *FA* it was for the parties to provide convincing evidence “falling within the economic and legal context”, to disprove that the agreement was not liable to impair competition and therefore not have an anticompetitive object.¹⁸⁵

Nevertheless, the issue of rebuttal is far from straightforward. Odudu suggests that it is possible to disprove detrimental consequences, which - if one believes that object means ‘necessary effect’ or ‘presumption of effect’ - then dilutes the sense of that concept.¹⁸⁶ Additionally, the concept of necessary effect is supported by the common rule that the success of an agreement is irrelevant to a finding by object. Hence, the real issue is the need to understand what the function of any such rebuttal is. For instance, is its role to rebut: (i) the legal presumption of harm, that is, restrictive effects and/or, (ii) that particular agreements are automatically considered restrictive by object, or (iii) that the aim of the agreement to restrict competition? The answer to this remains unclear. It arguably depends on how the object criterion is assessed. The orthodox approach does not permit presumptions of negative effects to be rebutted, whereas the hybrid approach suggests that presumptions of harm are capable of rebuttal, either because the aim of an agreement is not to restrict competition despite containing a *prima facie* object restraint, or because the detrimental consequences can be disproved. Although technically the MAAP demands that the plaintiff must prove an agreement has the purpose of restricting competition, it recognises necessary effect as a relevant

¹⁸² *FA* (*supra* n2), as cited in (Mahtani, 2012), p14.

¹⁸³ (Mahtani, 2012), p14; *FA*, para 143 (*supra* n2).

¹⁸⁴ *Ibid* (Mahtani, 2012).

¹⁸⁵ *FA*, para 143 (*supra* n2).

¹⁸⁶ (Odudu, 2009).

factor in such assessment. Hence, parties would be wise to adduce evidence to rebut any presumptions of harm and prove that the agreement was not designed to restrict competition.

This issue is aided by Bailey who argues that there should be no conclusive substantive or evidential presumptions in EU competition law.¹⁸⁷ Moreover, he considers that what may suffice as convincing evidence to rebut a presumption and the ease with which this is done will vary depending on the presumption in question.¹⁸⁸ Ultimately this underlines, again, how dependent the assessment of the object criterion is on the facts of the case. Indeed, the case law suggests that it is for the plaintiff to convince the Court it sufficiently assessed whether an agreement has the object or effect to restrict competition.¹⁸⁹

The contention is, therefore, that ultimately the legal burden under Article 101(1) TFEU remains with the Commission, though the defendant can produce evidence demonstrating why the burden should be rebutted.¹⁹⁰ Evidently, the consideration of an agreement's specific legal and economic context is key to such a finding.¹⁹¹ Hence the application and assessment of the object criterion under Article 101(1) TFEU is considered closely in chapter 4, which focuses on the role of the legal and economic context.

3.4.5. Conclusion: presumptions of harm

This section examined whether there are legal presumptions that particular restraints restrict competition *by object* due to their known negative effects. The outcome is that there are no absolute legal presumptions: under the MAAP any agreement is capable of restricting competition by object whereas under the hybrid approach any such presumptions are capable of rebuttal.¹⁹² The role of necessary

¹⁸⁷ (Bailey, 2010), IV, E.

¹⁸⁸ *Ibid*, III.C.

¹⁸⁹ See both *GSK* judgments, GC judgement in particular (*supra* n9 and n10).

¹⁹⁰ (Svetlicinii & Sad, 2011), III (3), p351.

¹⁹¹ See chapter 4.

¹⁹² Odudu agrees the presumption of necessary consequence is rebuttable as was successfully demonstrated in the GC's judgment in *GSK* and in *O2*: (Odudu, 2009).

effect is significant in this regard. It is axiomatic that, after 60 years of case law, experience will now play a part in the determination of infringements of competition under Article 101(1) TFEU. However, the concept of necessary effect is not sufficient justification for a category of restrictions to exist, *by law*, which can be said to automatically restrict competition by object. Even if such a category of agreements were to exist, then it would need to be flexible.¹⁹³ As such, the value of categorisation is limited given its fluidity. How the CJEU grapples with this issue unfortunately becomes no clearer with time.¹⁹⁴ Moreover, the presence of the legal and economic context in every assessment of object reinforces this view. The question as to whether the burden of proof within Article 101(1) TFEU shifts on to the defendant can nonetheless be answered by reference to Bailey's interpretation. The evidential burden may shift, but ultimately the legal burden under Article 101(1) TFEU to prove that an agreement has the object of restricting competition remains with the plaintiff.

3.5. The definition of 'object': conclusion

This section was tasked with assessing how the Courts have defined (if at all) the object criterion. This exercise revealed that the definition is dependent on the context in which it is delivered, namely, whether under the MAAP, the orthodox approach or the hybrid approach.

Under the MAAP, the object of an agreement is understood as whether its 'precise purpose' is to *restrict competition* and thus is an open-ended enquiry as any type of agreement has the propensity to restrict competition under this guise.¹⁹⁵ Conversely, the orthodox and hybrid approaches do not turn on a literal definition of the term, rather a notion that the object criterion relates to serious and ostensibly obvious restrictions of competition, which 'by their very nature' infringe Article 101(1) TFEU. Hence, the notion of 'object' rests on a category of

¹⁹³ Further, any category would only be based on judgements of the European Courts and not on pronouncements by the Commission.

¹⁹⁴ See eg *Cartes Bancaires* (*supra* n101).

¹⁹⁵ The relationship between the object concept and what constitutes a restriction of competition is considered in chapter 5.

agreements that automatically restrict competition, primarily due to their necessary effect.

These definitions appear to conflict and can immediately be seen as capable of producing different results. For instance, under the MAAP it is perfectly conceivable (though that is not to suggest it is likely) that restrictions that are not obvious or *prima facie* hardcore may be found to infringe Article 101(1) TFEU by object. Conversely, the orthodox approach applies to obvious restrictions based on their known negative effects. The concept of necessary effect is a key driver in the interpretation of the object criterion under both the orthodox and hybrid approaches. However, chapter 2 found that, on the whole, the MAAP benefits from greater judicial support. Its attributes as regards the definition of the object criterion are clear; it is flexible and has the ability to adapt to changing economic circumstances in view of its close association with what constitutes a ‘restriction of competition’. Hence, the definition of the object criterion should follow the MAAP’s interpretation. The merits of the MAAP versus the hybrid and orthodox approaches cannot be appropriately assessed, however, until the application of the object criterion is investigated.¹⁹⁶

Having explained the way in which the three approaches define ‘object’, this chapter closes the discussion on its meaning. The next chapter, therefore, hones in on how the object of an agreement is determined under the MAAP. To this end, it focuses on the application of the legal and economic context, which is the cornerstone that underpins our understanding of the notion of restrictions of competition by object.

¹⁹⁶ See chapter 4.

Chapter 4: Applying the object concept to agreements in accordance with the MAAP

1. Introduction

Building upon the legal analysis of the meaning of the object concept in accordance with the jurisprudence of the European Courts, this chapter examines the application of the object concept under Article 101(1) TFEU. Chapter 3 identified that, under the MAAP, the object concept means the ‘precise purpose’ of an agreement. How that purpose is then determined in accordance with the more analytical approach is the focus of this chapter.

This chapter proceeds as follows: first, it considers the application of the legal and economic context. This comprises an investigation of its definition and how it determines an agreement’s purpose with reference to influences such as legitimate goals/ objectives and ancillary restraints. How the legal and economic context may be used as tool to rebut presumptions of harm is also reflected upon. Secondly, it asks how restrictive effects impact on the application of the legal and economic context, including use of the counterfactual. Thirdly, it examines how other commentators have rationalised the case law on the object criterion and highlights the subtle differences between the MAAP and hybrid approaches in respect of presumption rebuttal. Finally, it will make a judgment from a purely legal perspective as to what is the best interpretation of ‘restrictions of competition by object’. It will conclude that, based on a granular investigation of the case law, the best interpretation of the object criterion is in accordance with the MAAP.

2. Legal and economic context

The direction of recent case law has driven attention towards the pivotal role of the legal and economic context in determining the object of an agreement.¹ The

¹ Such as the Game Changer Cases and more recently Case C-32/11, *Allianz Hungária Biztosító Zrt v Gazdasági Versenyhivatal*, 14 March 2013, nyr (*Allianz Hungária*); Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l’Autorité de la concurrence*, [2001] ECR I-9419 (*Pierre Fabre*);

European Courts have consistently reiterated the significance of context to an object assessment in nearly every judgment since *BIDS*. This is largely due to the consistent citation of *STM*. Determining an agreement's object within its legal and economic context is therefore not a choice, it is a legal requirement.² Despite the recognition of its importance, the precise boundaries of the legal and economic context and hence its role in the assessment of agreements under Article 101(1) TFEU necessitates examination.

A useful starting point is to examine the AG's Opinion in *BIDS*. AG Trstenjak dealt specifically with the issue of the legal and economic context and her opinion highlights how it impacts on the outcome of a determination by object, and notes the various issues that can be taken into account under its umbrella.³ As seen in chapter 2, the Advocate General insisted that the legal and economic context "must be taken seriously", though it should not be "seen as a gateway for any factor which suggests that an agreement is compatible with the common market".⁴ Instead, only the elements of the legal and economic context which may cast doubts on the existence of a restriction of competition can be taken into account.⁵ The AG thereby suggested that the legal and economic context is a means by which to question and rebut legal presumptions of anti-competitiveness under Article 101(1) TFEU. She recognised that presumptions play a role in the determination of the object of an agreement, but also that such presumptions are rebuttable within the context of Article 101(1) TFEU. In this guise, she has supported the hybrid approach.

AG Trstenjak recounted three categories where the "assumption of a restriction of competition" could be rebutted as a result of an investigation into the legal and

Case C-67/13 P, *Groupement des Cartes Bancaires (CB) v Commission*, 11 September 2014, nyr (*Cartes Bancaires*).

² Andreangeli notes that even though the CJEU in *BIDS* found that the arrangements constituted an inherently 'obvious' infringement which justified a presumption of anti-competitive effects, the CJEU still expressly chose to analyse the arrangement against its legal and economic context: (Andreangeli, 2011), p225.

³ Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637 (*BIDS*), paras 50-59.

⁴ *Ibid*, para 50.

⁵ *Ibid*, para 50.

economic context.⁶ These are: (i) when a limitation on the freedom of undertakings to determine their policy on the market independently has no effects in relation to competition;⁷ (ii) where an agreement is ambivalent in terms of its effects on competition (that is, it has a pro-competitive aim) and there is a necessary restriction of the requirement of independence; and (iii) ancillary agreements which are necessary in order to pursue a primary objective. In this last respect, where the primary objective is neutral or promotes competition then the ancillary restrictions are necessary to achieve that aim and so do not infringe Article 101(1) TFEU.⁸

Arguably, the legal and economic context does not simply provide a rebuttal mechanism for legal presumptions, but provides the scope to assess whether an agreement has the primary purpose of restricting competition. This can be achieved by applying the counterfactual, the ancillary restraints doctrine and assessing whether a restriction in an agreement has a legitimate objective or is objectively justified.⁹ The case law is not entirely clear in this respect, particularly as regards the law on an agreement having multiple purposes and legitimate aims.¹⁰ Nevertheless, it does permit tentative conclusions to be drawn, particularly with a view to how the law could be applied in the future.

2.1. Definition

As with the phrase ‘of its nature’, what constitutes the ‘legal and economic context’ is rarely defined. Mahtani complains that there is insufficient clarity to show how the application of the legal and economic context should be applied to cases and that it has been invoked inconsistently.¹¹ Certainly, the definition is wide and has the propensity to encompass any aspect of analysis of an agreement needed to

⁶ *Ibid*, paras 51-54.

⁷ See eg (Mahtani, 2012), p37. He interprets this as an application of a form of the counterfactual.

⁸ *Ibid*, p37. Mahtani likens the final two categories as being similar to when a *prima facie* object restriction is balanced against a legitimate commercial purpose and the conduct is necessary to achieve that purpose.

⁹ See Joined Cases C-403 & 429/08, *Football Association Premier League Ltd v QC Leisure and Karen Murphy v Media Protection Services Ltd*, [2011] ECR I- 9083 (FA), para 140. Cf (Mahtani, 2012), p19.

¹⁰ See eg *supra* n3, *BIDS*; Joined Cases C-96/82 etc, *IAZ v Commission/ ANSEAU* [1983] ECR 3369; cf *supra* n1, *Pierre Fabre*.

¹¹ (Mahtani, 2012), p26.

determine its object.¹² *STM* provides the best indication of the factors, particularly economic ones, that should be taken into account when considering the object of an agreement.¹³ These factors have already been documented.¹⁴ What is pertinent is that such factors are applicable to determining both object *and* effect.¹⁵ This level of assessment indicates that defining the market would not be a step too far in order to apply the *STM* Test. In fact, it may be necessary to understand not only one market, but the relationship between two or more markets.¹⁶ *L'Oréal* also supports such conclusion.¹⁷ The case law review in chapter 2 demonstrates how extensively the European Courts have looked at the market concerned, the position of the parties on that market, the nature of the product or services and the surrounding circumstances of the agreement when carrying out an examination of the object criterion. Hence, the economic context relates to the specific context of the agreement itself: what were the circumstances of its implementation and why, what is the background to the agreement as well as what were the market factors and the position of the parties within that market. Ultimately, the Court is asking, what is the agreement's genesis?

The extent to which such analysis is undertaken varies from case to case.¹⁸ It is consistently reiterated by the Courts, and indeed by commentators, that the context refers to the specific context of the particular case.¹⁹ As such, each case is considered on its merits and unique circumstances.²⁰ From the perspective of the MAAP, the goal of assessing an agreement in its legal and economic context is not to prove that the agreement has the actual effect of restricting competition,²¹ but

¹² This view is supported by the CJEU in *Cartes Bancaires*, para 78 (*supra* n1). See also paras 77-90.

¹³ Confirmed in *Allianz Hungária* and *Cartes Bancaires* (*supra* n1).

¹⁴ See the *STM* Test (chapter 2).

¹⁵ Case C-56/65 *Société Technique Minière V Maschinenbau Ulm* [1966] ECR 235, (*STM*), 250. Reinforced by cases such as *Allianz Hungária*.

¹⁶ See *supra* n1, *Cartes Bancaires*, paras 73-82, which considered two-sided markets.

¹⁷ Case C-31/80 *L'Oréal NV and L'Oréal SV v De Nieuwe AMCK PVBA* [1980] ECR 3775, para 19.

¹⁸ See eg *STM* (*supra* n15).

¹⁹ See (Waelbroeck & Slater, 2013), para 4.19 onwards; (Jones, 2010), *Left Behind By Modernisation?* Indeed the GC rebuked the Commission in Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 for simply looking at past precedents without proper reference to the agreement's context, para 138.

²⁰ See (Lasok QC, 2008).

²¹ Thereby distinguishing itself from 'effect'.

simply to ascertain whether the true purpose (that is, the object) of the agreement is to restrict competition.²² Under the hybrid approach, there is an additional challenge. The use of the legal and economic context is also required to determine if a presumption of anti-competitiveness can be rebutted. As will be seen, despite the Courts alluding to the application of the hybrid approach when describing the distinction between object and effect, in many cases they are in fact looking to determine the aim of the agreement when applying the legal and economic context.²³ Considering the context of an agreement to determine an agreement's purpose may encompass, *inter alia*, assessing its potential effects. Therefore, the economic context of an agreement is wide-ranging and by its nature unspecific. Yet, it cannot be comfortably described as completely 'abstract'.²⁴

The 'legal context' on the other hand presumably consists of the relevant law, such as the case law of the European Courts, and any relevant Directives, Regulations or other applicable national laws or regulatory frameworks, including the legal or regulatory context within which the parties to the agreement operate. These factors suggest that past precedent is a factor to be taken into consideration. This requirement needs to be balanced against the economic context of the agreement. Notably, the CJEU has not always referred specifically to an agreement's 'legal' context, instead specifying the consideration of its 'economic' context.²⁵ The implications of this inconsistency are unclear though probably immaterial, as arguably taking account of an agreement's legal context can be inferred from the requirement that the general circumstances of the agreement should be considered

²² See eg (Ibáñez Colomo, 2014), '*Groupement des cartes bancaires and the resilience of the case law on restrictions by object*'.

²³ See eg *BIDS* (*supra* n3).

²⁴ Cf, opinion in Case C-250/92 *Gøttrup-Klim v Dansk Landbrugs Grovvarereselskat AmbA* [1994] ECR I-5641 (*Gøttrup-Klim*). This understanding of 'context' subjects the MAAP to criticism from proponents of categorisation who value bright lines and legal certainty.

²⁵ The judgment in *Joined Cases 56 & 58/64, Etablissements Consten SA and Grundigverkaufs-GmbH v Commission*, [1966] ECR 342 (*Consten & Grundig*) introduced the notion of the 'legal and economic' context, though judgments such as Case C-5/69 *Franz Völk v SPRL Ets J Vervaecke* [1969] ECR 295 (*Völk*) do not refer specifically to the 'legal' context.

in any assessment of an agreement's object.²⁶ Nevertheless, the CJEU usually now refers to the 'legal and economic context' of an agreement.²⁷

To demonstrate how wide ranging the application of the legal and economic context is, the section below focuses on three areas. It will examine how context is used as a medium: (i) to undertake a form of balancing exercise by balancing the positive attributes of an agreement against its negative attributes; (ii) to consider the applicability of an objective justification or legitimate aim; and (iii) to consider whether particular restrictions are ancillary to an overall pro-competitive object.

2.2. Applying the legal and economic context to determine the precise purpose of an agreement: balancing the positive aims of an agreement against negative ones

Any proposal to balance the positive and negative attributes of an agreement is contentious as it leads, inevitably, to comparisons with the US rule of reason. As has been clearly established by the Courts (regardless of whether that interpretation is correct), the rule of reason does not have a role in EU competition law, more specifically within the context of the effect analysis.²⁸ Therefore, as with references to '*per se*', the rule of reason does not provide an appropriate analogy under EU law for the balancing process that sometimes occurs under Article 101(1) TFEU.²⁹ Instead, this process can be viewed somewhat differently: the question is whether a pro-competitive aim of an agreement has the power to trump particular restrictions of competition contained within it.³⁰ Chapter 2 revealed that there have been a number of cases where, when assessed under the object criterion, the positive attributes of an agreement have either outweighed the negative attributes

²⁶ See eg Case C-23/67, *Brasserie De Haecht v Wilkin (no.1)*, [1967] ECR 407; and *Anseau/IAZ (supra n10)*. In C-501/06 P *GlaxoSmithKline Services Unlimited v Commission (GSK)* [2009] ECR I-9291 (*GSK*), paras 61-64 the CJEU referred to the fact that agreements aimed at limiting parallel trade are, in principal, prohibited by object. See chapter 2.

²⁷ See eg *Pierre Fabre; Cartes Bancaires*, para 53 (*supra n1*).

²⁸ See Andreangeli's analysis of the balancing undertaken by the European Courts under Article 101 TFEU: (Andreangeli, 2011), p227 onwards.

²⁹ The position in the US will be briefly compared with that in the EU in chapter 6.

³⁰ See eg Case T-328/03, *O2 (Germany) GmbH & Co OHG v Commission*, [2006] ECR II-1231, Case C-519/04P, *Meca-Medina v Commission*, [2006] ECR I-6991, Case C-309/99, *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten*, [2002] ECR I-1577.

so that the agreement did not restrict competition by object or were not considered sufficient to excuse the application of object.³¹

Knowing quite when the positive attributes of an agreement will trump an application of the object criterion is difficult. This is because the case law establishing the MAAP proposes that the legal and economic context should determine whether such attributes will be successful in a particular case. Therefore, it is not possible to predict with certainty whether the factors that were successful in rebutting a restriction by object in one case will be equally as successful in another case. The outcome will depend on the facts of the case.³² It is of course helpful nevertheless to understand when the European Courts look at the positive attributes of an agreement and in what circumstances those attributes either fail or succeed to rebut a presumption of restriction of competition by object, bringing an agreement outside Article 101(1) TFEU entirely or warrant that its 'effect' requires determination.³³

Under the MAAP it is conceivable that an agreement that has a pro-competitive aim could be found not to restrict competition by object despite containing apparent 'by object' restrictions. The question for consideration is: how is the primary purpose of the agreement determined if an agreement has an apparently pro-competitive aim, but otherwise contains restrictions of competition? In responding to this question, the case law has produced some interesting answers.

In *Asnef Equifax* a horizontal credit information exchange agreement was held not to have the object of restricting competition as its "essential object" was to make

³¹ See eg Case C-41/69 *ACF Chemiefarma v Commission* [1970] ECR 661. In *Anseau/IAZ* (*supra* n10) the purpose of the agreement (to counter a shortage of raw materials and to protect the public health respectively) was not enough to invalidate the anticompetitive object of the agreement. In C-27/87 *Erauw-Jacquery v La Hesbignonne* [1983] ECR 1919 (*Louis Erauw*) absolute territorial protection was not held to infringe Article 101(1) TFEU and, in fact, came outside it as the Court recognised it was important that persons should be allowed to protect their financial investment in developing their products. Whereas in *Völk* (*supra* n25, paras 5-7), ATP was held to come outside Article 101(1) TFEU as the effect on the market was insignificant, which was established by a reference to the actual circumstances of the agreement.

³² See *supra* n9 *FA*, paras 140, 143.

³³ Scholars such as Jones, Andreangeli, Goyder, Mahtani and Odudu have also found no consistent rational explanation or methodology and have thus proffered their own conclusions.

available to credit providers relevant information about existing or potential borrowers.³⁴ Therefore, its positive attributes outweighed the fact that it was a horizontal information exchange agreement. The CJEU has viewed selective distribution agreements in a similar vein. In *AEG*, the Court found that the object of the agreement was to improve competition and therefore particular restrictions of competition were justified.³⁵ In *Pierre Fabre* the AG articulated very well the inherent balancing that takes place as regards selective distribution systems.³⁶ He emphasised that “an individual examination is...required in order to assess whether an agreement has an anticompetitive object even where it contains a restriction which falls within the scope of [the VBER]”.³⁷ When allowing absolute territorial protection (ATP) in *Louis Erauw*, the Court explained that plant breeders need to protect their financial investment when developing products.³⁸ In that case, the Court considered that such a clause would fall outside Article 101(1) TFEU.³⁹ Conversely, in *Asnef* the CJEU found that the register did not have a restrictive effect. It appears that once an agreement is not found restrictive by object the circumstances of the case dictate whether it then falls outside Article 101(1) TFEU or must be assessed by effect.⁴⁰

These cases show that there is clear precedent for a positive, pro-competitive purpose of an agreement to be taken into account and actively balanced against the restrictions contained in the agreement under the object criterion. Furthermore, a positive aim may trump a finding that any related restraints have the object of restricting competition. In these instances, those restrictions do not outweigh the benefits of the positive aim of the agreement and therefore should be

³⁴ Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, [2006] ECR I-11125 (*Asnef*). This point is also noted by (Jones, 2010), ‘Left Behind by Modernisation’, pp649, 652.

³⁵ C-107/82 *AEG-Telefunken v Commission* [1983] ECR 3151.

³⁶ *Pierre Fabre*, footnote 39 of the opinion and paras 35, 42 and 52 of the opinion (*supra* n1).

³⁷ *Ibid*, para 30.

³⁸ *Louis Erauw*, paras 10-11 (*supra* n31). Though the reasoning for this decision could also be attributed to the fact such restrictions are ancillary to the main purpose of the agreement.

³⁹ *Ibid*, paras 10-11. This can be contrasted with a different approach that the Court adopted in *Völk* (*supra* n25, paras 5-7). Here, the Court held that *any* restriction of competition will not be a restriction by object if the effect on the market is insignificant. In fact, in such cases the agreement would fall outside Article 101 TFEU entirely.

⁴⁰ This is considered further below.

assessed by reason of their ‘effect’ or fall outside Article 101 TFEU entirely. Whether this is a true case of ‘balancing’ is, however, a matter of labelling. Any such balancing is not concerned merely with weighing the effects of an agreement (though these may be taken into consideration). It could instead be described as a method by which the Court establishes the primary purpose of the agreement, and finding that on the facts, restrictions required to achieve that (pro-competitive) end are justified.⁴¹

The best examples of this kind of balancing are seen when the Courts assess selective distribution agreements. In *Pierre Fabre* the Court held a restriction of an absolute ban on internet sales was a step too far: it was not justifiable.⁴² The Court took this a step further by pronouncing that selective distribution agreements were “restrictions by object” in the absence of “objective justification”.⁴³ Understanding the law in accordance with the MAAP does not support such a proposition. Selective distribution agreements are not automatically designated or categorised as restrictions by object. Instead, it is perhaps more appropriate to say that they “necessarily restrict competition”, that is, they restrict competition.⁴⁴ The AG made the point in a more adroit fashion, “the mere fact that the selective distribution agreements in question...may restrict parallel trade may not in itself be sufficient to establish that the agreement has the object of restricting competition pursuant to Article 101(1)”.⁴⁵

The main point of interest in *Pierre Fabre* was the reference by the Court to “objective justification”.⁴⁶ This pointed to an open acknowledgment that an agreement can escape a finding of object if it can be objectively justified, which

⁴¹ The notion that the analysis of the object of an agreement must reveal a sufficient degree of impairment of competition is also pertinent in this regard: the scope of factors that may be considered under the *STM* Test is broad. See, *FA*, para 135 (*supra* n9).

⁴² *Supra* n1 *Pierre Fabre*. See (Mahtani, 2012), p37.

⁴³ *Ibid*, *Pierre Fabre*, para 39.

⁴⁴ *Ibid*, *Pierre Fabre* para 39. No further cases can be found linking object with selective distribution agreements.

⁴⁵ *Ibid*, *Pierre Fabre*, opinion, para 42. The Court ostensibly followed the AG’s opinion, though couched certain elements of the opinion in its own terms, which due to the nuances in language involved inevitably leads to an entirely different interpretation. This is not a lone example of such careless law-making.

⁴⁶ The position taken by the CJEU is correct and has precedent, see chapter 2.

implies that any legal presumption of anti-competitiveness is capable of being rebutted within Article 101(1) TFEU. Moreover, *justification* of a restriction of competition by object requires a form of balancing between the positive versus the negative attributes of an agreement.⁴⁷ Furthermore, such analysis is based on the facts of the particular case in issue in its unique legal and economic context.⁴⁸ If the purpose of an agreement is to improve competition then - particularly in the context of selective distribution agreements - so long as certain criteria are met (in this instance, the *Metro* criteria) an agreement will not be held to restrict competition under Article 101(1) TFEU. The significance here is that those types of agreement do not then require analysis under the effect criterion to determine their actual effects. Therefore the Courts have shown willingness to devise criteria to allow what are, ultimately, pro-competitive agreements to come outside Article 101(1) TFEU entirely. The fact that the Courts are prepared to do this would suggest that they are also prepared to allow other types of restraints in other circumstances. Ultimately, it highlights how limiting the orthodox approach is. It does not cater for these anomalies in the case law.⁴⁹

To therefore reflect the so-called 'balancing' of the positive aims of an agreement under the legal and economic context, the best definition of 'object' under MAAP is confirmed as the 'precise purpose' of the agreement.

Another case where the Court balances the pro-competitive aspects of an agreement despite acknowledging known negative effects on competition (that is, the necessary consequence of the agreement) was that of *Wouters*.⁵⁰ The CJEU held that a national regulation adopted by a body such as the Bar of the Netherlands did not infringe Article 101(1) TFEU, since that body could reasonably have considered that the regulation, despite the restrictive effects inherent in it,

⁴⁷ *Supra* n1, *Pierre Fabre*, para 40.

⁴⁸ *Ibid*, paras 39 to 47, in particular para 47.

⁴⁹ Ibáñez Colomo believes AG Wahl in *Cartes Bancaires* understands the significance of context when determining if "an agreement is a plausible source of efficiency gains", that is, only agreements that have no credible redeeming features will restrict competition by object: (Ibáñez Colomo, 2014), '*Chapeau bas, Prof Wahl*'.

⁵⁰ *Supra* n30, *Wouters*. See also (Jones, 2010), '*Left Behind by Modernisation*', p666.

was necessary for the proper practice of the legal profession within the Member State concerned.⁵¹ Moreover, the Court maintained that “not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101(1) of the Treaty”.⁵² This case demonstrates perfectly, that an agreement that has *known* negative effects on competition can still fall outside Article 101(1) TFEU entirely if the restraints are necessary to support the ultimate aim of the agreement, in this case, to regulate the legal profession. The Court clearly showed how it weighed up the positive attributes of the agreement against the negative ones with an eye firmly on a Member State’s ability to regulate its legal profession.⁵³

2.3. Legitimate goals/aims/objectives and objective justifications

Alongside the idea that a pro-competitive purpose can lawfully allow certain restrictions of competition to be contained within an agreement without infringing Article 101(1) TFEU, is the concept of an agreement having a ‘legitimate goal/aim/objective’.⁵⁴ The Courts use of these phrases has not always been consistent. Therefore, the overlap with what constitutes a ‘positive aim’ or ‘purpose’ of an agreement can be considerable, and in many cases probably means the same thing. If there were a distinction between having a legitimate aim versus a positive purpose, it could be as follows: the European Courts have said in a number of cases that simply having a ‘legitimate goal’ is not enough to bring an agreement outside the realms of Article 101(1) TFEU or to escape a finding of restriction by object.⁵⁵ This was aptly demonstrated in *BIDS*, where the ‘legitimate goal’ of the agreement, as argued by BIDS, was to address the overcapacity in the

⁵¹ *Ibid*, *Wouters*, para 110.

⁵² *Ibid*, *Wouters*, para 97.

⁵³ *Ibid*, *Wouters*, paras 73-110.

⁵⁴ These phrases are used interchangeably.

⁵⁵ See *supra* n3, *BIDS*.

Irish processing industry.⁵⁶ Hence, the issue was considered at length by AG Trstenjak.⁵⁷

Her strategy was first to determine if the purpose of the agreement was to restrict competition, and if that was found to be the case then to consider whether a pro-competitive object or unobjectionable primary objective could cast doubt on the finding of the existence of a restriction of competition.⁵⁸ The twist in this strategy was that despite agreeing that ‘obvious’ restrictions are not required in order to find a restriction by object, she considered that the legal and economic context was to be “taken into account only in so far as it can cast doubt on the existence of a restriction of competition”.⁵⁹

To determine the object of an agreement, the AG found that regard “must be had to the content of the agreement in the light of *its* legal and economic context”.⁶⁰ What is more, the AG’s methodology involved assessing the effect on market conditions of the agreement’s restrictions on the parties’ independence.⁶¹ The AG applied the counterfactual to determine this and took account of the effects which were the “necessary consequence” of the agreement and the effects which the parties intended to achieve through those restrictions.⁶² Such an analysis cannot be described as anything other than detailed. Having considered, *inter alia*, the counterfactual, the agreement’s effect on market conditions and on the withdrawal of players from the market, the effects of overcapacity in that market, levies, lessons from “economic science”, and restrictions on use and disposal, the AG

⁵⁶ See chapter 2 for the facts.

⁵⁷ See *BIDS*, paras 23-34 of the opinion (*supra* n3), which sets out the arguments of the parties. This clearly illustrates how BIDS considered none of its restrictions fell within the object category and they had the legitimate objective of eliminating overcapacity (paras 25 and 26).

⁵⁸ *Ibid*, *BIDS*, para 60: “first it must be considered whether the agreements have restrictions of competition as their necessary consequence or are aimed at limiting the freedom of the parties to determine their policy on the market independently and thereby at *affecting market conditions*. Subsequently it must be examined as part of an overall assessment whether the restrictive elements are necessary in order to achieve a precompetitive object or a primary objective which does not come under...Article [101]1 TFEU”. Emphasis added.

⁵⁹ *Ibid*, para 59.

⁶⁰ *Ibid*, para 43 citing *STM*. Emphasis added.

⁶¹ *Ibid*, para 62-93.

⁶² *Ibid*, para 63-65.

reached an “interim conclusion”.⁶³ She found that the agreement’s purpose of reducing production capacity, through processors leaving the market, the staging of levies and the restrictions on use and disposal had, as a ‘necessary consequence’, the restriction of competition.⁶⁴ This initial conclusion was then subject to the consideration of whether the agreements had a pro-competitive or a primary objective which could call such conclusion into doubt.

Surprisingly, the AG gave rather brief consideration to the rebutting factors. She looked at the “aims” pursued by the BIDS agreements. BIDS argued that the restrictions (collection of levies, restrictions on use and disposal) were justified as the agreement had a legitimate objective of limiting overcapacity and achieving economies of scale.⁶⁵ The AG reiterated that obvious restrictions are not the only types of restriction capable of restricting competition by object and, even if a sector is experiencing a structural crisis this does not prevent the application of Article 101(1) TFEU.⁶⁶ The AG reasoned that the BIDS situation was different from those where an agreement pursues “*either* a pro-competitive object *or* an object which is neutral from a competition point of view”.⁶⁷ This is because the “*aim* of increasing the profitability of the processing industry as a whole by reducing the overcapacity by 25% *inevitably* results in a restriction of competition”.⁶⁸ Therefore, the BIDS agreements had the object of restricting competition.

AG Trstenjak concluded, sagely, that the content of an agreement must always be examined against the backdrop of its legal and economic context. Hence, to compare agreements is not always appropriate. Such an exercise can fail to address the question of when a restriction of competition by object exists.⁶⁹ Ultimately, the AG credits the balancing of positive versus negative attributes of an agreement

⁶³ *Ibid*, paras 62-93.

⁶⁴ *Ibid*, paras 62–94, para 70.

⁶⁵ *Ibid*, para 96.

⁶⁶ *Ibid*, paras 98-99, citing Joined Cases T-217/03 and T-245/03 *FNCBV v Commission* [2006] ECR II-4987, para 90 and *IAZ/Anseau* (*supra* n10).

⁶⁷ *Ibid*, *BIDS*, para 100. Emphasis added.

⁶⁸ *Ibid*, *BIDS*. Emphasis added.

⁶⁹ *Ibid*, *BIDS*, para 104. This mirrors a similar point made by the GC in *GSK* (*supra* n19).

under the object criterion. This highlights how it is inherently possible for *any* type of restriction to restrict competition by object under Article 101(1) TFEU.

Conversely, the consideration of an ‘objective justification’ as a means to justify a restriction of competition, as opposed to arguing that an agreement had a legitimate aim, was considered by the Court in *Pierre Fabre*.⁷⁰ The CJEU, however, makes little distinction between what constitutes a legitimate objective and an objective justification. The CJEU found that in the absence of an objective justification a selective distribution agreement was to be considered a restriction by object.⁷¹ According to the CJEU, the Court has always recognised that there are “legitimate requirements” that may justify “a reduction of price competition in favour of competition relating to factors other than price.”⁷² Such legitimate requirements include the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products.⁷³ When selective distribution systems “aim” at the “attainment of a legitimate goal capable of improving competition in relation to factors other than price” such agreements can be in conformity with Article 101(1) TFEU.⁷⁴ In *Pierre Fabre*, a preliminary reference case, the question referred was whether a prohibition on all forms of internet selling was capable of being “justified by a legitimate aim” or alternatively whether the restrictions of competition “pursue legitimate aims in a proportionate manner”.⁷⁵ The Court, however, chose to limit its frame of reference by considering the restrictions in the context of selective distribution agreements examined in accordance with the *Metro* criteria.⁷⁶ This questions whether the

⁷⁰ *Supra* n1, *Pierre Fabre*.

⁷¹ *Ibid*, *Pierre Fabre*, para 39. Note the Court provides no citation supporting this contention. It was however correct to say that, as per *AEG-Teliefunken* that selective distribution systems ‘necessarily affect competition’. Cf para 42 of the opinion which clarifies selective distribution systems ‘necessarily restrict competition’.

⁷² *Ibid*, *Pierre Fabre*, para 40

⁷³ *Ibid*, *Pierre Fabre*, para 40.

⁷⁴ *Ibid*, *Pierre Fabre*, para 40.

⁷⁵ *Ibid*, *Pierre Fabre*, paras 42, 43.

⁷⁶ *Ibid*, *Pierre Fabre*, para 43 referencing para 41.

issues raised in *Pierre Fabre* should be considered outside the realms of selective distribution.⁷⁷

It is unwise to disregard the *Pierre Fabre* judgment, however, as the CJEU closely considered the application of the object criterion. It clarified that an *aim* to maintain a brand's prestigious image does not constitute a 'legitimate aim' for restricting competition.⁷⁸ In this case, the agreement required the sale of products to be made in the presence of a qualified pharmacist, the result of which was that internet sales of those products were banned. An interesting factor is that the agreement did not specifically ban internet sales. It was inferred from the consequences of the requirement that a qualified pharmacist be present at the point of sale, hence it was an indirect restriction. This underlines, again, the importance of assessing an agreement's content and circumstances as well as its potential effects.

Ultimately, the Court found that in the context of selective distribution systems, a clause requiring the sale of products to be made in the presence of a qualified pharmacist thus resulting in a ban on the use of the internet for those sales, amounts to a restriction by object. This finding relied on an:

"individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, and it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified."⁷⁹

⁷⁷ *Ibid*, *Pierre Fabre*. See also para 47.

⁷⁸ *Ibid*, *Pierre Fabre*, para 45.

⁷⁹ *Ibid*, *Pierre Fabre*, para 47. Cf (Svetlicinii & Sad, 2011) who argue that the CJEU has never previously referred to objective justifications as allowing agreements that have an anticompetitive object to escape Article 101(1) TFEU. Instead they argue the CJEU is applying a preliminary Article 101(3) assessment to determine if an agreement should be viewed restrictive by object under Article 101(1) TFEU. Therefore by allowing an objective justification the burden of proof is shifted to the parties from the Commission's *prima facie* assessment under Article 101(1) TFEU to objectively justify their agreement, which the Commission must look at again within a "truncated Article 101(3) TFEU assessment taking into account the legal and economic context".

It is unclear from the judgment precisely what conditions need be taken into account for an objective justification to rebut a finding of object.⁸⁰ To find an answer it is helpful to turn to the opinion upon which the CJEU's judgment was based. AG Mazák's opinion provided a clearer and more legally robust discussion of the issues. He was also less concerned to confine his opinion to the realms of selective distribution agreements. Instead, his opinion is relevant to the concept of object as a whole. In particular, he examined the issue of objective justification in depth.⁸¹

AG Mazák considered that regulatory obligations would be an objective justification for the ban on internet sales (although this was not the case in the case at hand).⁸² He acknowledged that there may be certain exceptional circumstances where restrictions on internet sales may be objectively justified owing to the nature of the goods or the customers to whom they are sold, and therefore a national or Community regulation would not be the only source of a potential justification.⁸³ Restrictions that are justified are then likely to fall *outside* Article 101(1) TFEU so long as they "do not go beyond what is necessary in accordance with the principle of proportionality".⁸⁴ For AG Mazák, a 'legitimate objective' that a party wishes to rely on must "be of a public law nature".⁸⁵ As such, it must be "aimed at protecting a public good and extend beyond the protection of the image of the products concerned".⁸⁶

This analysis by AG Mazák is compelling. First, he confirms that a form of balancing can be undertaken within an assessment of the object criterion. Secondly, he limits such justification to one that is of a public law nature, though it does not have to be contained within a regulation. He thereby addresses AG Trstenjak's concern that

⁸⁰ The Court simply states that the restriction in question restricts competition by object and is not justifiable. This situation could be compared with *Louis Erauw* where the Court was able to see the positive purpose of the ATP provision (*supra* n31).

⁸¹ *Pierre Fabre*, opinion, paras 31 to 43 (*supra* n1). Though that is not to say there are no flaws in the opinion, eg the reliance on *BIDS* to justify the distinction between object and effect.

⁸² *Ibid*, para 34.

⁸³ *Ibid*, para 35.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*. AG Mazák cites *Wouters*, para 97 (*supra* n30).

⁸⁶ *Ibid*, para 35.

not just any factor should invalidate a finding by object. Finally, he draws parallels with the concept of ancillary restraints: whether restraints are necessary and proportionate, but ancillary to the primary purpose of the agreement. He reiterates the need to examine the legal context (in this instance the case-law of the Court on selective distribution) and concludes that, as a result of such examination, the plaintiff (Pierre Fabre) did not have a sufficient objective justification for banning internet sales in order to protect the image of its product.⁸⁷ Consequently, whether a restriction is objectively justified depends on the case, its context and its purpose or objective. The correlation between objective justifications and the concept of ancillary restraints is particularly thought-provoking. The AG stated that to determine whether restrictions are inherent to an agreement, such restrictions must not go beyond what is objectively necessary in order to carry out the purpose of the agreement.⁸⁸

The AG also addressed the question of necessary effect. He agreed that, “in principle”, agreements aimed at prohibiting parallel trade have as their object the restriction of competition.⁸⁹ He qualified this, however, by finding that “the mere fact that the selective distribution agreements in question...may restrict parallel trade may not in itself be sufficient to establish that the agreement has the object of restricting competition”.⁹⁰ He thus recognised that agreements that restrict parallel trade have exceptionally been held to be compatible with Article 101(1) TFEU, means that those exceptions “suffice to establish that agreements which restrict...parallel trade do not automatically have the object of restricting competition...thus a mere appraisal of the terms of an agreement without assessing...the legal and economic context in which it was drafted and currently operates will not...suffice”.⁹¹ Assessing whether a selective distribution agreement has a restrictive object must “be carried out in the light of the nature of selective distribution agreements and the case-law thereon which forms part of the

⁸⁷ *Ibid*, paras 36-37.

⁸⁸ *Ibid*, para 57. See *infra* section 2.4 on ancillary restraints.

⁸⁹ *Ibid*, para 42.

⁹⁰ *Ibid*, para 42.

⁹¹ *Ibid*, footnote 33 of the opinion.

economic and legal context in which the agreements were concluded and operate.”⁹²

Similar issues regarding legitimate objectives and objective justifications were raised in *ACF Chemiefarma* and *IAZ/Anseau*.⁹³ The cases saw the parties argue that the restraints were necessary due to a shortage of raw materials (a crisis cartel) and to protect public health respectively. Both arguments were dismissed by the Court, which took them into consideration, but found that the context of the agreements did not justify their restrictive object.

The question is, therefore, when will an objective justification argument succeed? The answer is that it depends on the case and, in particular, whether a legitimate goal outweighs the restraints required to achieve it. Clearly in *ACF Chemiefarma* and *IAZ/Anseau*, as in *BIDS*, the Court was not convinced that this was the case. It can be argued that parties to an agreement must adduce convincing evidence that proves that any restraints are ancillary and proportionate to the *primary purpose* of the agreement, namely, a legitimate objective (commercial and public) or a pro-competitive purpose.⁹⁴ Regardless of whether this method is a form of rebuttal mechanism under Article 101(1) TFEU or part of the methodology to determine the purpose of an agreement, the legal and economic context (based on the content of the agreement) takes centre stage when assessing an objective justification.⁹⁵ Goyder supports AG Mazák, contending that only agreements which have public policy aims have benefited from objective justification arguments.⁹⁶ The CJEU, on the other hand, is willing to consider commercial justifications of restraints in the

⁹² *Ibid*, para 43. See also para 54 which discusses whether restrictions are “proportionate” and demonstrates that even apparent ‘hardcore’ restrictions preventing a ban on passive sales (as per the Commission’s various Guidelines) still can be seen to be proportionate, though admittedly in very exceptional circumstances.

⁹³ *Supra* n31, *ACF Chemiefarma* and n10 *Anseau/IAZ*.

⁹⁴ See *Louis Erauw and Asnef Equifax (supra* n31, 34).

⁹⁵ Goyder asserts that the Commission and the European Courts recognise that an agreement may not be restrictive by object if it is objectively justified, though this is narrowly defined: (Goyder, 2011), II. B.

⁹⁶ (Goyder, 2011), II. B, as shown in *Wouters and Meca Medina*. This is an important point as usually issues such as public policy etc are traditionally reserved for Article 101(3) TFEU. AG Mazák in *Pierre Fabre* limited objective justifications to those of a public law nature aimed at protecting a public good.

pursuit of a legitimate aim.⁹⁷ It would seem to be unwise to dismiss commercial rationale as a basis of objective justification. It is clear, however, that the raising of such a defence is rarely successful.⁹⁸

2.4. Object and the ancillary restraints doctrine

As has been conspicuous in the cases recounted above, the concept of ancillary restraints is closely correlated with balancing, legitimate goals and objective justifications. As with legitimate goals and objective justifications, the terms are used interchangeably, for instance, where particular restraints are deemed ancillary to the purpose of pursuing a pro-competitive goal or a legitimate objective. The question of whether a restriction can be ancillary to the main operation of an agreement is historically a consideration when assessing the 'effect' of an agreement.⁹⁹ An illustration of this is seen in Andreangeli's work. She examines the concept of 'ancillarity' in relation to Article 101(1) as a whole.¹⁰⁰ She contains the concept within the framework of restrictions on parties' freedom to trade. In this sense, she considers that the European Courts have taken a view that in such circumstances restraints "that were 'necessary' and 'proportionate' to pursue a 'legitimate commercial purpose', as well as...a public interest goal, could be regarded as falling outside the remit of Article 101(1) TFEU altogether".¹⁰¹ She regards this more "economics-principled" and realistic approach to Article 101(1) TFEU as "a step closer to 'balancing' the pro- and anti-competitive *effects*" of agreements in the same way as under Article 101(3) TFEU.¹⁰²

The same principles are applicable, however, within the realms of the object criterion. This is notwithstanding that it does not have at its heart the balancing of the pro and anti-competitive effects of an agreement, but rather a balancing of the

⁹⁷ *Pierre Fabre*, supra n1, para 47. This is reinforced by the judgment in *Cartes Bancaires* where the CJEU stated that consideration should be given to whether a legitimate objective (in this case combating free-riding) precludes an agreement from being found restrictive by object: para 70.

⁹⁸ It would be interesting to assess if arguments in favour of RPM could be made under this banner (as in the US).

⁹⁹ See eg, (Nazzini, 2006); Article 81(3) Guidelines.

¹⁰⁰ (Andreangeli, 2011), p227 onwards.

¹⁰¹ *Ibid*, (Andreangeli, 2011), p227.

¹⁰² *Ibid*. This is shown in *Meca Medina* (supra n30).

positive and negative attributes of the *purpose* of the agreement. What is striking about *Meca Medina* (and *Wouters*) is that, unlike in *BIDS*, the Court held that a limitation in the freedom of action of an undertaking should not be automatically regarded as prohibited by Article 101(1) TFEU, without an analysis of the legal and economic context.¹⁰³ Since the agreement in *Meca Medina* pursued legitimate goals (in this case the protection of health of athletes and the integrity of competitive sports) and the restraints were *limited to what was necessary* to achieve that objective, the restraints were not found to be incompatible with Article 101(1) TFEU.¹⁰⁴ Therefore, even though the restraints restricted the economic freedom of the parties, the rules were not caught by Article 101(1) TFEU. In the case of *BIDS*, it could be argued that the restraints imposed were not ‘limited’ and that, in that instance, the CJEU did not believe the purpose of the agreement constituted a legitimate goal.¹⁰⁵

Although not commonly linked, the ancillary restraints doctrine has a clear place under the object criterion. This is because it helps explain why the ‘object’ of an agreement is often described by the Courts as the ‘primary purpose’ or ‘precise purpose’, and hence why the object concept permits particular agreements typically seen as containing hardcore restrictions to fall outside Article 101(1) TFEU altogether.¹⁰⁶ A hypothetical example can be envisioned as follows: an agreement between competitors is designed to improve a distribution channel, which the parties currently do not share but could, and such collaboration would potentially benefit consumers due to increased efficiencies. In order for the parties to have the incentive to invest in improving the distribution channel, they require various short-term territorial protections from each other and market sharing arrangements. Debatably, the primary purpose of the agreement (to improve the distribution channel) could be viewed as being pro-competitive or as having a legitimate objective. The restraints could be seen as ancillary to that purpose as they are objectively necessary and proportionate to that primary aim.

¹⁰³ Lasok argues object and effect have the same assessment process, (Lasok QC, 2008).

¹⁰⁴ (Andreangeli, 2011), p227-228.

¹⁰⁵ See the CJEU’s explanation of the *BIDS* judgment in *Cartes Bancaires*, paras 83-87 (*supra* n1).

¹⁰⁶ See eg Case T-360/09, *E.ON Ruhrgas AG v Commission*, 29 June 2012, nyr, para 141.

Alternatively, they could be understood to be objectively justified.¹⁰⁷ Moreover, to determine whether the agreement is ‘sufficiently deleterious’, an analysis of the agreement under the *STM* Test would take those factors into account in order to establish whether the ‘precise purpose’ of the agreement is to restrict competition.

Aspects of such a hypothesis can be seen in *E.ON Ruhrgas AG*.¹⁰⁸ The Commission fined E.ON and GDF Suez EUR 553 million on account of agreements relating to their joint construction of the MEGAL pipeline to deliver Russian natural gas to Germany and France.¹⁰⁹ On appeal, the GC specifically linked the idea that the parties did not have the object of restricting competition as the agreements were ancillary to the overall purpose of the primary agreement.¹¹⁰ Although the GC ultimately rejected this argument, it gave the argument credence as it found the agreements were not directly related and objectively necessary to the implementation of a main operation, which must be proportionate.¹¹¹ Notably, the GC emphasised that the requirement of objective justification does not mean that the pro- and anticompetitive effects of an agreement must be weighed.¹¹² This observation gets to the crux of the matter. The seemingly interchangeable notions of balancing, legitimate objectives, objective justifications and the doctrine of ancillary restraints are not looking specifically to assess the pros and cons of the effect of an agreement. Rather, they are tools used to identify the primary purpose of the agreement within its legal and economic context.¹¹³

What is particularly interesting in *E.ON* is that the GC recognised that the assessment of the ancillary nature of the agreement in relation to the main operation “entails complex economic assessments”.¹¹⁴ This emphasises how, despite an apparently restrictive object (to share markets, which is seen by the

¹⁰⁷ Therefore objective justification and ancillarity could be viewed as one and the same.

¹⁰⁸ *Supra* n106, *E.ON*.

¹⁰⁹ Case COMP/39.401 — *E.ON/GDF*. The judgment is discussed further below and in chapter 5.

¹¹⁰ *E.ON*, para 138.

¹¹¹ *E.ON*, paras 62-64.

¹¹² *E.ON*, para 65.

¹¹³ Ibáñez Colomo refers to this as analysing the “rationale” behind the agreement to determine its “nature” as opposed to its “effects”: (Ibáñez Colomo, 2014), ‘*Chapeau bas Prof Wahl*’.

¹¹⁴ *Supra* n106, *E.ON*, para 69. Though the GC held that judicial review of that assessment is limited: the essence being that the Court cannot substitute its own economic analysis.

Commission as a hardcore restriction), the Court accepted that the doctrine of ancillary restraints can and should be considered under, what must be assumed to be, the object criterion where appropriate. Indeed, the Commission itself considered the evidence in this regard.¹¹⁵ From this it can be concluded that the object criterion has the propensity to find apparently hardcore restraints as being ancillary to a pro-competitive purpose, a legitimate objective (which may also be pro-competitive) or a purpose that has a neutral effect. The outcome of such a finding would generally bring an agreement outside the realms of Article 101(1) TFEU. How this then impacts on the relationship between object and effect is considered in the following chapter.

This conclusion would be rejected by some commentators. Nazzini, for instance, does not believe there is a separate ancillary restraints doctrine under Article 101(1) TFEU beyond the balancing of welfare enhancing and welfare reducing effects.¹¹⁶ The case law shows that this view is too narrow. An interesting summation is provided by Jebelli. He claims that the role of the ancillary restraints doctrine is to protect an undertaking's legitimate business interests to ensure a more efficient and competitive market and thus enable efficient business transactions.¹¹⁷ Protecting legitimate business interests that are not necessarily directly pro-competitive, but are objectively necessary is compatible with "workable competition".¹¹⁸

¹¹⁵ *Ibid*, para 138. The parties also argued in the alternative that the purpose of the agreements was 'neutral' having regard to the economic context existing at the time. This argument also failed, though it is notable that it was considered here as an alternative to ancillarity: that if the agreement is not ancillary to the main operation then its purpose could be deemed as neutral, that is, the agreement has a neutral effect on competition. A neutral purpose would also bring the agreement outside Article 101(1) TFEU. The neutrality of an agreement is considered further below.

¹¹⁶ (Nazzini, 2006), pp534, 535. Ibáñez Colomo argues that the Court is looking to determine, within the context of the agreement, if that agreement "is a plausible source of efficiency gains": (Ibáñez Colomo, 2014), *'More on AG Wahl and restrictions by object'*.

¹¹⁷ (Jebelli, 2010), section 2. He argues that the Court does not look at the pro-competitive effects of an agreement, but rather any pro-competitive effects that may be considered are merely as an indirect result of protecting the parties' legitimate interests. Such legitimate interests can only be protected by restrictions that are proportionate to the interest and do not go further than is necessary.

¹¹⁸ *Ibid*.

As highlighted by AG Trstenjak in *BIDS*, the ancillary restraints doctrine is not a gateway through which every restriction of competition might escape Article 101(1) TFEU. Deringer reminds us that the fact that an agreement pursues other objectives is unimportant to a finding of restriction by object.¹¹⁹ The object criterion could therefore be described as ascertaining whether an agreement is designed to restrict competition. The ancillary restraints doctrine is another tool that can be utilised by parties who wish to convince the authorities their agreement is not restrictive by object: whether this is by means of presumption rebuttal or by highlighting the agreement's primary purpose.¹²⁰ Viewing the application of the doctrine as a form of balancing is not necessarily an inappropriate analogy. Under the object heading, any so-called 'balancing' involves identifying the aim of the agreement. Thereby certain restraints within an agreement may be 'necessary' in order to secure, for example, a positive purpose. Conversely, balancing under the 'effect' criterion relates more specifically to the positive and negative effects of the agreement outweighing each other.¹²¹ For instance, agreements with a restrictive *effect* which are necessary to enable parties to achieve a legitimate purpose fall outside Article 101(1) TFEU, provided they are no more restrictive than is necessary.¹²² By utilising this doctrine within the context of the object criterion, it is therefore also possible for agreements to come outside Article 101(1) TFEU, by-passing an analysis of their actual effects.

The type of balancing exercise described above has been most commonly used in cases concerning export bans. Such bans have sometimes been viewed as ancillary restraints as they were proportionate, necessary and directly related to the implementation of the main agreement.¹²³ The question is one of determining, not whether:

¹¹⁹ (Deringer, 1968), paras 130-131.

¹²⁰ This is likely to be dictated by how the Commission approaches the case.

¹²¹ See cf (Ibáñez Colomo, 2012), pp555-556, 560.

¹²² *Ibid*, pp558-560. Agreements leading to substantial transaction cost reductions, and that do not go beyond that deemed necessary to achieve these reductions, can be presumed to fall outside Article 101(1) TFEU.

¹²³ See eg, *supra* n31 *Louis Erauw*; Case C-258/78 *Nungesser v Commission*; Case C-262/81 *Coditel SA v Cine Vog*. In these cases the export bans were contained in licensing agreements which the CJEU

“the restriction is indispensable to the commercial success of the main operation, but [instead] of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation”.¹²⁴

Moreover, such restraints may be seen as furthering a legitimate purpose or being objectively necessary in order to penetrate a new market.¹²⁵ In these circumstances, the restraints do not infringe Article 101(1) TFEU by object, but also fall outside Article 101(1) TFEU altogether. Even though the types of cases that have succeeded in the application of the ancillary restraints doctrine and objective necessity test have involved export bans, there is nothing to prevent the Courts from using the same principles for other types of restraint, such as RPM.¹²⁶

2.5. Conclusion: legal and economic context

This section examined the application of the legal and economic context as a means to determine the precise purpose of an agreement. Its scope was seen to be wide ranging. Under the umbrella of the legal and economic context, the following factors have been taken into account: the positive attributes of an agreement, objective justifications or legitimate aims/goals/objectives and the ancillary restraints doctrine. The legal and economic context thus provides the core to any assessment by object based on the content of the agreement. The facts of the case then determine to what extent such assessment is required.¹²⁷ This assessment can lead to three possible outcomes: (i) an agreement is restrictive by object; (ii) it comes outside Article 101(1) TFEU altogether; or (iii) it requires an examination by ‘effect’. Consequently, the implications of the legal and economic context on an outcome are profound, whether by acting as a rebuttal mechanism under the

found to be objectively justified on the basis that they were proportionate in relation to the need to protect the right holder’s economic interests.

¹²⁴ Case T-112/99 *M6 v Commission*, [2001] ECR II-2459, para 109, 58.

¹²⁵ See eg, (Kolstad, 2009), p47.

¹²⁶ *Ibid*, p51.

¹²⁷ The remit of the legal and economic context means there is potentially greater scope to conduct a comprehensive economic analysis of an agreement under Article 101(1) TFEU as opposed to the more prescriptive elements that may be considered under Article 101(3) TFEU – see chapter 5 for further analysis.

hybrid approach or assessing an objective justification, objective aim, legitimate goal, pro-competitive purpose or ancillary restraint.

It is notable from this examination of the legal and economic context that the effects of an agreement have evidently been considered by the Courts in cases seeking to determine an agreement's object. This has been seen, in particular, in those cases where legitimate objectives, pro-competitive purposes as well as objective justifications are appraised.

3. The role of 'effects' under the legal and economic context

This section examines the extent to which the effects of an agreement are taken into account when considering whether an agreement is restrictive by object. Accordingly, the judgment in *Allianz Hungária* is used as a vehicle to demonstrate this.¹²⁸ The judgment signalled the endorsement of the hybrid approach to the object criterion by the CJEU, despite underlining the significance of the MAAP's methodology and uncovering the primary purpose of the agreement. More importantly, the judgment emphasises the status of the *STM Test*.¹²⁹

What is more, defining the relevant market, usually closely intertwined in determining an agreement's effect, is unmistakably now a feature of an object assessment.¹³⁰ For instance, the GC's judgment in *Fresh Del Monte* reveals the degree to which the GC investigated the market, the market power of the parties, the regulatory framework and economic arguments raised by the parties in order to determine whether the agreement in contention (a concerted practice) had the object of fixing prices.¹³¹ The judgment in *Cartes Bancaires* likewise reaffirms the importance of market definition when determining if an agreement is "by nature

¹²⁸ *Supra* n1 *Allianz Hungária*. The judgment rendered by the CJEU took a different path to that of the AG. In support of the outcome of chapters 2 and 3, the judgment demonstrates a clearer and more in-depth appreciation of the concept of object. The opinion, on the other hand, relied heavily Commission's Article 81(3) Guidelines. Notably, the CJEU ignored much of the AG's opinion (for example, the CJEU does not endorse that "the classification of an agreement...as restrictive of competition by object acts as a kind of 'presumption'" (para 64).

¹²⁹ Upheld in *Cartes Bancaires* (*supra* n1). See chapter 2.

¹³⁰ *Supra* n1 *Allianz Hungária*, para 42.

¹³¹ Case T-587/08 *Fresh Del Monte*, 14 March 2013, nyr, paras 293-585. Particularly paras 375-440, which relate to the legal and economic context.

harmful to the proper functioning of normal competition”, and therefore “all relevant aspects” such as the nature of the services, the real conditions of the functioning and structure of the markets should be considered.¹³² However, merely determining the relevant market is alone not sufficient to understand whether the object of an agreement is to restrict competition as the context of an agreement is the key factor in any analysis.

3.1. Allianz Hungária

The judgment in *Allianz Hungária* deserves particular scrutiny, as it largely supported the wave of case law emanating from the CJEU since *BIDS* and addressed a number of key themes raised in this thesis. It was also a preliminary ruling and thus gave the CJEU greater scope for legal interpretation. Moreover, it was a controversial judgment. The Court has been accused of blurring the distinction between restrictions by object and by effect.¹³³ If the object concept is understood in accordance with the orthodox approach, then the judgment also appears to add a new type of restriction to the object category. The question referred to the CJEU was whether agreements that car insurance companies entered into with their dealers acting as car repair shops, were restrictive by object as the rate of payment the dealers received for repairs was linked to the amount of insurance they sold.¹³⁴

On their face such vertical agreements would not appear to be obvious restrictions anticompetitive by object.¹³⁵ Nonetheless, the CJEU held that such agreements *could* amount to restrictions by object.¹³⁶ The purpose of the agreement was not obvious. Once it was assessed within its legal and economic context taking into account its potential effects, however, the fact that its primary purpose was to increase the market power of the insurance companies became apparent.¹³⁷ Increasing market power is not a hardcore restriction, but the CJEU deemed that

¹³² *Supra* n1, *Cartes Bancaires*, para 77. See paras 73-82.

¹³³ See (Graham, 2013), ‘How to decide when an agreement has the object of restricting competition’. See eg *Allianz Hungária*, para 36.

¹³⁴ *Supra* n1, *Allianz Hungária*, para 31.

¹³⁵ A point correctly raised by the AG. See opinion, para 77.

¹³⁶ *Allianz Hungária*, para 51.

¹³⁷ *Allianz Hungária*, para 44.

such a purpose had the propensity to restrict competition by object. Reaching this conclusion, it closely followed the wording of the *STM* Test and recounted part of the *STM* Test rarely cited by the European Courts, namely, that the nature of the goods affected and the real conditions of the functioning and structure of the market should be considered as part of the context.¹³⁸

The reliance on *STM* is somewhat undermined by the notion of categorisation when the CJEU insisted on delineating object from effect in the same terms referenced in *BIDS*: that “certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”.¹³⁹ To determine this does, however, require a careful examination of the facts. The CJEU made specific reference to how the link between the two services, namely the car repair service and car insurance brokerage, was possible because the dealers acted in a dual capacity.¹⁴⁰ The CJEU recognised that the establishment of such a link “does not automatically mean that the agreement...has as its object the restriction of competition.”¹⁴¹ On closer analysis such a link can, nevertheless, constitute an important factor in determining whether such agreement is “by its nature injurious to the proper functioning of normal competition...in particular, where the independence of those activities is necessary for that functioning.”¹⁴²

Furthermore, the CJEU emphasises how the potential effects of an agreement are crucial to an assessment of an agreement’s object by asserting that it is “necessary” to take into account whether the agreement is “likely to affect not only one, but two markets...and its object must be determined with respect to the two markets

¹³⁸ *Allianz Hungária*, para 33-38, in particular para 36 (see also Case C-226/11, *Expedia Inc v Autorité de la concurrence*, 13 December 2012, nyr (*Expedia*), para 21). Unfortunately the CJEU incorrectly cites *Expedia*, where it reiterates the same point, but more generally in respect of how a restriction should be assessed: para 21 referencing *Asnef* which makes the same point, but in respect of the ‘effect’ criterion; *Asnef*, para 49 (*supra* 34). See *STM*, para 250 (*supra* 15).

¹³⁹ *Supra* n1, *Allianz Hungária*, para 35.

¹⁴⁰ *Allianz Hungária*, para 40.

¹⁴¹ *Allianz Hungária*, para 41.

¹⁴² *Ibid.* This reinforces the CJEU’s continued allegiance to ordoliberal principles. Consumer welfare considerations, namely, allocative efficiency concerns, would be unlikely to be concerned with such activities. See generally (Gerber, 1998).

concerned”.¹⁴³ The need for market definition under the object criterion is thus reinforced, particularly for cases where a restriction of competition is not obvious.¹⁴⁴ The court also asserted, however, that agreements “*designed to partition the market*” would “have to be treated as a restriction by object”.¹⁴⁵ This pays homage to the hybrid approach.

Notwithstanding the fact that it is not referenced explicitly, the most striking aspect of the *Allianz Hungária* judgment is its clear loyalty to *STM*. This is evident when the CJEU states that it is necessary to determine whether, by taking into account the legal and economic context, the agreement is “sufficiently injurious to competition on the car insurance market as to amount to a restriction of competition by object.”¹⁴⁶ In *STM*, the CJEU referred to the “effect on competition [needing] to be sufficiently deleterious”.¹⁴⁷ This was subsequently recounted by the CJEU in *Cartes Bancaires*.¹⁴⁸ The significance of this statement in *Allianz Hungária* relates to how the potential effects of an agreement and the context of which it forms part helps determine whether it is restrictive by object. To this end, the CJEU cited, *inter alia*, domestic law requirements and whether the structure of the market meant that competition on that market would be eliminated or seriously weakened following the conclusion of those agreements.¹⁴⁹

Two things can be inferred from the fact that for an agreement to be found restrictive by object it must be ‘sufficiently deleterious’. One is that agreements by object must have the capacity to harm competition.¹⁵⁰ Secondly, as found by the

¹⁴³ *Ibid*, para 42. In para 44: the CJEU held that in respect of the car insurance market, the aim of entering into such agreements from the perspective of the insurers is to maintain or increase their market shares. This highlights the continued relevance of market power to any Article 101(1) TFEU assessment. Moreover, it questions whether the CJEU is clearing the path for considerations that would not merit scrutiny under Article 102 TFEU, to come in by the back door.

¹⁴⁴ See *L’Oréal* (*supra* n17). Also González recounts two methods to establish object: (González, 2012), p17.

¹⁴⁵ *Supra* n1, *Allianz Hungária*, para 45. Also see (González, 2012), p17.

¹⁴⁶ *Allianz Hungária*, para 46.

¹⁴⁷ *Supra* n15, *STM*, para 249.

¹⁴⁸ *Supra* n1, *Cartes Bancaires*, para 52.

¹⁴⁹ *Supra* n1, *Allianz Hungária*, para 48. See paras 47-49.

¹⁵⁰ Or arguably an acknowledgment that restrictions by object must be appreciable: see Chapter 5. See also (Parret, 2010), ft 42: the Commission’s stance is that “it is assumed that there shall be a negative impact on competition”.

CJEU in *Cartes Bancaires*, the agreement must have the necessary effect of restricting competition based on experience.¹⁵¹ The key factor in determining whether an agreement is sufficiently deleterious is an assessment of the circumstances of the agreement, that is, its context. For example, in *Allianz Hungária*, the CJEU referred to the expectations of insurance policyholders to determine if the “proper functioning of the car insurance market is likely to be significantly disrupted by the agreements”.¹⁵² The potential effects of the agreement will therefore play an integral role in such a finding. Alternatively, in *Cartes Bancaires* the CJEU found that if the potential effects of an agreement do not reveal that it is by its nature harmful to competition, then such agreement cannot be restrictive by object.¹⁵³

In *Allianz Hungária* the CJEU stated that an agreement “would” restrict competition by object if it is “likely that, having regard to the economic context, competition on that market would be eliminated or seriously weakened following the conclusion of those agreements”.¹⁵⁴ Whether infringements by object can be found absent such considerations is moot. The CJEU reiterated the *STM* Test when it stated that an analysis of the agreements must “in particular” consider the structure of the market, the existence of alternative distribution channels and their importance and the market power of the companies concerned.¹⁵⁵ There is therefore an implication that such considerations are not limited to those mentioned. The key point as regards any consideration of the potential effects of an agreement appears to be this: potential effects are relevant in determining the agreement’s ‘objective’, but are not utilised to carry out an analysis of the ‘effect’ of an agreement.¹⁵⁶

The judgment in *Allianz Hungária* is significant for a number of reasons: it questions the categorisation of the object criterion in view of the restrictions considered by the CJEU in that case which are not normally associated with the object criterion; it

¹⁵¹ *Supra* n1, *Cartes Bancaires*, para 51.

¹⁵² *Supra* n1, *Allianz Hungária*, para 47.

¹⁵³ *Supra* n1, *Cartes Bancaires*, para 82.

¹⁵⁴ *Supra* n1, *Allianz Hungária*, para 48 (emphasis added).

¹⁵⁵ *Ibid.*

¹⁵⁶ *Supra* n1, *Cartes Bancaires*, paras 82, 86.

reaffirms the importance of establishing the object of an agreement based on the content of the agreement; it confirms that the aim of an agreement must be considered on its merits, its own unique circumstances and with consideration of its specific legal and economic context; it highlights the need for market definition, in particular in respect of less 'obvious' cases; and it serves to highlight how the orthodox approach belies the complexity of the object criterion and thus the inappropriateness of a generic process of restriction identification.¹⁵⁷

Essentially, the judgment in *Allianz Hungária* demonstrates that the effects-based approach is not the preserve of the effect criterion. It is utilised also under the object criterion when viewed through the lens of the MAAP and indeed the hybrid approach. Thus, criticisms aimed at the Commission for failing to engage with the effects-based approach miss the point as when an agreement is assessed in accordance with the MAAP such criticisms fall away.¹⁵⁸ To circumvent having to apply a more economic approach to agreements that may be restrictive by effect, the Commission has instead chosen to abuse the object category. To this end, it has expanded the object category, thereby enabling the Commission to engage in a limited assessment under the object criterion.¹⁵⁹ The Commission has finally been taken to task for this by the CJEU.¹⁶⁰ Despite the reliance on the *STM* Test, the CJEU in *Cartes Bancaires* chose to use the concept of necessary effect as the primary rationale against widening the category. This is not entirely reflective of the law. When the law is understood under the MAAP, widening the object category is not a concern as the standard of proof is raised. Rather, the focus is on the methodology used to determine the *precise purpose* of the agreement. The judgment in *Allianz Hungária* does not examine the concept of necessary effect. Instead, it

¹⁵⁷ *Supra* n1, *Allianz Hungária*, para 51 "...agreements...can be considered as a restriction of competition 'by object'..., where, following a concrete and individual examination of the wording and aim of those agreements and of the economic and legal context of which they form part, it is apparent that they are, by their very nature, injurious to the proper functioning of normal competition on the one of the two markets concerned".

¹⁵⁸ See (Gerardin & Girgenson, 2011), pp2, 15.

¹⁵⁹ Though see comments on the decision in *Lundbeck* in Chapter 1.

¹⁶⁰ *Supra* n1, *Cartes Bancaires*, para 58.

concentrates on establishing the aim of the agreement and, as such, better reflects the law.¹⁶¹

3.2. Determining potential effects: the capacity to restrict competition

Examining the potential effects of an agreement to help determine an agreement's object is seen further in cases where the purpose of the agreement could be seen to be neutral. In such cases, there is no objective to affect competition at all. This is seen in both *E.ON* and *Protimonopolný*, which examine the tricky issue of whether an agreement must have the capacity to affect competition in order to be found restrictive by object. This also encompasses a consideration of the counterfactual within such assessment.

An example, which encapsulates how capacity and the object criterion may relate to one another, is found in the *E.ON* Decision.¹⁶² As discussed previously, the decision pertains to the joint venture entered into by E.ON and GDF to build the MEGAL pipeline in order to bring gas into both Germany and France. The parties entered into side letters, which prohibited them from entering each other's home markets. The Commission found that the agreements restricted competition by object and fined the parties accordingly. In their defence, the parties argued that the agreements had no impact on competition as prior to 2000 the gas markets were not liberalised and market entry would not have been possible. The Commission rejected these arguments and declared that a counterfactual analysis would have been impossible to build and was irrelevant. For the Commission, the mere fact that the parties concluded the agreement, regardless of whether they would have entered each other's markets in the absence of the agreements, meant

¹⁶¹ In *Allianz Hungária* the CJEU underscores that the success of an agreement is not a pre-requisite to a finding of object. Using the wording of *T-Mobile*, the CJEU stresses that for an agreement to be found to be restrictive by object it is "sufficient that it has the potential to have a negative impact on competition...that it be capable in an individual case of resulting in the...restriction of competition...", para 38. The CJEU points out "actual" effects are only relevant when determining the fine and assessing any claim for damages (*supra* n1).

¹⁶² *Supra* n109, *E.ON/GDF*.

that Article 101(1) TFEU was infringed. Participation in the agreement alone was seen as sufficient to infringe Article 101(1) TFEU.¹⁶³

The GC did not wholly support the Commission's opinion in this regard and partially rejected its submissions concerning the question of capacity.¹⁶⁴ The parties argued that as they were not potential competitors until after 2000, the agreement was not subject to Article 101(1) TFEU. Significantly, the GC agreed that Article 101(1) TFEU only applies to sectors open to competition.¹⁶⁵ However, to examine the conditions of competition requires an assessment of both existing and potential competition between undertakings on the market. Such assessment ascertains whether there are real possibilities for the undertakings to compete or for a new competitor to enter the market and compete.¹⁶⁶ Therefore, the counterfactual is relevant in this regard. The GC found that the burden is on the Commission to determine whether an undertaking is a potential competitor by assessing what the situation would be had the agreement not applied: in those circumstances would there have been a real, concrete possibility for the parties to enter the market and compete.¹⁶⁷ Moreover, the GC held that a potential competitor can be labelled as such if it has the ability to enter the market: whether it is precluded from doing by a monopoly derived from national legislation is irrelevant to such an assessment if there is a theoretical possibility.¹⁶⁸ The GC found that the Commission had not shown sufficient evidence that there was in fact potential competition on the German market between 1980 and 1998.¹⁶⁹ Hence, the agreements were not subject to Article 101(1) TFEU during that period. The GC held that "the system of competition established by Articles 81 EC and 82 EC [was] concerned with the economic consequences of agreements, or of any comparable form of concertation or coordination, rather than with the their legal form."¹⁷⁰

¹⁶³ *Ibid*, para 241-246.

¹⁶⁴ *Supra* n106, *E.ON*.

¹⁶⁵ *Ibid*, para 84.

¹⁶⁶ *Ibid*, para 85.

¹⁶⁷ *Ibid*, paras 86 and 105.

¹⁶⁸ *Ibid*, paras 87 and 105, 106.

¹⁶⁹ *Ibid*, para 115.

¹⁷⁰ *Ibid*, para 251.

The judgment in *E.ON* is a reminder that the parties to an agreement must have the capacity or the ability to restrict competition, which seemingly requires the parties to be potential competitors. It is therefore understandable that undertakings would endeavour to argue such a position in order to take their agreements containing ‘hardcore’ restrictions, as in the case of *E.ON*, outside the remit of Article 101(1) TFEU.¹⁷¹ To determine such capacity requires consideration of the counterfactual as demonstrated in *E.ON*.

Under the MAAP, the counterfactual forms part of the *STM* Test.¹⁷² As such, its use may be relevant in determining an agreement’s precise purpose. Certainly, to assess what the situation would have been absent the agreement helps explain why certain restraints are seen as necessary, justifiable or ancillary to a pro-competitive purpose.¹⁷³ The judgment in *E.ON* showed how using the counterfactual is also relevant when determining the capacity of the agreement to restrict competition. This potentially means that agreements that aim to restrict competition may not be found to restrict competition by object and thereby fall outside Article 101(1) TFEU altogether if the parties lack the capacity to affect competition. In the case of *E.ON*, this was because the undertakings were not potential competitors during particular periods. This finding brings to the fore the issue of whether an agreement can be found to be restrictive of competition by object even when it is impossible for it to have an effect on competition. The answer is not straightforward and is ostensibly linked to the fact that an agreement does not have to be successful to be found restrictive by object.

¹⁷¹ See *supra* n131, *Fresh Del Monte*.

¹⁷² Cf (Gerardin & Girgenson, 2011), p7. Gerardin believes the effects-based approach and counterfactual method are not involved in determining the object of an agreement. Conversely, Andreangeli finds the counterfactual only applies to “less obvious breaches” of Article 101(1) TFEU, (Andreangeli, 2011), p242.

¹⁷³ As was the case for instance in *O2*, which was an ‘effect’ case (*supra* n30). Drawing on the judgment in *O2*, Andreangeli comments that owing to the application of the counterfactual, practices that would have previously been found to be restrictive of competition “may now be considered to be ‘neutral’ for competition and, furthermore, that some of the analysis that has hitherto taken place against the framework of the legal exception now occurs as part of the ‘in-context’ approach that the prohibition clause now details”, (Andreangeli, 2011), pp232-233.

The complexity of this issue is highlighted in *Protimonopolný*. In a short judgment, the Court answered the question of whether an agreement that has no effect on competition can still be found restrictive by object in the affirmative.¹⁷⁴ In this case, the CJEU held that the fact that an undertaking was allegedly operating illegally (Akcenta) on the relevant market at the time the agreement was concluded, had no impact on whether the agreement restricted competition by object under Article 101 (1) TFEU. The facts involved several banks who colluded to terminate, in a coordinated manner, current and future contracts that the banks had with Akcenta. As Akcenta did not have the requisite licence to carry out its business, the banks argued it was operating illegally and could not therefore be regarded as a competitor. Hence, the agreement did not have the object of restricting competition. The CJEU disagreed and found the object of the agreement between the banks to be the restriction of competition as the agreement was intended to eliminate a competitor.¹⁷⁵ It noted that Akcenta was adversely affected by the agreement.

The judgment bears some scrutiny. On one hand, it could be seen to strengthen the orthodox approach as the CJEU refuted the need to prove the capacity of the agreement to do harm (that is, cause a potential effect). If the parties exclude a player who has no right to be in the market at all, then it is arguable that the agreement is not capable of having any effect on competition. This undermines the necessity of assessing the agreement in its legal and economic context as there is no need to prove the capacity of an agreement to do harm, or indeed investigate whether the economic context explains that capacity. On the other hand, the case strengthens the philosophy underpinning the more analytical approach: whether Akcenta was acting illegally does not mean that the agreement was not capable of having an effect on the market as the parties *aimed* to restrict competition by eliminating Akcenta (their competitor regardless of whether Akcenta was acting illegally or not). On the facts, Akcenta was operating in the market, albeit illegally, but was nonetheless having a measurable impact on the market to the extent that

¹⁷⁴ C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa*, 7 February 2013, nyr.

¹⁷⁵ *Ibid*, see the answer to first and second questions.

the banks wished to eliminate it. If the correct counterfactual was that Akcenta would be able to continue operating illegally on the market absent the agreement, then the agreement restricted competition.¹⁷⁶

It is submitted that the CJEU was correct to reject the argument that the agreement did not restrict competition because Akcenta was acting illegally. The banks colluded with the purpose of excluding a player in the market and were unable to rebut this. This rationale was enough to satisfy the CJEU of that object based on its assessment of the specific legal and economic context. This principle operates in a similar way to the success of an agreement being irrelevant to a finding by object, which is why actual effects do not need to be demonstrated. Entering an agreement with the *purpose* of restricting competition as determined under the *STM* test is restrictive by object.¹⁷⁷ The legal and economic context is thus fundamental to this determination. In *Protimonopolný*, the CJEU stated that the agreement “specifically had as its object the restriction of competition” and the question of illegality was not enough to refute this.¹⁷⁸ A similar point was made in *E.ON* where the GC held that GDF’s monopoly was meaningless as this did not preclude the fact that the aim of the agreement (the prohibition of supply of gas) was to circumvent possible legal and factual changes during the lifespan of the gas pipeline.¹⁷⁹ Hence, the concept of necessary effect alone is not sufficient when determining the capacity of an agreement to restrict competition or whether an agreement has an effect.

In summation, *Protimonopolný* demonstrates that arguments relating to an undertaking operating illegally were irrelevant to the consideration of the legal and economic context when determining the object of the agreement. Arguably, the appropriate place for considering whether an anti-competitive agreement can be

¹⁷⁶ The question of capacity to restrict competition is a complex issue and is discussed further in chapter 5 in conjunction with the *de minimis* doctrine.

¹⁷⁷ See Case C8/08 *T-Mobile* [2009] ECR I-4529: for an agreement to be found to be restrictive by object it is “sufficient that it has the potential to have a negative impact on competition...that it be capable in an individual case of resulting in the...restriction of competition...”.

¹⁷⁸ *Supra* n174, *Protimonopolný*, para 19.

¹⁷⁹ *Supra* n106, *E.ON* para 135.

justified by the fact Akcenta acted without a licence, is Article 101(3) TFEU.¹⁸⁰ The CJEU was correct to find that the undertakings should have reported Akcenta to the authorities as opposed to taking it upon themselves to eliminate a competitor. Should the banks have jointly reported Akcenta to the authorities, then there would not have been a restriction of competition in those circumstances. Instead, the banks agreed between them to terminate their contracts with Akcenta, which meant that it was unable to carry out its business and therefore was eliminated from the market. The moral compass surrounding whether undertakings should be allowed to protect their industry is thus immaterial to Article 101(1) TFEU.

3.3. Conclusion: The role of effects under the legal and economic context

This section considered the extent to which the effects of an agreement are taken into account when determining whether an agreement is restrictive by object. The judgment in *Allianz Hungária* was examined, and it was demonstrated how the legal and economic context was used as a means to determine whether the agreement was designed to restrict competition. This encompassed the need for a definition of the relevant markets, the market structure, and the position of the parties on those markets in order to uncover the true aim of the agreement. Whether every case requires such an in-depth assessment of its context depends on the facts, but it is the plaintiff's burden to discharge. Taking into account an agreement's effects also helps determine whether an agreement is sufficiently deleterious, as the concept of necessary effect is not solely relevant in this regard.¹⁸¹

The effects of an agreement are also relevant in determining whether an agreement has the capacity to restrict competition or has no effect on the market whatsoever and thereby circumvents a finding by object. The counterfactual is invaluable in this regard, though whether it needs to be applied in every contextual

¹⁸⁰ This is analogous with cases such as *BIDS* where the parties attempted to argue that the agreement was necessary to preserve the beef industry. Additionally an undertaking's charitable status does not prevent it from being subject to the competition rules.

¹⁸¹ Note, the definition of the 'legal context' includes previous case law, therefore precedent is relevant in such determination. Also, taking effects into account is different from having to prove effects (actual or potential) under the 'effect' heading.

analysis under the MAAP is open to interpretation. What is clear is that these issues are complex. The answer to the question of whether the capacity of an agreement to restrict competition should be a bar to a finding of object is far from straightforward. In *E.ON*, the Court agreed that, during particular periods of time, the parties were unable to compete due to the structure of the market (it was not liberalised). However this did not mean that the undertakings were able to continuously flout the competition rules. Likewise, undertakings which are potential competitors and have the capacity to restrict competition can be found to restrict competition by object, even if the agreement is not implemented or is unsuccessful or a party is operating illegally. How these factors are then distinguished from the notion of appreciability and the related issue of market power requires careful thought.¹⁸²

4. Commentator rationale: explaining the anomalies without abandoning categorisation

In the wake of recent court decisions, there has been a spate of scholarly papers concerning the object criterion. These papers articulate disparate attempts to rationalise the case law. The increased debate and analysis surrounding the object criterion is a welcome development. It shows no sign of abating.¹⁸³ How scholars interpret the law on the application and function of the legal and economic context, in particular, deserves scrutiny. Many commentators now acknowledge the anomalous case law, but have tended to retain a focus on the categorisation approach to the object criterion.¹⁸⁴ For instance, Jones argues that it is hard to rationalise when, as she terms it, the object category is expanded or narrowed.¹⁸⁵ She argues that the anomalous cases have arisen in two main areas, namely where horizontal price or output restraints are essential to the attainment of the pro-competitive goals of a joint venture, and where absolute territorial protection (ATP)

¹⁸² The contentious issue of whether restrictions of object need be appreciable is considered in the following chapter.

¹⁸³ Apparent from the spike in commentary published on the internet following the judgment in *Cartes Bancaires* and subsequent conferences planned on the academic and practitioner circuits.

¹⁸⁴ This thesis argues that the object concept should move away from categorisation.

¹⁸⁵ (Jones, 2010), '*Left Behind by Modernisation*', p664.

is necessary to the distribution or licensing arrangement.¹⁸⁶ She has examined *Wouters* finding that when an agreement is designed to achieve a legitimate objective, even if it involves a severe horizontal restraint, then such restraint may not breach Article 101(1) TFEU at all.¹⁸⁷ Jones suggests that the circumstances in which restraints are objectively necessary are very limited, and are connected to the nature of the product in issue. This indicates to Jones that ATP for the distributor is “inherent or necessary to the success of the distribution arrangement”.¹⁸⁸ This view is supported by the CJEU’s judgment in *GSK* where the CJEU reinforced the narrow nature of the exception. Jones points out that the GC had “taken a different view”, holding that “the Commission had been wrong to characterise Glaxo’s distribution agreements designed to restrict parallel trade... as restrictive by object simply by relying on the clauses of the agreement without reference to the legal and economic context”.¹⁸⁹

This is an important point, and it is submitted that the GC’s judgment was correct in this regard. The GC was highlighting the fact that based on the particular facts of the case the presumption of anticompetitive effects did not apply. Furthermore, the CJEU did not reject this element of the GC’s judgment.¹⁹⁰ In fact, the AG in *GSK* endorsed the GC’s understanding of the legal and economic context.¹⁹¹ What the CJEU rejected was the GC’s subsequent requirement that such an agreement must restrict competition to the detriment of the final consumer.¹⁹² For Jones, the answer to how and why the object category is expanded or narrowed is not clear, but she considers that cases such as *BIDS*, *GSK* and *T-Mobile*:

“suggest categorisation is not simply a presumption that can be set aside by establishing that consumer harm or anticompetitive effects are not likely (or have not occurred) on the facts of the case. Cases

¹⁸⁶ *Ibid.* Jones cites Commission and Court cases. This is also recognised by (Mahtani, 2012), p11. Mahtani also points out that there are cases which contain an apparent object restriction but do not ultimately breach Article 101(1) TFEU by object (p 10).

¹⁸⁷ (Jones, 2010), ‘*Left Behind by Modernisation*’, p666.

¹⁸⁸ *Ibid*, p667.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Supra* n19, *GSK*, para 58.

¹⁹¹ *Supra* n26, opinion, para 137 .

¹⁹² *Ibid*, para 119, paras 63-64.

such as *Eraug-Jacquery* and *Wouters* indicate, however, that hardcore restraints inherent in, or reasonably necessary to achieve, legitimate, pro-competitive objectives of an agreement may fall outside Article 101(1) altogether.”¹⁹³

This view endorses the position that the potential or actual effects of an agreement ultimately do not bear on whether an agreement is anti-competitive by object. This ties in with the rule that an agreement does not need to succeed or produce effects to infringe Article 101(1) TFEU.¹⁹⁴ Consequently, her opinion credits the proposition that the role of effects in any analysis of the legal and economic context is best suited to understanding whether an agreement has a primary purpose of restricting competition and its restraints are necessary and ancillary to such, most commonly, pro-competitive purpose. That is, they can be balanced.

Alternatively, Mahtani makes a bold attempt to explain the anomalies and to clarify the case law. He too recognises that there are cases where the outcome predicted by an application of the orthodox approach has not resulted in the identification of an object restriction.¹⁹⁵ He divides the cases into two groups identifying those cases where an apparent object restriction exists, but the agreement did not breach Article 101(1) TFEU by object and, secondly, those cases where a breach of the object criterion was established by an analysis that was beyond merely identifying the object restriction. Like Jones, he limits the circumstances in which the object assessment has not resulted in the outcome predicted by the orthodox approach due to the analysis conducted.¹⁹⁶ Using *FA* as an example, Mahtani notes that the CJEU stated that ATP may not breach Article 101(1) TFEU by object if “other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition”.¹⁹⁷ For Mahtani, the case of *Pierre Fabre* highlights that the context (or circumstances) of the agreement can

¹⁹³ (Jones, 2010), ‘*Left Behind by Modernisation*’, p668.

¹⁹⁴ An agreement can infringe competition by object irrespective of the effects it produces. This issue links in with Jones’ assertion that restrictions by object come outside Article 101(1) TFEU entirely if there is no credible theory of harm (*Ibid*, p664): this is significant when the *de minimis* doctrine is considered in chapter 5.

¹⁹⁵ (Mahtani, 2012), p10.

¹⁹⁶ *Ibid*, p11, see also ft 438.

¹⁹⁷ *Ibid*, p14.

justify a *prima facie* breach by object and that such analysis is not defined by abstract principles.¹⁹⁸ Nevertheless, Mahtani plays down the role of the legal and economic context by stating that merely a “number of cases” make reference to the context.¹⁹⁹ This is wrong. The vast majority of case law, in particular more recent case law, reaffirms the prominence of the legal and economic context in any assessment by object.

Overall, Mahtani disagrees with Jones’ position that the exceptions to the orthodox approach should be viewed as a narrowing of the object category of agreements in certain circumstances.²⁰⁰ Instead, he considers that the object category as delineated by the object box is never narrowed, rather:

“in certain circumstances the category approach is disapplied. To seek to codify those circumstances within the object box (as refinements or narrowing) could be overly prescriptive. Nor do we necessarily need to consider such situations as exceptional as such, but part of the framework of Article 101(1) TFEU.”²⁰¹

Mahtani believes that the case law reveals that an object analysis involves two stages: (i) a review of the clauses of an agreement to determine whether a *prima facie* object restriction exists; and (ii) a deeper consideration of the purpose and the context. Though the context is limited to the commercial purpose of the coordination and the means used to achieve that purpose:²⁰²

“this analysis involves the identification of such a legitimate commercial purpose to the restriction and an assessment of whether the restriction goes not further than necessary to achieve that purpose. If the commercial purpose is legitimate and the *prima facie* object restriction is a necessary and proportionate means of achieving that purpose, no breach of the object aspect of Article 101(1) is occasioned.”²⁰³

¹⁹⁸ *Ibid*, p16. That the legal and economic context is not abstract is correct. Cf opinion in *Gøttrup Klim (supra n24)*.

¹⁹⁹ (Mahtani, 2012), p18.

²⁰⁰ *Ibid*, p18.

²⁰¹ *Ibid*, p19.

²⁰² *Ibid*.

²⁰³ *Ibid*. Also citing (King, 2011).

Further, Mahtani also recognises that in addition to those occasions where judgments appear to create “exceptions” to the object box, there are also instances where a breach of the object aspect is found without direct reference to a category of object restrictions.²⁰⁴ He acknowledges that in these instances there is a desire for the object criterion to operate more flexibly than the object-as-category understanding.²⁰⁵ Moreover, he recognises that these cases have explicitly rejected the premise that the object criterion operates narrowly, limited to a short list of ‘hardcore restraints’. He considers *BIDS* and *T-Mobile* demonstrate that the CJEU “identified coordination which breached the object aspect of Article 101(1), not by reference to precedent or to the existence of specific restraints, but by examining whether the coordination as a whole had the consequence of directly restricting rivalry between competitors.”²⁰⁶ Mahtani also accepts that in cases such as *BIDS*, the analysis was specific to the factual circumstances of the case.²⁰⁷ Mahtani’s rationale is simply to say these types of cases operate outside the object category.²⁰⁸

Mahtani acknowledges that the common factor in all these cases is the presence of the legal and economic context. For him, the legal and economic context has been invoked inconsistently and used to “do too much and to do so in an unstructured way”.²⁰⁹ This is not an unfair criticism. Instead of adjusting the parameters of the object category or using the legal and economic context to mitigate its harshness, Mahtani’s solution is for us to “recognise the object aspect of Article 101(1) TFEU as encompassing a structured, multi-layered assessment, which includes, but allows more than, the mere identification of a restraint belonging to an established category of such restraints”.²¹⁰ He bases this recommendation on the opinion of AG Trstenjak in *GSK*.²¹¹ He recognises that the AG’s methodology requires that the

²⁰⁴ *Ibid*, p20.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid*. However it is submitted that this type of analysis by the CJEU is not necessarily unusual or simply limited to the circumstances outlined by Mahtani. This is amply demonstrated in chapter 2.

²⁰⁷ *Ibid*, p25.

²⁰⁸ *Ibid*.

²⁰⁹ *Ibid*, p26.

²¹⁰ *Ibid*, p27.

²¹¹ *Ibid*.

legal and economic context must always be considered under the object criterion.²¹² For Mahtani, however, the primary role of the legal and economic context is simply to cast doubt on a *prima facie* breach by object.

Mahtani recognises the presence of the three approaches put forward in this thesis. He concludes that object can be established in one of three ways, namely: (i) the categorisation of object drawn from precedent; (ii) by considering the aim or purpose of the parties to the restriction; and (iii) by an abridged analysis of the expected effects of the restriction (the presumption of restrictive effects).²¹³ Mahtani thus acknowledges that there is a ‘rebuttal mechanism’ within the object criterion and cites the AG Trstenjak in *BIDS* as the authority for the ways in which the object of an agreement can be rebutted.²¹⁴ Specifically, he argues there are three ways this can happen: first, where a limitation on commercial freedom has no anticompetitive effects as the parties are not competitors or there is insufficient competition that can be restricted by the agreement (Mahtani refers to this as a form of the counterfactual); secondly, where an agreement is ambivalent in terms of its effects on competition, and so has - for example - a pro-competitive purpose and the restrictions required are ancillary, and thirdly, where ancillary restraints are necessary to pursue a primary objective, which is neutral as regards competition or promotes competition and the ancillary restraints are necessary to achieve that objective. Mahtani likens the second and third scenarios to situations where the *prima facie* object is to restrict competition and is being balanced against a legitimate commercial purpose and the conduct is necessary to achieve that purpose.²¹⁵ This results in what Mahtani terms the “Two-stage Object Analysis”:²¹⁶

Breach by object established by:	Prima facie breach capable of rebuttal by:
the existence of a specific restraint identified by reference to a category of restraints—limited factual assessment required	evidence that no competition exists absent the restriction; or a legitimate commercial purpose and restrictions proportionate to that purpose

²¹² *Ibid*, p28.

²¹³ *Ibid*, p27.

²¹⁴ *Ibid*, p37. Also described as “casting doubt on a prima facie restriction by object”.

²¹⁵ *Ibid*.

²¹⁶ *Ibid*, p38 where this table is originally produced.

an abridged analysis of negative effects on competition—broad factual assessment required	evidence that no competition exists absent the restriction; or a legitimate commercial purpose and restrictions proportionate to that purpose
a specific collective purpose to bring about negative effects on competition—broad factual assessment required	no rebuttal possible

Mahtani’s arguments certainly support many of the issues and findings raised in this thesis, in particular, his examination justifies the detail in which the various aspects and facets of the object criterion are discussed in this chapter. Despite having much sympathy for a number of the points made by Mahtani, however, the continued focus on Whish’s ‘object box’ in a comprehension of the object criterion is unsatisfactory. The object box interpretation of the law lacks credibility in the eyes of the European Courts.²¹⁷ Instead, understanding the law in accordance with the MAAP is, in one sense, a simpler means of explaining how the Courts have tackled the object criterion, in particular as it is framed around *STM*.²¹⁸

Goyder also supports the continued categorisation of the object criterion. Her view is that there is an object restriction where a restriction of competition is the “necessary consequence” of the content of the agreement, regardless of the actual intentions of the parties.²¹⁹ She recognises that a subjective intention to restrict competition is relevant, but a restriction may have an anticompetitive object even if the parties also have legitimate objectives.²²⁰ She agrees that is “not sufficient, in order to establish an object restriction, to identify a restriction as a type that has been found to be ‘by object’ before...a ‘prima facie’ object restriction. The case law requires that the analysis go further than an examination of the actual terms of the agreement in question”.²²¹ This entails a consideration of the economic and legal context, which may result in the negation of the “presumption of infringement arising because the type of clause in question appears to be an object restriction”.

²¹⁷ In particular it is not referred to by the European Courts as forming part of the object criterion, nor is it specifically referred to by the Commission as the basis of its interpretation.

²¹⁸ This is because, as well as raising the standard of proof, applying the MAAP means the same legal framework is applicable to any given scenario. Therefore, there are no anomalies or exceptions to the rule.

²¹⁹ (Goyder, 2011), II.

²²⁰ *Ibid.*

²²¹ *Ibid.*

Then any possible “objective justification” must be examined, and if an agreement is *de minimis* it will fall outside Article 101(1) TFEU as it does not have an appreciable effect on competition.²²² Goyder agrees that, in exceptional circumstances, a restriction of the type that is normally classified as being by object can, once considered within its legal and economic context, be found not to be anticompetitive by object. An objective justification or the application of the *de minimis* principle may also negate what is *prima facie* an object restriction.²²³

Goyder separates the legal and economic context from objective justifications and the *de minimis* doctrine.²²⁴ It is submitted that the legal and economic context in fact encompasses all the various elements that may cast doubt on a presumption of object. Moreover, it is not simply a rebuttal mechanism. Ultimately, Goyder highlights that there are no magic formulae when considering the application of the object criterion. She concurs that the EU framework is significantly more flexible than, for example, the US framework at dealing with unusual cases.

Andreangeli provides an alternative interpretation of the CJEU’s approach to the object criterion, which supports both the more analytical approach and hybrid approach.²²⁵ She recognises that the CJEU has applied some of the elements “characterising the more flexible and ‘economics-principled’ approach hitherto relevant for ‘by-effect’ cases to the assessment of *prima facie* restrictions by object”.²²⁶ Moreover, as was found in chapter 2, she recognises that although the CJEU continues to rely on the dichotomy between object and effect restrictions, it has scrutinised the goals and content of agreements by taking into account their actual context. This has been carried out in a similar pattern of analysis to that of “less serious” infringements.²²⁷ As a result, she proposes that the Court now adopts an approach to Article 101(1) TFEU better characterised as a “continuum”

²²² *Ibid.*

²²³ (Goyder, 2011), IV.

²²⁴ Object’s relationship with the *de minimis* doctrine will be considered in chapter 5.

²²⁵ (Andreangeli, 2011).

²²⁶ *Ibid.*, p216.

²²⁷ *Ibid.* Though as previously noted, the Court’s current understanding of the dichotomy is problematic, particularly in view of how it in fact applies the object criterion post *BIDS*.

between more and less serious infringements than by a relatively stark alternative between 'by-object' and 'by-effect' restrictions of competition.²²⁸ This, she argues, is demonstrated by the Court's framework for appraisal, which reserves intervention only for those agreements inherently incompatible with Article 101 TFEU or result in actual impairment of competition.²²⁹

Andreangeli illustrates this using the AG's opinion in the *BIDS* case.²³⁰ She considers that even though AG Trstenjak recognised that the agreement was pursuing a pro-competitive primary objective, the fact the agreement imposed, *inter alia*, production cuts, the exiting of competitors from the industry and the imposition of levies, resulted in the agreement restricting competition by object as the restraints stifled potential competition by erecting barriers to entry.²³¹ She acknowledges that the CJEU cemented this approach by referring to the market share of the parties to the agreement, which aimed as a result of the agreement to increase its concentration.²³² As such, the parties were unable to engage in competitive rivalry. Industrial policy considerations were relegated to consideration under Article 101(3) TFEU.²³³ Moreover, crucially, she confirms that the Court rejected any attempt to read an exhaustive list of 'serious infringements' into Article 101(1) and thus concluded that the BIDS arrangement breached Article 101(1) TFEU by object.

In this vein, Andreangeli supports many of the conclusions identified in this thesis. The fact that the Court is assessing the potential (and in some cases) actual effects of an agreement within its appraisal of the object of an agreement is significant. Indeed, Mahtani's interpretation of the case law places little emphasis on this phenomenon. The one-dimensional portrayal of the object criterion under the orthodox approach is again exposed. Andreangeli also recognises the important question of how the concept of a 'restriction of competition' should be construed

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ The continued reliance on AG Trstenjak by all commentators highlights the significance of the opinion.

²³¹ (Andreangeli, 2011), p220.

²³² *Ibid*, p221.

²³³ *Ibid*, p222.

under any assessment by object. For the MAAP, this question is pivotal to an appraisal of the object of an agreement.²³⁴ However, Andreangeli's overall interpretation of *BIDS* does have some distinctions. For instance, she places much emphasis on the fact that the Court distinguished between object and effect by considering the "seriousness of each infringement on the basis of the experience of its impact on competition".²³⁵ For her, the Court drew a line between very damaging practices for the competitive process and those that were less deleterious.²³⁶ Consequently, the former will, due to their nature, be presumed to have anticompetitive effects without the need to enquire into their impact on the market. The latter will require a closer examination to determine whether they have in fact resulted in an appreciable restriction of competition.²³⁷

Despite this, Andreangeli recognises that *BIDS* suggests the possibility, through the application of the "in-context" and more "economics-principled" pattern of analysis, that the presumption of anticompetitive effects by reason of an agreement's object can be rebutted under Article 101(1) TFEU.²³⁸ Moreover, whether an agreement falls within the 'by object' or 'by effect' category is not based on an "exhaustive list", and therefore each agreement has to be determined by way of an examination of its content and purpose against its legal and economic context.²³⁹ Despite her understanding of the *BIDS* case, she compares it to the GC's judgment in *ENS*.²⁴⁰ In the light of *ENS*, she considers that the judgment in *BIDS* is not consistent with the pre-existing stark dichotomy between object and effect as suggested in *ENS*.²⁴¹ For her, the Court had not simply considered the "hardcore nature of the restraints that the *BIDS* deal entailed", but rather chose to conduct a close scrutiny of the agreement's individual clauses against their legal and economic context. Through this latter method, the Court found that the agreement

²³⁴ This issue will be considered in chapter 5.

²³⁵ (Andreangeli, 2011), p224. However she cites *STM* as an example of this. A reading of the case does not support this analysis.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*, p233.

²⁴⁰ *Ibid.*, p234.

²⁴¹ *Ibid.*

restricted competition by object.²⁴² On this basis, Andreangeli finds that the pattern of analysis carried out by the Court suggests that it wished to extend some aspects of the more ‘economics-guided’ approach already adopted in *by-effect* cases to more serious object cases. Furthermore, it also took into consideration issues previously reserved for the application of Article 101(3) TFEU.²⁴³

The case law analysis undertaken in chapter 2 does not wholly support such an interpretation. The CJEU had already been applying a methodology to the object criterion since *STM* that had the scope to be applied in a more ‘economics-guided’ way. Certainly, the *STM* Test has the capacity to tolerate an ‘effects-based’ analysis. Consequently, the effects-style analysis carried out by the Court in *BIDS* was not particularly ‘new’, and the Court did not go a step beyond its existing case law.²⁴⁴ Rather, the flaw in Andreangeli’s argument is her reliance on *ENS*. It is *ENS* that is the anomaly in the case law, and it is *ENS* that misinterpreted the case law of its superior court. This is evident from the GC’s rejection of its own methodology in cases such as *GSK*.²⁴⁵ The judgment in *BIDS* simply re-emphasised the analysis advocated by the more analytical approach. The main issue with *BIDS* is the Court’s choice of wording when explaining the distinction between restrictions by object and those by effect: it is this aspect of the judgment that ensures the orthodox approach continues to enjoy some legitimacy.²⁴⁶ Therefore, the advent of a ‘hybrid approach’ to the object criterion has dawned.

Andreangeli does go on to modify her initial stance, but remains of the opinion that *BIDS* is the turning point in the jurisprudence.²⁴⁷ She believes that it is preferable to consider the CJEU’s “current approach” as “one akin to the idea of a continuum, as a result of which the type of assessment should be framed in light of the practice’s nature and inherent seriousness as well as the inherent features of the market”.²⁴⁸

²⁴² *Ibid.*

²⁴³ *Ibid.* Note that Andreangeli then looks at the impact of *BIDS* on the future interpretation of Article 101(1) and subsequently does not find that the *ENS* methodology is appropriate.

²⁴⁴ *Ibid.*, 235.

²⁴⁵ Also *supra* n1, *Cartes Bancaires*.

²⁴⁶ See (Andreangeli, 2011), p235.

²⁴⁷ *Ibid.*, pp235-238.

²⁴⁸ *Ibid.*, p236.

Prima facie infringements of Article 101(1) TFEU must, however, be assessed in the legal and economic context and that this is not limited to specific categories of agreements, but also encapsulates any practice suspected of being anti-competitive.²⁴⁹ She thus recognises, like Paul Lasok QC, that it “could” be argued that the analysis in the initial stages would be the same for all types of anticompetitive agreements as such analysis would concentrate on its “content and purpose”.²⁵⁰ As a result, if the agreement was seen to be so pernicious that it was almost inevitable to harm consumer welfare it will infringe Article 101(1) TFEU without the need to determine its actual impact on competition in the relevant market.²⁵¹ Conversely, if such initial enquiry does not reveal such harm then its lawfulness must be tested under the ‘effect’ criterion and will only be prohibited if it can be shown competition has been distorted as a result of it.²⁵² Essentially, her rationale follows the judgment in *STM*.

From this, Andreangeli argues that the CJEU has moved away from a strictly literal and categorical approach to Article 101(1) TFEU and towards a legal standard for analysing the content and purpose of any agreement. Such analysis “focuses more on the inherent seriousness rather than on their formal characteristics”.²⁵³ As a result, Andreangeli believes that in accordance with *BIDS*, the question to be considered is whether an agreement’s content and purpose is compatible with the objectives of Article 101 TFEU (namely, economic efficiency for the purpose of promoting consumer welfare) as opposed to whether the agreement belongs to a formalistic category as cases such as *ENS* suggest.²⁵⁴ Therefore the type of inquiry required for a particular agreement depends on its nature and seriousness. Andreangeli’s arguments are extremely persuasive, but she places too much emphasis on *BIDS*. *BIDS* did not progress the law as such, rather it cemented principals the CJEU had already established.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

4.1. Analysis of the commentary

On the whole, the commentary recounted above seeks to explain the anomalous case law fairly cautiously. The position advanced in this thesis is less cautious. The review of the case law in chapter 2 brought into sharp focus the divergent ways in which the European Courts have tackled the object criterion. It is not denied that the jurisprudence is confusing and at times unclear. Nevertheless, there are unambiguous paths which the CJEU has taken and varying paths which the GC has taken over the years. The advent of modernisation and increasing reliance on economic coherence has meant that the test originally devised in *STM* has taken on a renewed significance and role.²⁵⁵ The prospect of a more analytical approach has always been present within the jurisprudence, but this was put in the shadow by the Commission's more formalistic approach to the object criterion as highlighted in its Article 81(3) Guidelines and in many of its decisions. The Commission's approach is evolving, however, although its goal is different from that of the Courts. The Commission must police the competition rules and therefore devise policies (for itself, undertakings and national competition authorities) to follow in this regard. As such, undertakings and NCAs must take note of the Commission's predilection. The tension, therefore, between the approach of the Commission and the European Courts is evident.

The ordering of the case law and the development of a framework under which object should be applied undertaken by commentators such as Mahtani is admirable. Such a 'multi-layered structured methodology' is complicated, however, and does not reduce the possibility that, in the future, other types of situation may arise that do not fall neatly within the various categories advocated. It thus seems almost futile to attempt to identify precise scenarios where exceptions to the general rule advocated by the orthodox approach may be granted. The truth is that there is likely to be no single 'correct' answer. As so many commentators have now established, the case law is not consistent. The Courts have not used consistent

²⁵⁵ Andreangeli recognises that the Courts in their more recent decisions suggest a strong commitment to upholding an 'in context' and economics-based interpretation of Article 101(1) TFEU and thus to a 'modernised' reading of Article 101 TFEU: (Andreangeli, 2011), p243.

terminology in relation to the object criterion, have not provided a clear cut definition of object or of the various terms utilised in connection with it, nor have always followed a set methodology when applying 'object' to cases.²⁵⁶ Even leading commentators such as Jones and Whish are unable adequately to 'rationalise' the case law. Therefore, an entirely alternative approach is needed.

Bright lines in law are clearly important, but rigid lines are not always appropriate. Even the US Courts have had to adapt their *per se* approach to accommodate situations that they had not legislated for with the 'quick look rule of reason'. The approach advocated herein is that, while it is of course useful to understand and recognise the situations in which any presumptions of anti-competitiveness by object can be rebutted, it is not then appropriate to limit such circumstances. Instead, a more fluid approach to the object criterion is required.²⁵⁷ Therefore, the so-called anomalies in the case law should be viewed from the perspective that the role of the object criterion is simply to determine whether the *precise purpose* of the agreement is to *restrict competition*.

That assessment must be undertaken within the legal and economic context of the particular facts pertaining to the agreement in question. Given the influence of the concept of necessary effect, this is a factor that should be taken into account within the legal context (though it is not the defining factor or the starting position). Even though it may be extremely difficult to rebut a presumption of harm,²⁵⁸ the fact remains it is possible to do so. Chapter 2 demonstrated the circumstances where such rebuttal has been achieved. In future, different types of scenario may justify a rebuttal, or be seen to have a pro-competitive purpose or legitimate objective, and thus tolerate certain restraints ancillary to that primary purpose. The defining factor is the analysis of the facts of each case: the concept of object is flexible and

²⁵⁶ See also (Mahtani, 2012), p39 citing (Howard, 2009); also (Jones, 2010), '*Left Behind by Modernisation*'; (Goyder, 2003), I.

²⁵⁷ See also Mahtani's conclusion, (Mahtani, 2012), p38-39 where he recognises that "object is not applied in a linear or abstract fashion – flexibility is afforded by an examination of the purpose of the coordination, its likely market consequences, and the legal and economic context".

²⁵⁸ See (Odudu, 2006), (supported by Mahtani) regarding the inability to rebut presumptions of subjective intention to restrict competition.

case-specific. Overall, the dichotomy between by object and by effect restrictions as portrayed by the Commission and in cases such as *ENS* requires refinement. Any restraint is, in principal, capable of restricting Article 101(1) TFEU by object; hence the ability of any so-called 'category' to expand.²⁵⁹ Therefore, the reliance on the concept of 'necessary effect' to delineate the dichotomy is erroneous: rather, it rests on the nature of the agreement itself. If its purpose is not to restrict competition, then either it falls outside Article 101(1) TFEU or its actual effects must be determined.

5. Conclusion

This chapter was tasked with investigating the application of the object criterion under the MAAP. The sheer scale of this undertaking demonstrates that the object criterion is nuanced and complex. There is also increasing consensus among commentators regarding the multifaceted nature of the object criterion. Nevertheless, attempts to rationalise the case law have proved difficult for many commentators who continue to subscribe to the notion that the object criterion involves a form of categorisation as advanced under the hybrid approach. Supporting the hybrid approach ensures, however, that the significance of the legal and economic context is at least recognised. Consequently, there is agreement that the concept of object cannot be dismissed as a simplistic, formalistic or abstract formula.

The MAAP provides an alternative, though persuasive, explanation of the apparent anomalies in the case law (that is, the deviations from the orthodox approach). However, the European Courts and indeed the Commission currently follow the hybrid approach.²⁶⁰ Hence, reliance on the categorisation of the object criterion has not abated. The legal and economic context was seen to play the central role in every assessment of an agreement's object whether under the MAAP or hybrid approaches. Its purpose under the hybrid approach, however, is not just to

²⁵⁹ As shown in *supra* n1, *Pierre Fabre*.

²⁶⁰ Though, notably, the Article 81(3) Guidelines follow the orthodox approach more closely than the hybrid approach, which creates a conflict between the Commission's practical application of the law in decisions such as *Lundbeck* and its interpretation of the concept within its various Guidelines.

determine the agreement's aim, but also to provide a mechanism under which the effects of an agreement can be rebutted. The AG in *BIDS* proposed that particular elements of an agreement's legal and economic context may draw into question the preliminary labelling of an agreement as restrictive by 'object'. This can occur when: (i) the restriction does not produce relevant effects on competition; (ii) the agreement has ambivalent effects on competition and is intended to promote competition; or (iii) the restriction is ancillary to the broader agreement. AG Trstenjak has been proved correct as regards the consideration of such elements, but it is submitted that such factors are not merely used to rebut presumptions of harm. Rather, they serve to determine if the purpose of the agreement is to restrict competition. This is an open-ended enquiry, but does not imply that every agreement can be found restrictive by object. The emphasis on legal context will ensure past precedent is relevant, but not a defining factor in this regard.

Most recently, the CJEU has suggested that the object concept is not open-ended, but rather is reserved for those types of coordination that by their nature harm competition due to their known necessary effect.²⁶¹ The merits of these arguments are considered more closely in the next chapter. Focusing on the necessary effect of an agreement is limiting the usefulness of the object criterion as a tool under Article 101(1) TFEU. Additionally, it implies that new types of restrictive practice cannot be found to be anticompetitive by object.²⁶² Moreover, such an understanding proposed by the CJEU does not accurately reflect the law as discussed in this chapter. It is therefore submitted that, in accordance with the case law of the European Courts, the MAAP is the best interpretation of the object criterion. The following chapter will examine the impact of this finding on Article 101 TFEU as a whole.

²⁶¹ See *supra* n1, *Cartes Bancaires*. Though the CJEU did not then define the contents of such category.

²⁶² On the basis of the judgment in *Cartes Bancaires*, the Commission should lose the appeal in *Lundbeck* as it found an agreement restrictive by object, which had not previously been found to do so. Given the Commission cannot expand the object category (unlike the European Courts), the reasoning of the Court is eagerly anticipated.

Chapter 5: The implications of adopting the more analytical approach on Article 101 TFEU

1. Introduction

The purpose of this chapter is to investigate the implications for Article 101 TFEU as a whole of finding that the best legal interpretation of the object criterion is in accordance with the MAAP. It therefore seeks to determine whether the MAAP fits well within the framework of Article 101 TFEU and thereby justifies the conclusion that it is the better rationalisation of the law. To this end, the chapter focuses on four key aspects of Article 101 TFEU that are directly affected by the examination of the object concept undertaken in chapters 2, 3 and 4. These aspects are pertinent also to the 'effect' criterion. First, the relationship between the object criterion and the application of the *de minimis* doctrine is tackled. Chapter 3 found that a neutral effect or the capacity of the parties to affect competition may have a bearing on the outcome when determining an agreement's object. This section thus addresses the MAAP's response to the impact of market power on any analysis of an agreement's object and questions whether an agreement restrictive by object must be appreciable. Next, this chapter addresses the objectives of Article 101 TFEU and the relationship between such objectives and the object criterion. The correlation between the concept of a 'restriction of competition' and the object criterion is pertinent in this regard. Next the distinction between restrictions of competition by 'object' and by 'effect' is assessed, and the criticism that the two concepts become blurred under the MAAP is addressed. Finally, it investigates what the MAAP means for the availability of an Article 101(3) TFEU exemption as well as its relationship with Article 101(3) TFEU.

2. *De Minimis*: How appreciable is object?

2.1. Introduction

This section examines the relationship between the object concept and appreciable effects. This relationship is also pertinent to an understanding of the object/effect dichotomy. AG Kokott has argued that when examining whether a restriction by object is appreciable, this does not mean it should be measured against the same thresholds (such as market share thresholds) applied when examining the appreciable effect of restrictions of competition by effect: “otherwise the fundamental difference between restrictions of competition ‘by effect’ and ‘by object’ would become blurred”.¹

The nature of the relationship between the object concept and appreciable effects has been thrown into uncertainty by the recent suggestion that the *de minimis* doctrine is not applicable to the object criterion at all. The uncertainty flows from the CJEU’s controversial judgment in *Expedia*, which has since been preserved by the Commission in its revised *De Minimis* Notice and accompanying guidance.² In *Expedia*, the CJEU held that an “agreement that may affect trade between Member States and that has an anticompetitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition”.³ The Commission recounted this verbatim in its Notice and interpreted it to mean that the object criterion cannot benefit from the *de minimis* doctrine.⁴ Hence, the revised Notice does not cover agreements that have as their object the restriction of competition.⁵

¹ Case C-226/11, *Expedia Inc v Autorité de la concurrence*, 13 December 2012, nyr (*Expedia*), AG Kokott, para 54.

² *Ibid*, *Expedia*; 2014/C 291/01, Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (Revised *De Minimis* Notice); C(2014) 4136 final, Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the *De Minimis* Notice - 25.6.2014.

³ *Ibid*, *Expedia*, para 37.

⁴ Revised *De Minimis* Notice, point 2. Note the Commission has always maintained this position, but now cites legal authority for its contention.

⁵ *Ibid*.

Such an approach challenges the widespread belief that *any* restriction of competition must have an appreciable impact on the market.⁶ The *de minimis* doctrine provides the rationale behind the belief held, by many commentators, that a quantitative component to any object analysis is only necessary when determining if an agreement has an appreciable impact on competition. This is in view of the rule that there is no need to prove anti-competitive effects for agreements restrictive by object.⁷ Moreover, the significance of the *de minimis* doctrine is that if a restriction of competition by object is not appreciable it could fall outside Article 101(1) TFEU.⁸ Hence, the ruling by the CJEU in *Expedia* merits careful reflection.

In the following paragraphs, therefore, the relationship between the object criterion and the *de minimis* doctrine is probed in more depth in light of the judgment in *Expedia*.⁹ This is a complex area, the analysis of which centres on two key issues. The first is whether restrictions by object should be deemed automatically appreciable.¹⁰ The second concerns the appropriateness of the link made by the CJEU in *Expedia* between restrictions by object and the effect on trade requirement under Article 101(1) TFEU. This section demonstrates that it is questionable whether the Commission is entitled to conclude that “by definition” anti-competitive agreements by object have “an appreciable impact on competition” and cannot be considered as minor.¹¹ Arguably, the Commission has failed adequately to address the complexity of the issues involved, and has ignored established case law.¹² It is therefore imperative that the rationale and application of the *de minimis* doctrine are understood. To this end, the *Expedia* judgment is used as a basis to explore these issues and to determine how the MAAP rationalises the law.

⁶ (Whish & Bailey, 2012), pp120, 140-144. The *de minimis* doctrine was established in Case C-5/69 *Völk v Vervaecke* [1969] ECR 295, 5/7, 302.

⁷ (Whish & Bailey, 2012), p120.

⁸ *Ibid.*

⁹ The *De Minimis* Notice thus only links restrictions by ‘effect’ with the *de minimis* doctrine.

¹⁰ For instance, what is the role of market power in any ‘by object’ assessment.

¹¹ See Commission press release IP/14/728 dated 25 June 2014.

¹² *Supra* n6, *Völk*, p302; see (King, 2013).

2.2. *Expedia*: background to the case

A French transport regulator had levied a fine on SNCF and Expedia for an agreement they had entered to create an online travel agency for the sale of train tickets. The regulator found that the “object and effect” of the agreement was to restrict competition.¹³ Further, it found that as the parties were competitors in the market for on-line travel agency services, their market share was more than 10% as stipulated in the former *De minimis* Notice, and therefore the *de minimis* rule was not applicable. The parties appealed the fine and argued that the market shares had been overestimated, though they did not dispute the finding that the agreement had an anticompetitive object. It was in this light that the *Cour de Cassation* made a reference for a preliminary ruling. It requested clarity on whether NCAs were precluded from applying Article 101(1) TFEU to an agreement that does not reach the thresholds specified by the Commission in its *De Minimis* Notice.¹⁴

Both the 2014 and 2001 *De Minimis* Notices set out the Commission’s guidance on the concept of appreciable effect under Article 101(1) TFEU.¹⁵ It is well documented that following the judgment in *Völk*, an agreement - whether by its object or effect - that has only an ‘insignificant effect’ on the market will fall outside the remit of Article 101(1) TFEU and therefore not restrict competition.¹⁶ The Commission did not fully endorse the judgment in *Völk* in its 2001 *De Minimis* Notice, as it refused to exempt restrictions by object from this rule.¹⁷ According to Jones and Sufrin, however, that does not mean that those types of agreement will

¹³ *Supra* n1, *Expedia*, para 8.

¹⁴ *Ibid*, paras 12 and 13. Note that the *De Minimis* Notice referenced in *Expedia* was to its previous incarnation of 2001. It has been revised following the *Expedia* judgment. Together referred to the as ‘*De Minimis* Notices’.

¹⁵ Notice on Agreements of Minor Importance OJ [2001] C 368/13. It prescribes that if the aggregate market share held by undertakings at a horizontal level is less than 10% and for undertakings at a vertical level the aggregate market share is less than 15%, those agreements will not fall within the scope of Article 101(1) TFEU. This notice has now been superseded by the Revised *De Minimis* Notice.

¹⁶ *Supra* n6 *Völk*; Joined Cases T-68/89 etc *Società Italiana Vetro SpA v Commission* [1992] ECR II-01403; and Notice on Agreements of Minor Importance, paras 16 and 17. See also (Whish & Bailey, 2012), p120; (Jones & Sufrin, 2011), pp171, 172-177.

¹⁷ *Supra* n15, para 11; and (Whish & Bailey, 2012), p142. Jones and Sufrin take a more nuanced stance to the Commission’s position (Jones & Sufrin, 2011), p176.

never fall outside Article 101(1) TFEU: an agreement may still be considered of “minor importance” if the market shares are significantly lower than those contained in the Notice.¹⁸ Consequently, the more serious the restraint, the more insignificant the position of the parties to the agreement must be.¹⁹ This stance was espoused by AG Kokott in *Expedia*, who delivered an opinion that deserves further scrutiny.²⁰

2.3. Opinion of Advocate General Kokott

The opinions of AG Kokott are often compelling and influential, if sometimes contentious. She has clear ideas on how the law concerning the object criterion should be interpreted for the future. Her views are not, it is submitted, always faithful with the case law.²¹ The *Expedia* case is an excellent example of an instance in which AG Kokott shifted boundaries and moulded the law into a form that she wished it to take.²² She advocated the hybrid approach to the object criterion, though she has a clear vision of the role that she wishes the object concept to perform based on the concept of necessary effect and the promotion of legal certainty.²³ For AG Kokott, the reply to the question referred would determine the scope that NCAs would have in the future when applying Article 101 TFEU.²⁴ She also saw the case as providing an opportunity for “further clarification of the requirements for a finding of restrictions of competition by object at both Union and national level”.²⁵

¹⁸ (Jones & Sufrin, 2011), p176.

¹⁹ (Jones & Sufrin, 2011), p172, 176-177 citing (Faull & Nikpay, 2007), 3.159-3.161.

²⁰ *Supra* n1, *Expedia*, paras 48-50, 54-56.

²¹ As evidenced in her opinion in Case C-8/08 *T-Mobile Netherlands and others* [2009] ECR I-4529. See (Whish & Bailey, 2012) for commentary on her opinions: pp118-119. AG Kokott approves of the idea that the object concept is there to create legal certainty and therefore moves towards positions that support that interpretation (see (Bailey, 2012), p560, ft 9). However, she also understands that agreements are assessed on the basis of their own contexts and this tension with her support of a more orthodox understanding of the object concept is not always reconciled in her opinions.

²² See similar issues raised by *Pablo Ibáñez Colomo* in relation to AG Kokott’s interpretation of copyright in the Greek decoders case: (Ibáñez Colomo, 2011).

²³ *Supra* n21, *T-Mobile*, opinion, para 43.

²⁴ *Supra* n1, *Expedia*, para 5.

²⁵ *Ibid.*

One theme in AG Kokott's opinion was that *de minimis* market share thresholds are irrelevant for assessing agreements between undertakings with an anti-competitive object.²⁶ Specifically, she asked whether an appreciable effect on competition may be presumed where an anti-competitive object is being pursued, but the *de minimis* thresholds under the *De Minimis* Notice are not reached.²⁷ Acknowledging that the *De Minimis* Notice is not legally binding on NCAs, she recognised that the prohibition under Article 101 encompasses "only appreciable restrictions of competition".²⁸ She cited case law such as *Völk* and *STM* to support this, and proceeded to state that restrictions of competition must be appreciable for both restrictions by object and by effect.²⁹ Her citation of *STM* at this juncture was curious. She later used the case to illustrate where the CJEU had not required restrictions by object to be appreciable.³⁰

According to the AG, the requirements concerning proof of an appreciable effect differ dependent on whether the agreement concerns restrictions by object or effect.³¹ This, she concluded, manifests itself as a result of the dichotomy between restrictions by object and by effect: that restrictions by object do not require actual anti-competitive effects to be proved.³² All that must be shown in an object case is that the agreement is "actually capable" of restricting competition.³³

Accordingly, "these different requirements regarding proof arise from the fact that restrictions 'by object' are regarded, by their very nature, as being injurious to the proper functioning of normal competition" as they have harmful consequences for

²⁶ *Ibid*, paras 44-57.

²⁷ *Ibid*, para 45.

²⁸ *Ibid*, para 30, 39, 47. Though see para 38 where she adds NCA's should not ignore Notices due to their duty of sincere cooperation.

²⁹ *Ibid*, para 47.

³⁰ *Ibid*, para 55. Though this is not necessarily because the CJEU merely presumed appreciability for restrictions by object. This is discussed below.

³¹ *Ibid*, para 48.

³² *Ibid*, paras 49-50.

³³ *Ibid*. This is in-keeping with the Article 81(3) Guidelines, though not with the judgment in *STM* which requires agreements to be sufficiently deleterious.

society.³⁴ Moreover, they can “hardly be regarded as *de minimis* infringements”.³⁵ More philosophically, AG Kokott contended that it must be presumed that undertakings “always intend” an appreciable effect on competition, irrespective of their market power when they enter into agreements that have an anti-competitive object.³⁶ Although providing no citation, she would seem to have drawn from Odudu’s contention, though itself now somewhat modified, that subjective intention is proof of a restrictive object.³⁷ AG Kokott argued that the non-application of the *de minimis* market share thresholds to anticompetitive agreements by object makes sense in law and in terms of competition policy.³⁸ This is because undertakings with market shares below the thresholds would otherwise be encouraged to engage in anticompetitive behaviour.³⁹ It follows that market share thresholds as set out in the *de minimis* notice are irrelevant when determining whether restrictions of competition by object are appreciable.⁴⁰

AG Kokott explained that the judgment in *Völk* supports the proposition that Article 101(1) TFEU is not applicable to agreements that have an anticompetitive object if the agreement has an “insignificant effect” on the market, taking into account the weak position of the parties on the relevant market.⁴¹ This is significant as it amounts to confirmation that restrictions by object can fall outside Article 101(1) TFEU if they have an insignificant effect. Moreover, AG Kokott stressed that this does not then mean that “the appreciable effect of restrictions of competition ‘by

³⁴ *Ibid*, para 50 citing *BIDS* and *T-Mobile*. How the CJEU recounts the distinction between object and effect is troublesome as the statement originally made in *BIDS* provides no legal citation, but yet has subsequently been cited in judgments such as *T-Mobile*, *Pierre Fabre*, *Expedia*.

³⁵ *Ibid*, paras 50-51. This statement clearly supports the Commission’s position which specifically omits the safety net of the *de minimis* thresholds for hardcore restrictions. Such understanding of the law begs the question, why should restrictions by object need to be appreciable at all if this is how the Court interprets the object criterion? Notably in *Cartes Bancaires*, despite the CJEU upholding the object/effect distinction set out in *BIDS*, it found how the object of an agreement is determined turns on whether the analysis reveals the agreement is sufficiently deleterious (as per the *STM* Test).

³⁶ *Ibid*, para 50.

³⁷ (Odudu, 2001), ‘*The Object Requirement Revisited*’. See also Case C-209/07 *BIDS* [2008] ECR I-8637, paras 44-46 of the opinion, which also support Odudu’s interpretation. See also (Odudu, 2006), p114 and chapter 3 of this thesis.

³⁸ *Supra* n1, *Expedia*, opinion, para 52.

³⁹ *Ibid*.

⁴⁰ *Ibid*, para 53.

⁴¹ *Ibid*, para 54.

object' *must* be measured by reference to market share thresholds and still less by reference to the same thresholds as those used when examining the appreciable effect of restrictions of competition 'by effect'".⁴²

In the light of her reasoning, AG Kokott reached the conclusion that the requirements concerning proof that restrictions of competition by object are appreciable, should not be more stringent than the requirements concerning proof of an appreciable effect on trade between Member States.⁴³ She did not explain why she made that link, though she did comment by way of a footnote that an "appreciable effect on trade" can be found from a market share that is normally around 5%.⁴⁴ She concluded that if it is established that an agreement that is "anticompetitive by object is *capable* of appreciably affecting trade between Member States, it may be readily inferred that the agreement is also *capable* of appreciably restricting...competition".⁴⁵ This suggests that for by-object restrictions appreciable effects need only be potential and not concrete.⁴⁶ A similar link was made in *Völk*, whereby the Commission submitted that the same reasons why the agreement in question did not have the object of restricting competition were applicable to why the agreement did not affect trade between Member States.⁴⁷

In answer to the preliminary reference, AG Kokott proposed that a Member State may impose penalties on undertakings on the grounds that the agreement they have entered is anti-competitive and does not reach the thresholds set out in the *De Minimis* Notice, provided that the NCA has taken account of the Notice and proves in another way that the object or effect of the agreement is an appreciable restriction of competition.⁴⁸ Furthermore, the Notice should be interpreted to

⁴² *Ibid.* Emphasis added.

⁴³ *Ibid.*, para 56.

⁴⁴ *Ibid.*, para 58, ft 57.

⁴⁵ *Ibid.*, para 57

⁴⁶ This aspect is not expanded upon in the opinion.

⁴⁷ *Supra* n5, *Völk*, p301 (g). Though notably this is not the same as saying the requirements of proof are identical when determining appreciability for the effect on trade criterion and when establishing whether there is a restriction of competition.

⁴⁸ *Supra* n1, *Expedia*, para 58(1).

mean that the market share thresholds are irrelevant when determining whether agreements with an anti-competitive object are appreciable.⁴⁹

Though much of the opinion is valuable and sensible, it is problematic.⁵⁰ For instance, AG Kokott did not sufficiently address the relationship between the object concept and the requirement that it be appreciable,⁵¹ or its relationship with the jurisdictional function of the effect on trade criterion and the associated test establishing an effect on trade. Ostensibly, AG Kokott agreed that the object concept must be appreciable (though to a lesser degree than under the effect concept), and that exclusive reliance on market shares is not the only means to measure or prove appreciability. Her reasoning, however, does not give any real indication why she supports the position that object should be appreciable at all. This is especially pertinent given that the majority of her opinion aims to show why the *de minimis* thresholds in the *De Minimis* Notice are irrelevant to restrictions by object.⁵² Nonetheless, her opinion is more nuanced and considered than the subsequent judgment of the Court.

2.4. Judgment of the Court

At first sight, it would appear that the CJEU agreed with much of AG Kokott's opinion. The CJEU responded to the question referred by the *Cour de Cassation* by stating:

“Article 101(1) TFEU and Article 3(2) of [Regulation 1/2003] must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its [*de minimis* notice], provided that the agreement constitutes an appreciable restriction of competition”.⁵³

⁴⁹ *Ibid*, para 58(2).

⁵⁰ See *infra* section 2.5.

⁵¹ *Supra* n1, *Expedia*, paras 53-57 (particularly 55).

⁵² Note that *STM* requires restrictions by object to be “sufficiently deleterious”. AG Kokott does not allude to this.

⁵³ *Supra* n1, *Expedia*, Operative part.

Seemingly, the Court is merely reiterating that a Notice issued by the Commission is only binding on the Commission. In this regard, the Commission binds itself over the exercise of its own powers as it is constrained in applying EU competition law within the parameters of its own guidance.⁵⁴

In its judgment, the CJEU correctly reasons that an agreement will come outside Article 101(1) TFEU if it has only an “insignificant effect” on the market. It notes that both agreements by object and agreements by effect must “perceptibly” restrict competition, and must *also* be capable of affecting trade between Member States in accordance with Article 101(1) TFEU.⁵⁵ It also recounts how a restriction of competition should be assessed by reiterating the conditions set out in the *STM* judgment (although it did not directly cite that case).⁵⁶ As well as recounting the judgment in *Völk*, the Court recognised that the position of the parties on the market is not the only basis upon which an agreement may have an appreciable effect.⁵⁷ The CJEU also agreed with the AG that the Commission’s *De minimis* Notice is not binding on Member States: NCAs may take into account the thresholds in the Notice, but are not required to do so.⁵⁸ It found that such thresholds are one of several factors that enable an authority to determine whether a restriction is appreciable when examining the actual circumstances of the agreement.⁵⁹ In view of the anticompetitive object of the agreement, the CJEU subsequently made the point that the *concrete* effects of an agreement do not need to be taken into account once it appears that it has as its object the restriction of competition.⁶⁰ The Court then described the now familiar distinction between infringements by object and infringements by effect, arising from the fact that “certain forms of collusion

⁵⁴ This ensures the adherence to principles of equal treatment and the protection of legitimate expectations.

⁵⁵ *Supra* n1, *Expedia*, paras 16-17.

⁵⁶ *Ibid*, para 21.

⁵⁷ *Ibid*, para 22, citing *Bagnasco and Others*, para 35.

⁵⁸ *Ibid*, para 31.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*, para 35.

between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition”.⁶¹

Despite the logical build up to the *ratio decidendi* of the judgment, the CJEU then used the distinction between object and effect as the basis for the statement that an “agreement that may affect trade between Member States and that has an anticompetitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition”.⁶² This implied that if an agreement affects trade between Member States (which must be appreciable) and is also determined to be a restriction by object it will automatically be an appreciable restriction of competition. That is, ‘object’ means ‘appreciable restriction of competition’. If that is the CJEU’s intention, then the judgment is ground-breaking.

On its face, this ruling reflects the link made by AG Kokott between the satisfaction of the effect on trade criterion with an anticompetitive object, which ‘may’ imply that an agreement is capable of appreciably restricting competition.⁶³ The CJEU has made the link more definite however. The significance of the statement therefore necessitates reflection as the CJEU is potentially overruling its previous case law.⁶⁴ The questions raised by this statement are numerous: is the object concept now intrinsically linked with the satisfaction of the effect on trade criterion, and if so, why? Is that then an appropriate test to determine whether an agreement has an appreciable effect on competition, and what would this mean for the relationship between object and appreciability?

The judgment has been interpreted by a number of practitioners as stipulating that, “an agreement that has an effect on interstate trade and an anticompetitive object constitutes an appreciable restriction on competition *per se*”.⁶⁵ Also, that the CJEU

⁶¹ *Ibid*, para 36.

⁶² *Ibid*, para 37.

⁶³ *Ibid*, opinion, paras 56-57.

⁶⁴ See *supra* n6, *Völk*: that any agreement must have an appreciable impact on competition to infringe Article 101(1) TFEU regardless of its object or effect.

⁶⁵ (Stibbe, 2013).

has “simplified the case law by ruling that agreements with the object to restrict competition that have an effect on trade between Member States will always constitute a violation of Article 101 TFEU”.⁶⁶ Hence, the suggestion is that the CJEU does not require the object criterion to be appreciable, which gives rise to the possibility of a return to a more formalistic understanding. In this vein, there is no quantitative component to the object criterion; if one follows the orthodox approach it is clear that certain restrictions automatically harm competition and do not require separate assessment to determine if they have an appreciable effect. Akman considers the judgment to declare that “any object agreement which has an appreciable effect on trade between Member States has an appreciable effect on competition”, and therefore that object agreements that have an effect on trade can no longer make use of the *de minimis* doctrine.⁶⁷ This means that for restrictions by object there is a presumption that they will have an appreciable effect on competition.⁶⁸ For Akman, the judgment in *Expedia* has thus over-turned the judgment in *Völk*.⁶⁹

Re-enforcing that position, the Commission has adopted the stance that the CJEU has “now established that the concept of a non-appreciable impact on competition (*de minimis*) does not apply when the agreement in question contains a so-called ‘by object restriction’”.⁷⁰ Hence, it appears to affirm that there is no need to prove appreciability for the object criterion as it is automatically appreciable *per se*.

Whether such an interpretation is correct is not categorical given both the CJEU’s statement that agreements must “perceptibly” restrict competition, and its actual answer to the question referred.⁷¹ The propensity for confusion and lack of clarity regarding the object criterion, despite subsequent judgments such as *Allianz*

⁶⁶ *Ibid.* This was said to be in contrast to the *Völk* judgment where any restriction whether by object or effect will fall outside Article 101(1) TFEU if it only has an insignificant effect on the market, taking into account the weak position of the parties on the relevant market.

⁶⁷ (Akman, 2013).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Commission, Public Consultations, Revision of the *De Minimis* Notice, Objective of the consultation, July 2013.

⁷¹ *Supra* n1, *Expedia*, paras 20, 38.

Hungária and *Cartes Bancaires* which advocate a more analytical approach, has thus been heightened.

If the Commission is right, the implications of the judgment are profound as it seemingly reinforces the orthodox approach. Such an understanding of the judgment could have consequences that the CJEU did not intend.⁷² The most obvious consequence has been the Commission's tendentious interpretation of the judgment and its influence on the revised *De Minimis* Notice.⁷³ AG Kokott gave clear reasoning as to why the *De Minimis* Notice thresholds are not applicable to restrictions by object, but she did not then reject the idea that the object criterion requires some form of appreciable impact.

2.5. Analysis of the judgment

Contrary to the views expounded above, the CJEU did not in fact announce a new position in law, particularly in the light of its concluding statement and the context of its judgment.⁷⁴ The Court does not, moreover, readily proffer contentious judgments. Rather, in *Expedia* it was merely stating the obvious: that agreements that affect trade and have an anticompetitive object will normally appreciably restrict competition. To have actually determined the object of an agreement would have required the Court to assess an agreement within its legal and economic context. Therefore, whether the agreement was appreciable would have already been assessed at that juncture.

Alternatively, the CJEU was asserting that satisfaction of the effect on trade criterion will also satisfy the requirement that the object of an agreement is appreciable. This latter interpretation is more problematic as the CJEU did not disclose how the concepts should be linked. Furthermore, it could be misinterpreted as suggesting that when assessing the object of an agreement any analytical component is now redundant if the effect on trade criteria has been satisfied. Chapters 2 and 3

⁷² This is amplified in the CJEU's judgments in Case C-32/11 *Allianz Hungária* and Case C-67/13 P *Cartes Bancaires*.

⁷³ See *De Minimis* Notice, para 2, and accompanying press releases.

⁷⁴ *Supra* n1, *Expedia*, para 38.

demonstrate that if this were the case the CJEU would have been turning its back on decades of case law. Moreover, at no point does the Court state that the object criterion cannot benefit from the *de minimis* doctrine as coined in *Völk*. On the contrary, the CJEU reaffirms the fact that restrictions by object must be perceptible.⁷⁵

What is unfortunate about the judgment is that it has allowed inferences to be drawn that have ultimately been preserved by the Commission in its revised *De Minimis* Notice. The scope for misinterpretation of the law and its misapplication is therefore significant. The revised *De Minimis* Notice and accompanying guidance document brings the Commission back to a more orthodox approach despite subsequent judgments in *Allianz Hungária* and *Cartes Bancaires*, which support a more contextual analysis.⁷⁶ Rather than recasting the law, *Expedia* raises pertinent questions regarding the role of *de minimis* in any assessment of the object of an agreement.⁷⁷ It is this relationship and its appropriateness that is considered next.

2.5.1. Appreciable effects

The requirement that restrictions of competition under Article 101(1) TFEU need be appreciable is not a requirement of the Treaty. Therefore, demonstrating the existence of market power is not a pre-requisite for a finding of a restriction of competition.⁷⁸ Rather, the European Courts have determined that an agreement must restrict competition to an appreciable extent and that Article 101(1) TFEU is not concerned with agreements that have an insignificant effect on the market.⁷⁹ Moreover, the case law shows that even agreements containing hardcore restraints can fall outside Article 101(1) TFEU should they have an insignificant effect.⁸⁰ What

⁷⁵ *Ibid*, para 38.

⁷⁶ Though the Commission has conceded that in “exceptional” cases a restriction by object may be compatible with Article 101(1) TFEU if it is objectively necessary or protects a legitimate goal; in such instances the agreement comes outside Article 101(1) TFEU: section 1 of the *De Minimis* Guidance.

⁷⁷ *Expedia* also crucially recounts how restrictions of competition are determined: para 21. This is then specifically related to the object criterion in Case C-32/11 *Allianz Hungária*, para 36.

⁷⁸ (Jones & Sufrin, 2011), p215.

⁷⁹ Case 22/71 *Béguelin Import Co v GL Import-Export S.A* [1971] ECR 949. *Supra* n6, *Völk*, p302.

⁸⁰ *Supra* n6, *Völk*. See in particular the Commission’s comments in section IV (e), (f) and (g) as well as the ‘grounds of judgment’ pp301-302 in *Völk*, which support the more analytical approach and a

the case law does not tell us is what constitutes an ‘insignificant effect’, or whether the measure changes depending on the nature of the restraint. Neither does it explain in the context of the object criterion whether that effect need be an actual or potential effect on competition. Moreover, the case law does not explain whether the effect of agreements-by-object should be appreciable and, if so, whether that is at all appropriate.

The judgment in *Expedia* succeeds in further fudging the essence of the object criterion. This is due to the interplay between the MAAP and the orthodox approach, which are both advocated in the judgment.⁸¹ It is unclear whether the CJEU was reiterating AG Kokott’s conclusion in its own terms and thus approving the link she established between proof of effect on trade and proof of appreciable effect. The practical implications of this are ambiguous.⁸² Moreover, a concern is whether then proving the object of an agreement requires any meaningful quantitative component, particularly as concrete effects do not need to be proven (or indeed, if the Commission is believed, potential effects).⁸³

It is submitted that *Expedia* does not counsel the abandonment of any quantitative component. The CJEU still expressly stipulated that to assess whether a restriction under Article 101(1) TFEU exists, recourse to the content of the agreement, its objectives and the legal and economic context is necessary and must perceptibly restrict competition.⁸⁴ Whether proving an effect on trade provides a short cut to the assessment of whether an agreement restricts competition by object is dubious. It is not correct that the only quantitative component when determining if

strict reading of the *STM* and *Consten & Grundig* judgments. See also AG Kokott’s comments in para 43 of *Expedia* (*supra* n1).

⁸¹ *Supra* n1, *Expedia*, paras 17-22 versus para 36-37.

⁸² See (Bailey, 2012), p590 who notes that “a complicating factor has been that the idea of an appreciable effect on competition is sometimes intermingled with the separate concept of appreciable effect on trade”.

⁸³ See section 1, *De Minimis* Guidance.

⁸⁴ *Supra* n1, *Expedia*, paras 17, 21.

an agreement is restrictive by object arises when assessing its appreciability.⁸⁵ This is due to the increasingly recognised role of the ‘legal and economic context’.⁸⁶

The Court was right to affirm that the Commission’s thresholds in its *De minimis* Notice may be disregarded by the NCAs “provided that the agreement constitutes an appreciable restriction of competition”.⁸⁷ This is because whether an agreement is appreciable or not depends on the facts of the case, and thus on its own legal and economic context. It is axiomatic that certain agreements that come under the *de minimis* thresholds could still, in principle, have an appreciable effect. The thresholds are the Commission’s enforcement policy choice: these are essential tools for the Commission to carry out its work, but are not necessarily upheld by law. They give undertakings a degree of certainty that the Commission will not investigate agreements below the threshold.

The relationship between the object criterion and the *de minimis* doctrine is abstruse. The necessity to prove actual appreciable effects in an *effect* analysis was first raised in *STM*.⁸⁸ Even though the Community Courts have consistently upheld the *de minimis* doctrine since *Völk*,⁸⁹ it is still not altogether unambiguous. This will undoubtedly be exacerbated by *Expedia*.⁹⁰ Whether appreciability makes sense for restrictions by object requires reflection. This is because restraints by object do not require the plaintiff to prove the agreement actually has a restrictive effect on competition. Furthermore, the success or implementation of an agreement is irrelevant to a finding by object. Others believe that a detailed analysis of appreciability would undermine the distinction between object and effect.⁹¹ It is also argued that those undertakings with extremely low market shares would almost be “invited to refrain from effective competition with each other and to join

⁸⁵ Cf (Whish & Bailey, 2012), p120; (Rose, 24 February 2010).

⁸⁶ See chapters 2, 3 and 4.

⁸⁷ *Supra* n1, *Expedia*, para 38.

⁸⁸ Case C-56/65 *STM*, 249. Note it is not a requirement of the TFEU itself.

⁸⁹ *Supra* n79, *Béguélin*; Case T-77/92 *Parker Pen Ltd v Commission* [1994] ECR-II-549; C-260/07 *Pedro IV Servicios SL v Total Espana SA* [2009] ECR I-2437; Case T-49/02 *Brasserie Nationale v Commission* [2005] ECR II-3033.

⁹⁰ See (Bailey, 2012), p590.

⁹¹ (Bailey, 2012), p591.

together in restraint of trade”.⁹² There is certainly case law that could be seen to endorse the position that appreciability is not a requirement for satisfying the object criterion.⁹³ Appreciability is almost viewed as a step removed from the process of determining the object or effect of an agreement, as if it is a separate requirement.

It is proposed that, contrary to being a separate component, the requirement of appreciability should be seen, when determining restrictions of competition by object, as part of the overall assessment as to whether an agreement has the object of restricting competition. This is drawn from a consideration of the legal and economic context. It is clear from the judgment in *Völk* that restrictions by object can benefit from a form of appreciability as the Court held that, with reference to the *actual circumstances* of the agreement, an agreement *may* fall outside Article 101(1) TFEU if the effect on the market is insignificant.⁹⁴ The Court did not specify at what level the effect is considered ‘insignificant’, nor did it specify that to determine such effect required knowledge of the parties’ actual market shares. Rather, it referred to “the weak position which the persons concerned have on the markets of the product in question”.⁹⁵ The *STM* test upholds this notion as it requires that when assessing the *precise purpose* of the agreement (that is, the object), if an analysis of the clauses of the agreement does not reveal the “effect on competition to be *sufficiently deleterious*” then the consequences (the actual effects) of the agreement should be considered to determine whether competition has in fact been restricted to an appreciable extent.⁹⁶

Determining whether the effect on competition is sufficiently deleterious would arguably involve an understanding that an agreement had some form of appreciable effect. It does not necessarily warrant, however, a determination of

⁹² *Supra* n1, *Expedia*, opinion, para 52.

⁹³ Case C-56/65, *STM*, 249. See also *ibid*, *Expedia*, opinion, para 55.

⁹⁴ *Supra* n6 *Völk*, para 5/7, p302. Emphasis added.

⁹⁵ *Ibid*, para 5/7.

⁹⁶ Case C-56/65, *STM*, 249. Emphasis added. See this replicated in C-67/13P *Cartes Bancaires*, para 52. Though it is questionable what the distinction is between ‘sufficiently deleterious’ and ‘appreciable’. See the Commission’s submission in *Völk*, p 300 IV (e) (*supra* n6).

actual appreciable effect. Rather, that it is capable or has the potential of having a negative impact on competition.⁹⁷ In *STM*, the Court stipulated that to decide whether a restriction is prohibited by its object or effect, it is appropriate to take into account, *inter alia*, the nature and quantity of the products covered by the agreement and the position and importance of the supplier and distributor on the market for the products concerned.⁹⁸ This requirement was repeated in *Allianz Hungária*, *Expedia* and *Cartes Bancaires*, though in some cases the citations made in support were inaccurate and moreover the pertinent authority for this, *STM*, was omitted.⁹⁹ That aside, the case law review in chapter 2 highlights that each case should be assessed on its own merits and facts.¹⁰⁰ As such, it would depend on the agreement at what point it would be ‘sufficiently deleterious’.¹⁰¹ This point was picked up on by the CJEU in *Cartes Bancaires* where it referred to the need for the agreement to reveal a sufficient degree of harm.¹⁰² Determining whether an agreement reveals a sufficient degree of harm to competition necessitates an analysis of the agreement’s legal and economic context, which involves taking account of the nature of the goods and the real conditions of the functioning and structure of the market/s in question.¹⁰³ Hence, the parties’ market power may be an important factor in such analysis when determining if an agreement’s purpose is to restrict competition.¹⁰⁴

The judgment in *Völk* stated that an agreement falls outside Article 101(1) TFEU when it has:

“only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question. Thus an [exclusive dealing] agreement, even with absolute territorial protection, *may*, having regard to the

⁹⁷ See eg, C-32/11 *Allianz Hungária*, para 38. Cf *De Minimis* Guidelines, section 1.

⁹⁸ Case C-56/65, *STM*, p250.

⁹⁹ (Graham, 2013), ‘*Methods for determining whether an agreement restricts competition: comment on Allianz Hungária*’, p548. Also, C-32/11 *Allianz Hungária*, para 36; *supra* n1, *Expedia*, para 21.

¹⁰⁰ C-32/11, *Allianz Hungária*, para 38.

¹⁰¹ See (Faull & Nikpay, 2007), para 3.158 and case law cited.

¹⁰² C-67/13P, *Cartes Bancaires*, paras 52-53, 78. However, the notion that this is dependent on experience alone is not supported herein.

¹⁰³ C-67/13P, *Cartes Bancaires*, para 53; See also *supra* n1, *Völk*.

¹⁰⁴ *Ibid*, *Völk*, para 54.

weak position of the persons concerned on the market in the products in question...escape the prohibition laid down in Article [101]”.¹⁰⁵

This passage is taken to mean that the weak position of the parties to the agreement on the product market in question should be taken into account when assessing the *actual circumstances of the case* for agreements whether *by object or effect*. Therefore, the legal and economic context is key. This assessment goes hand in hand with an assessment of the effect on trade criterion, which too must be satisfied.¹⁰⁶ The Court’s judgment in *Völk* follows its rephrasing of the question referred as: “whether, in deciding whether [exclusive distribution agreements] fall within the prohibition set out in Article [85](1) of the Treaty, regard must be had to the proportion of the market which the grantor controls or endeavours to obtain in the territory ceded”.¹⁰⁷

Consequently, it would appear that where the parties have a market share between 1% and 5% the effect on competition is insignificant.¹⁰⁸ From an economic perspective, it is hard to see where the economic harm might be if two undertakings with no market power colluded. This view is upheld by Akman who considers it to be unacceptable to suggest that an agreement where the parties have a market share of 2% will have an appreciable effect on competition.¹⁰⁹ That said, parties that aim to restrict competition should not benefit from a rule that allows their agreements to fall outside Article 101(1) TFEU *per se* as a result of their low market shares.¹¹⁰ However, this depends on what the parties are seeking to achieve and is context driven.¹¹¹ For instance, it is less plausible that horizontal agreements would be seen to be *de minimis* as opposed to vertical ones.¹¹² The thresholds set out by the Commission in its revised *De Minimis* Notice may well not

¹⁰⁵ *Ibid*, *Völk*, para 5/7, p302. Emphasis added.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*, para 2/4, p301/302.

¹⁰⁸ (Faull & Nikpay, 2007), para 3.160.

¹⁰⁹ (Akman, 2013).

¹¹⁰ This is separate from the Commission setting out thresholds as safe harbours against prosecution in a *De Minimis* Notice. Therefore the Commission will not pursue parties to agreements that are below a particular market share. That is a justifiable policy decision, but not the law.

¹¹¹ See C-19/77, *Miller International* [1978] ECR 131.

¹¹² See *Expedia*, opinion, ft 56 (*supra* n1).

apply to restrictions by object, but that is not to say that there is no place for consideration of market shares and an agreement's potential impact on competition.

The judgment in *Expedia* does not overturn *Völk*. Rather, it illustrates how the CJEU does not always enunciate the subtleties of Article 101(1) TFEU and can thus confuse rather than clarify. The phraseology used by the CJEU is unhelpful: arguably there is an innate finding of appreciable effects when the object of an agreement is determined within its legal and economic context. This resolution of the law is, however, contentious. For example, there is a question over whether determining appreciability is a separate element from determining the object of an agreement. In *Ziegler SA v Commission*, the GC found that agreements that restrict competition by object infringe Article 101(1) TFEU only if they have an appreciable effect on competition and on trade between Member States.¹¹³ This suggests appreciability is assessed *after* a finding of object, and that it seemingly must measure an actual effect on competition. Whether the determination when appreciability is assessed makes any material difference to the eventual outcome for a restriction by object is moot. To perceive appreciability as part of the legal and economic context as well as the appraisal of the circumstances of the agreement would surely be more sensible. This is partly because it would then discourage the idea that there is no quantitative component to the object criterion. The fact of the matter is, the impact of agreements that are restrictive by object must be appreciable, but at what point they become appreciable is debatable.¹¹⁴

¹¹³ T-199/08 *Ziegler SA v Commission* 11 July 2013, nyr, paras 41-45; T-49/01 *Brasserie Nationale v Commission* [2005] ECR II-3033, para 140. The *De Minimis* Notice would also suggest *de minimis* is determined *after* a finding of object.

¹¹⁴ See (Bailey, 2009), p359. Bailey suggests that the OFT has found in several decisions that agreements which have the object of restricting competition are, by their very nature, capable of having an appreciable effect on competition and therefore trade. That is, a finding of object could satisfy the requirement of an appreciable effect on trade within the UK. However, Bailey caveats his interpretation by saying, "...save in exceptional circumstances, agreements that have as their object the restriction of competition necessarily have at least the potential to affect trade within the United Kingdom". (Emphasis added). Bailey thereby turns AG Kokott's reasoning around by finding that, within UK law, an [appreciable] effect on trade [in the UK] may be inferred from the existence of an appreciable restriction of competition: p361.

That even a tiny market share could potentially result in a finding of an infringement by object is therefore not in question, although it is doubtful. The more pertinent issue is whether anything else other than market shares could satisfy the requirement that agreements are perceptibly restrictive of competition. Whish and Bailey suggest that market power can be influential where the parties hold a tiny proportion of the market for a particular product, but have an important position on the market generally.¹¹⁵ They also suggest that the case law shows agreements have been found not to be appreciable, not because of the parties' market power, but because the restriction is insignificant in a qualitative sense.¹¹⁶

In summation, *STM* highlights that each case is decided on its merits, hence the consideration of the position of the parties on the market within the analysis of the legal and economic context. The judgment in *Völk* concurs with this as the outcome of whether an agreement comes outside Article 101(1) TFEU depends on the "actual circumstances" of the agreement.¹¹⁷ Bailey argues – correctly – that what constitutes appreciability under the object criterion is different from that under effect: that actual appreciable effects do not need to be proved under the object criterion, rather that "the potential effects on competition of the conduct are inherently likely to be significant".¹¹⁸ Otherwise, it would undermine the object/effect dichotomy.¹¹⁹ Bailey asserts that the *de minimis* doctrine is based on the idea that "the risk of competitive harm is too small for the law to be concerned with".¹²⁰ Therefore the *de minimis* doctrine only applies to cases of real economic insignificance.¹²¹ Consequently, it is not inconceivable that parties to an agreement with a tiny market share (below 5%) may, within the agreement's context, be found to restrict competition by object.¹²² Ultimately, the outcome depends on the

¹¹⁵ (Whish & Bailey, 2012), p143 citing Case 30/78 *Distillers Co Ltd v Commission* [1980] ECR 2229.

¹¹⁶ *Ibid*, p144.

¹¹⁷ *Supra* n1, *Völk*, para 5/7, p302.

¹¹⁸ (Bailey, 2012), pp590, 591.

¹¹⁹ See eg Bailey, *ibid*, p590.

¹²⁰ *Ibid*, Bailey, p590, 4.3.

¹²¹ *Ibid*, Bailey, p591.

¹²² *Supra* n111, *Miller*. See also (Bailey, 2012), ft 214.

purpose of the agreement.¹²³ For instance, *Völk* concerned a vertical agreement (exclusive dealing). Whether the same conclusion would have been reached if the case had concerned a horizontal price fixing cartel is doubtful.¹²⁴

AG Kokott was aware of these issues concerning the frailty of the relationship between appreciability and the object concept; hence, her suggestions that the level of proof differs when establishing the object of an agreement. In addition, she marked out as significant the fact that appreciability can also be proved without recourse to market shares, a point also picked up by the CJEU in its judgment.¹²⁵ For the Commission, the *de minimis* doctrine plays a different role. Drawing on the Commission's *De minimis* Notices, appreciability refers to whether the effects on competition are sufficient to warrant the EU's intervention under Article 101(1) TFEU.¹²⁶

Whether the *de minimis* doctrine is appropriate for the object concept is, nonetheless, debatable. It is submitted that the doctrine is suitable as it cannot be truly said that an agreement *aims* to restrict competition if the potential effect on competition is insignificant.¹²⁷ This should be determined when examining the legal and economic context of an agreement: is an agreement so unimportant, that despite the anticompetitive purpose of the agreement it should still fall outside the realms of Article 101(1) TFEU altogether as its potential effect on competition in that market is inconsequential. *STM* refers to the "precise purpose" of an agreement, which denotes the over-arching purpose of the agreement and, secondly, that the effect on competition be "sufficiently deleterious".¹²⁸ This

¹²³ Though Bailey describes this by stating the *de minimis* doctrine only applies "to cases of real economic insignificance", (Bailey, 2012), p591. Also Joined Cases T-67, 68,71 & 78/00, *JFE Engineering v Commission*, [2004] ECR II-2501, para 384.

¹²⁴ Bailey refers to a number of judgments in support of such a stance whereby the Court rejected the argument that a cartel did not appreciably restrict competition. (Bailey, 2012), p591.

¹²⁵ *Supra* n1, *Expedia*, para 22.

¹²⁶ For a discussion regarding the Commission's consultation on revising the *De Minimis* Notice in view of *Expedia*, see (Graham, 2013), '*Rethinking the de minimis rules*'.

¹²⁷ See eg (Bailey, 2012), p590: the doctrine is based on the concept of *de minimis non curat lex*, that is, the risk of competitive harm is too small for the law to be concerned with. Cf (Blanco, 2012), p23 and pp30-33.

¹²⁸ Case C-56/65, *STM* also refers to the consideration of the position and importance of the parties on the market.

alludes to the balancing act that can take place under the object criterion when determining what the true purpose of the agreement is. The complicating factor resulting from *Expedia* is whether, in respect of the object criterion, the CJEU intended to link satisfaction of the effect on trade criterion with satisfaction of an appreciable effect on competition.

2.5.2. Effect on trade

The most important aspect of the effect on trade criterion is that, unlike the substantive test which determines whether an agreement restricts competition, it is a jurisdictional test.¹²⁹ It determines whether an examination of an agreement or conduct is warranted under Articles 101 and 102 TFEU.¹³⁰ Article 101 TFEU requires that it is applicable only to agreements that “may affect trade between Member States”. The requirement ‘may affect trade’ relates to the fact that it is possible to foresee with a sufficient degree of probability that the agreement “may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”.¹³¹ Therefore it is necessary that an agreement is capable of having an effect, but it is not necessary to prove it will do so.¹³² Whether the pattern of trade is influenced it is merely necessary to show that trade has been influenced by means of a reduction or, indeed, an increase in trade.¹³³ Given the wide remit of the notion ‘may affect’, it highlights that the jurisdictional reach is extensive.¹³⁴ Moreover, an agreement containing a so-called ‘hardcore restriction’ may circumvent the remit of Article 101(1) TFEU if it does not satisfy the effect on trade requirement.

¹²⁹ (Jones & Sufrin, 2014), p181.

¹³⁰ (Whish, 2009), p144; (Whish & Bailey, 2012), p146; C-22/78, *Hugin Kassaregister AG and Hugin Cash Registers Ltd v Commission* [1979] 3 CMLR 345. See also generally, (King & Scott, 2012).

¹³¹ Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU], (Guidelines on Inter-state Trade), para 23.

¹³² *Ibid*, para 26.

¹³³ *Ibid* para 34.

¹³⁴ (Whish & Bailey, 2012), p146.

The effect on trade must be appreciable.¹³⁵ To assess appreciability, the Commission looks to the market position of the parties to the agreement. The larger the market share, the more likely that trade will be affected.¹³⁶ According to the Commission, not only is an undertaking's market share relevant, but also the value of its turnover.¹³⁷ Moreover, the assessment should be undertaken within the legal and economic context.¹³⁸ Arguably, this aspect of the test is similar to that required when assessing the object of an agreement in accordance with *STM*. What is more, the Commission states that appreciability, in the context of effect on trade, is satisfied when the parties aggregate market share is above 5% and their turnover is below 40 million EUR.¹³⁹ This test differs from that set out in the *De Minimis* Notices. It is this distinction that is drawn upon by AG Kokott in *Expedia*.¹⁴⁰

It is submitted that the outcome of the effect on trade test should not autonomously satisfy whether an agreement restricts competition by object, nor that the functions of the jurisdictional and substantive tests be merged. The jurisdictional test and substantive test pursue different goals.¹⁴¹ The ruling by the CJEU in *Expedia* has had the unfortunate consequence of bringing into question the relationship between the jurisdictional and substantive elements of Article 101(1) TFEU. Consequently, there will be speculation over whether a satisfaction of the effect on trade test will automatically satisfy the requirement that restrictions by object are appreciable.¹⁴² As stated above, some commentators have interpreted

¹³⁵ (Whish & Bailey, 2012), p147.

¹³⁶ *Supra* n131, Guidelines on Inter-state Trade, para 45.

¹³⁷ *Ibid*, paras 46-47.

¹³⁸ *Ibid*, para 49.

¹³⁹ *Ibid*, para 52.

¹⁴⁰ *Supra* n1, *Expedia*.

¹⁴¹ (Bailey, 2012), p590, 4.3.

¹⁴² It is hard to see that AG Kokott intended this outcome.

this as removing any analytical component from the object concept.¹⁴³ It is proposed that the CJEU did not necessarily intend such conclusion.¹⁴⁴

It is not denied that there are superficial factors that connect the effect on trade criterion and the substantive test under Article 101(1) TFEU: factors used to determine whether there is an effect on trade will often have similarities to those used to determine whether there is a restriction of competition. For instance, a consideration of the nature of the products and the position and importance of the parties on the market will be relevant in both cases.¹⁴⁵ It would therefore not be inappropriate to surmise that these were the reasons why AG Kokott deemed it suitable to link those lesser thresholds under the Effect on Trade Notice with the satisfaction of the requirement that restrictions by object can be inferred as being appreciable.¹⁴⁶

Aside from the fact the effect on trade requirement is a jurisdictional test, however, there are crucial differences. An effect on trade is determined on the basis of whether an agreement may have “an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”.¹⁴⁷ Therefore the test relates to a determination of the ‘pattern of trade’, not whether there is a ‘restriction of competition’. Fundamentally, the goals of the requirements are different. Linking the satisfaction of the jurisdictional test with the substantive test can only result in confusion.¹⁴⁸ The results of the jurisdictional test should not form the basis for an automatic irrebuttable presumption that an agreement found to have a restrictive object is appreciable.¹⁴⁹ To blur the lines between the

¹⁴³ See commentary by Greenberg Traurig (Urlus & Mulder, 29 January 2013), which states “any contract with an effect on interstate trade within the EU including an anti-competitive object, constitutes an appreciable restriction on competition *per se*. Ergo, clauses with such an anti-competitive object are banned, and it is not necessary to investigate whether the restriction in such clauses is capable of affecting competition”.

¹⁴⁴ As borne out in the judgments of Case C-32/11 *Allianz Hungária* and Case C-67/13P *Cartes Bancaires*.

¹⁴⁵ (Jones & Sufrin, 2011), p179.

¹⁴⁶ *Supra* n1, *Expedia*, paras 55-57 of the opinion: though the point was made in relation to the higher thresholds set out in the *De Minimis* Notice.

¹⁴⁷ Case C-56/65 *STM*, p249.

¹⁴⁸ (Jones & Sufrin, 2011), p177 onwards.

¹⁴⁹ Arguably AG Kokott did not intend her inference to be interpreted as irrebuttable.

jurisdictional and substantive assessments under Article 101(1) TFEU undermines the body of case law, which rightly separates the two requirements.

Whilst the outcome and methodology applied when determining if the jurisdictional test has been satisfied may be a helpful basis upon which to determine if the object of an agreement is appreciable within its legal and economic context, it cannot be depended upon.¹⁵⁰ Rather, the substantive test would need to reaffirm whether the object of an agreement was to restrict competition appreciably. This is also because the test to satisfy the requirement that an agreement affects trade is a broad one, and it is of no consequence whether the pattern of trade is potentially reduced, restricted or even increased.¹⁵¹

2.6. Conclusion: not a landmark judgment

The judgment in *Expedia* is unhelpful in terms of the impact it may have on the interpretation of the object criterion. The judgment forms the basis of the Commission's stance for its exclusion of restrictions by object to its *de minimis* thresholds in its revised *De Minimis* Notice. AG Kokott, whose opinion seems to have influenced the CJEU, is wrong to state so categorically that if an agreement with an anti-competitive object is capable of appreciably affecting trade between Member States it can be inferred that the agreement is also capable of appreciably restricting competition.¹⁵² At the very least, such inference must be rebuttable. It is perhaps true that the effect on trade criteria demands lower thresholds to prove an appreciable effect on trade and that it could be closely seen to mirror a form of substantive analysis. That said such rationale undermines the determination of restrictions by object. The judgment in *Expedia* gives a false impression that there is a short cut to the more analytical approach advocated in *STM* and confirmed in subsequent cases such as *Allianz Hungária*. There are indeed arguments in favour of having a far lower *de minimis* threshold for restrictions by object, but that is not

¹⁵⁰ Jones and Sufrin in the past argued that the Commission is more willing to accept that an agreement containing hardcore restraints may escape Article 101(1) TFEU on the ground that the agreement does not appreciably affect trade, (Jones & Sufrin, 2011), p177.

¹⁵¹ See eg Case C-56/65 *STM*; *supra* n6, *Völk*; (Jones & Sufrin, 2014), p183.

¹⁵² *Supra* n1, *Expedia*, opinion, para 57.

to say that the consideration of appreciability is redundant. The treatment of the *de minimis* doctrine by the CJEU in *Expedia* has been damaging and it is submitted that, although AG Kokott makes salient points regarding infringements by object, she ultimately would prefer to follow her normative vision of what constitutes the object criterion rather than a faithful reading of the case law.

AG Kokott's reasoning is flawed by her linking of the jurisdictional and substantive elements of Article 101(1) TFEU. If she had simply concluded that the requirements concerning proof of an appreciable restriction by object should be no more onerous than the requirements for proof of an appreciable effect on trade, such reasoning would have made more sense.¹⁵³ In her attempt to simplify the law and to highlight the distinction between restrictions by object and by effect she has, however, evoked uncertainty. She by-passed the subtleties of the law regarding the object criterion sketched out above. Certainly, the Commission believes that the CJEU intended to reflect her opinion when stating that agreements that may affect trade between Member States and that have as their object the restriction of competition constitutes an appreciable restriction of competition.¹⁵⁴

The conclusion drawn in this thesis is that the CJEU did not necessarily intend to be contentious by changing the law. Notably, the CJEU continues to uphold the requirement that restrictions by object must be "perceptible".¹⁵⁵ The *Expedia* judgment has therefore not overturned *Völk*.¹⁵⁶ Whether the effect on trade analysis can satisfy the requirement for an appreciable restriction of competition by object is unclear. The CJEU is not explicit enough in this regard.¹⁵⁷ Instead, the

¹⁵³ *Ibid*, para 56 of the opinion.

¹⁵⁴ *Ibid*, para 37 of the judgment; revised *De Minimis* Notice, para 2.

¹⁵⁵ *Ibid*, para 38 of the judgment.

¹⁵⁶ Jones and Sufrin agree: (Jones & Sufrin, 2014), p228.

¹⁵⁷ For instance it does not highlight the fact that under the object criterion appreciable effects need only be potential ones. It simply alludes to that fact: *supra* n1, *Expedia*, para 35.

CJEU has succeeded in perpetuating confusion.¹⁵⁸ This is exacerbated by its subsequent and comprehensive judgment in *Allianz Hungária*.¹⁵⁹

3. The impact of the MAAP on the objectives of Article 101 TFEU

3.1. Introduction

The judgment in *Expedia* raises a number of themes concerning the relationship between the object criterion and particular elements of Article 101 TFEU as a whole, such as the *de minimis* doctrine and the effect on trade criterion. These features raise the broader question of the objectives of EU competition law. This section examines how the object criterion, when interpreted in accordance with the MAAP, complements the changing objectives of Article 101 TFEU. In particular, it examines the close relationship between the object concept and the notion of a ‘restriction of competition’. This in turn enables the distinction between ‘object’ and ‘effect’ to be scrutinised. This section will demonstrate that the object criterion is able to fit comfortably within the framework of Article 101 TFEU when understood in accordance with the MAAP.

3.2. The objectives of Article 101 TFEU: what is a restriction of competition

According to Bork, it is not possible to “frame a coherent body of substantive rules” until the goals of competition law are understood.¹⁶⁰ He considers that competition law policy cannot be understood unless we know what the normative purpose of the law is.¹⁶¹ Bork’s point is pertinent, though would require an unchanging set of aims.¹⁶² The history of the development of EU competition law reveals that the goals of EU competition law vary over time and, in conjunction, there will continue to be a body of substantive rules.¹⁶³ More specifically, in relation to the object

¹⁵⁸ Particularly as it does not adequately explain the leap between paragraphs 36 and 37 of its judgment in *Expedia*, if indeed there is an explanation. AG Kokott is more explicit in this regard (paras 54-57), but it is not certain the CJEU completely agreed with her analysis.

¹⁵⁹ See Case C-32/11 *Allianz Hungária*; cf *supra* n1, *Expedia*, paras 34-36.

¹⁶⁰ (Bork, 1993), p50.

¹⁶¹ *Ibid.*

¹⁶² (Monti, 2007), p3.

¹⁶³ *Ibid.*

criterion, aside from the Commission's stance in its Article 81(3) Guidelines, there is no clear consensus from the European Courts as to the precise role of the object concept. Despite this, the law relating to the object criterion has continued to develop and evolve and, in the background, the objectives of EU competition law have also changed, which in turn shape the direction of the law.¹⁶⁴

This section is not concerned with undertaking an in depth investigation into the goals of EU competition law. Rather, it seeks to gain a more basic understanding of how the objectives behind Article 101 TFEU help shape the application and role of the object criterion, as interpreted under the MAAP, when applying Article 101 TFEU to agreements. Such an exercise helps put the object concept into context when assessing its pivotal role within Article 101 TFEU: the concept of object relates directly to our understanding and assessment of what is a 'restriction of competition'. The power of the object concept to determine this therefore depends largely on the characterisation of a 'restriction of competition'. What comprises a restriction of competition in turn depends on how the goals of EU competition law are perceived. The goals and objectives of Article 101 TFEU have, unsurprisingly, been the source of intense debate in recent years, particularly as a result of modernisation.¹⁶⁵

On a more practical level, the Commission is responsible for devising EU-wide competition policy and polices its enforcement.¹⁶⁶ Thus, the Commission has a huge influence on the orientation of the EU's competition policy and dictates its enforcement priorities. Nonetheless, the European Courts have the ultimate power in interpreting the law. As the Courts' views on the objectives of EU Competition law are not always consonant with those of the Commission, this creates tension.¹⁶⁷ It has been argued that the European Courts have become less tolerant of the Commission's policy-driven approaches. Monti points out that policy can guide the

¹⁶⁴ *Ibid*, p3.

¹⁶⁵ See (Townley, 2011). Also, (Chirita, 2014).

¹⁶⁶ This is achieved through its drafting of guidelines, notices and decisions etc. See Case C-344/98 *Masterfoods v HB Icecream* [2000] ECR I-11369; (Parret, 2010), p372. Also see (Monti, 2009), p16.

¹⁶⁷ (Townley, 2011), p441. (Parret, 2010), p345.

evolution of law, but only within reason.¹⁶⁸ Furthermore, legal language cannot be stretched so far as to deprive it of meaning in order to reach a desired end.¹⁶⁹ This proposition is particularly pertinent for the MAAP, which closely follows the wording of the Treaty, and contradicts the orthodox approach, which imposes its own extraneous meaning on the object criterion.

To understand what the main objectives of EU competition law are, it is necessary to look at numerous sources, such as the treaties, legislation, jurisprudence as well as policy documents.¹⁷⁰ Motta asserts that the main objectives are “most probably economic efficiency and European market integration”.¹⁷¹ Conversely, Monti contends that the core values of EU competition law are market integration, economic freedom and economic efficiency.¹⁷² These core values shift in importance and interpretation over time depending on current influences such as politics, economics and institutions.¹⁷³ This assessment must be correct: the law does not operate in a vacuum. A system of competition law naturally includes both the law (that is, a body of legal rules and standards) and policy, which together regulate and enforce EU competition law and ensure the maintenance of competitive markets.¹⁷⁴

What is understood to constitute the goals of EU competition policy also differs depending on whether lawyers or economists are consulted.¹⁷⁵ Consumer welfare is now at the heart of competition law policy for the Commission,¹⁷⁶ though the CJEU still holds a torch for ordoliberal principles, public policy aspirations, and market integration goals as demonstrated in cases such as *GSK*, *Pierre Fabre* and *FA*

¹⁶⁸ (Monti, 2007), p43-44.

¹⁶⁹ *ibid.*

¹⁷⁰ (Parret, 2010), p359; (Monti, 2009), p15.

¹⁷¹ (Motta, 2004), p15. See also (Parret, 2010), p341; (Nazzini, 2006), p504.

¹⁷² (Monti, 2007), pp51-52.

¹⁷³ (Monti, 2007), pp1-6, 52 and (Parret, 2010).

¹⁷⁴ (Parret, 2010), pp341, 352.

¹⁷⁵ (Parret, 2010),345. (Townley, 2011), p441 who is particularly scathing of economist influence at DG Comp.

¹⁷⁶ (Parret, 2010), pp357, 359. (Townley, 2011), p441. See Article 81(3) Guidelines, paras 13 and 43.

(*Premier League*).¹⁷⁷ EU competition law and policy has moved towards a neoclassical model and away from the maxim that every agreement that restricts economic freedom is a restriction of competition.¹⁷⁸ The current focus on the economic concept of consumer welfare and economic efficiency (the effects-based approach), has again recast the objectives of EU competition law.¹⁷⁹ Hence, the debate as to the objectives of Article 101 TFEU and the meaning of ‘competition’ remain.¹⁸⁰

This serves to illustrate the shifting sands of EU competition law objectives. Nevertheless, such objectives continue to be relevant in judgments, in particular, in the context of determining an agreement’s object.¹⁸¹ The judgment in *E.ON Ruhrgas AG* demonstrates how these objectives permeate the outcome of the case law. In that case, the GC took account of its understanding of the Community’s objectives when determining whether the object of an agreement was to share markets.¹⁸² The Court referred to the CJEU’s desire to unite national markets in a single market, which was an “essential object of the Treaty”.¹⁸³ The object of the agreement under scrutiny could not be said to be neutral as it was concluded at a time when the liberalisation of the energy markets could be reasonably envisaged.¹⁸⁴ The judgment in *E.ON Ruhrgas AG* is a useful point of reference as it not only depicts non-economic goals being considered by the GC within Article 101(1) TFEU, but evinces that the single market objective was taken to be part of

¹⁷⁷ Joined Cases C-501/06 P, *GSK*, para 61-63; Case C-439/09 *Pierre Fabre*; Joined Cases C-403 & 429/08 *FA*. (Parret, 2010), p347. The CJEU still talks about firms needing to independently determine their own commercial policy. See as an alternative example, *supra* n37, *BIDS*. Also (Conway, 2014), p517; (Gerard, 2013), section D, pp36-38.

¹⁷⁸ (Monti, 2007), p52; (Parret, 2010), p349; Case C-309/99 *Wouters*.

¹⁷⁹ See in particular Regulation 1, 2003 and the White Paper supporting it. For commentary on the potential conflict between consumer welfare and efficiency see (Parret, 2010), pp349-350, 361; (Townley, 2011), pp441-443. Townley refers to the DG COMP’s “blind fetishism with consumer welfare” owing to the rise in importance given to economic thinking and economists within the Commission, p441.

¹⁸⁰ See (Monti, 2007), p51-52 and (Motta, 2004), pp1-17. Though see Articles 2 and 3 of the EC Treaty. Also, (Parret, 2010), p362; (Monti, 2009), p 14.

¹⁸¹ See also Case T-587/08, *Fresh Del Monte Produce Inc v Commission*, para 548; Case C-68/12 *Protimonopolný*, First and Second Questions.

¹⁸² Case T-360/09 *E.ON Ruhrgas AG v Commission*, 29 June 2012, nyr (*E.ON*).

¹⁸³ *Ibid*, *E.ON*, para 146.

¹⁸⁴ *Ibid*, para 148.

the consideration of the ‘economic context’ of the agreement.¹⁸⁵ Similarly, in *BIDS* a deciding factor in the judgment was the freedom of the undertakings independently to determine their own commercial policy.¹⁸⁶

It is contended that the MAAP is far better placed than more formalistic alternatives to react flexibly to such changing objectives of EU competition law, not least changing policy objectives.¹⁸⁷ As the object criterion is based on understanding whether an agreement’s purpose is to restrict competition, this enables considerations relating to competition law goals to be balanced within the legal and economic context. For instance, the orthodox approach automatically prohibits ATP, and conversely experience dictates the type of restriction automatically condemned by object.¹⁸⁸ Hence, in those cases where the CJEU has found certain restraints justifiable or has newly found others to infringe Article 101(1) TFEU by object, they would be seen as anomalous.¹⁸⁹ This is illustrated by the *Lundbeck* decision where the Commission struggled to adapt the orthodox approach to its changing policy objectives. Under the MAAP, however, specific economic circumstances may justify such restraints and the agreement is not then found to restrict competition by object.¹⁹⁰ Conversely, the hybrid approach is founded on categorisation based on experience (if the judgement in *Cartes Bancaires* is believed) so is less able to accommodate the changing goals of competition law than the MAAP, but unlike the orthodox approach, any presumption of harm would be rebuttable within Article 101(1) TFEU.

¹⁸⁵ *Ibid*, paras 138-148.

¹⁸⁶ *Supra* n37, *BIDS*, paras 34, 36.

¹⁸⁷ See (Andreangeli, 2011), p236: the “decisive question would be whether its ‘content and purpose’ are compatible with the objectives of Article 101 TFEU, that is, economic efficiency for the purpose of promoting consumer welfare and not whether they belong to a relatively formalistic category...”.

¹⁸⁸ See chapter 1.

¹⁸⁹ See eg, Case C-27/87 *Louis Erauw*.

¹⁹⁰ Though that is not to say such arguments would necessarily succeed. See for instance the arguments made by the GC in Case T-168/01 *GSK* regarding the pharmaceutical industry and consumer welfare.

3.2.1. Conclusion: the relationship between the object concept and restrictions of competition

The MAAP is able to adapt to the changing objectives of EU competition law due to the relationship between the object criterion and what constitutes a ‘restriction of competition’. Like the objectives of EU competition law, what constitutes a restriction of competition will evolve depending on the economics and political influences present at a given time.¹⁹¹ Therefore, its meaning is heavily influenced by the goals of EU competition law. The Treaty itself provides a list of examples of ‘restrictions’ in Article 101(1)(a)-(e) TFEU.¹⁹² Nazzini concludes that it means “anti-competitive effects”.¹⁹³ He finds that Article 101 TFEU “prohibits collusive behaviour that reduces, or is likely to reduce, consumer welfare through restricting output and raising prices or through partitioning the common market”.¹⁹⁴ For Monti, the evolving role of a ‘restriction of competition’ is evident as he believes it has transformed from meaning a “substantial interference with economic freedom” to a “restriction of economic freedom [that] now serves only to establish a presumption that the agreement reduces efficiency to the detriment of consumers, a presumption which can be aided when the firms have market power”.¹⁹⁵ The influence of economics on such an understanding of what constitutes a restriction of competition is however questionable.¹⁹⁶ Monti argues that following the drafting of Article 101 TFEU a restriction of competition must have a non-economic meaning as, if there is efficiency (as found under Article 101(3) TFEU), then there is no restriction of competition.¹⁹⁷

¹⁹¹ (King, 2011), p295.

¹⁹² As noted by (Deringer, 1968), ft 122; Chapter 2.

¹⁹³ (Nazzini, 2006), ft 2.

¹⁹⁴ (Nazzini, 2006), p506. Nazzini believes that the *STM* Test involves a balancing of welfare reducing and welfare-enhancing effects under Article 101(1) TFEU.

¹⁹⁵ (Monti, 2007), p52.

¹⁹⁶ (Monti, 2009), p13.

¹⁹⁷ *Ibid.* See also (Townley, 2011), p443.

So what does this mean for the object concept? Under the MAAP, if object is understood as ‘purpose’ then it is well placed to adapt flexibly to whatever is deemed to entail a restriction of competition.¹⁹⁸ Such purpose is assessed within its own particular context. The jurisprudence demonstrates that if a type of agreement has been previously identified by the European Courts as being restrictive by object this does not then denote that it will in future automatically be found to contravene Article 101(1) TFEU. Moreover, both object and effect serve the same purpose, to establish whether competition is restricted.¹⁹⁹ This is underpinned by *STM* which underlines how the elements share a basic methodology.²⁰⁰ The orthodox approach, on the other hand, imparts less significance to the notion of a ‘restriction of competition’.²⁰¹ Instead, it is constrained by the concept of necessary effect.²⁰²

It has been seen that the European Courts have expanded the object category, a fact that undermines the rationale supporting the orthodox approach (the contention that the category of agreements-by-object should be narrowly construed). Furthermore, the CJEU often uses vague language when finding that particular restrictions *may* restrict competition by object depending on the circumstances of the case, particularly its legal and economic context.²⁰³ This also challenges the straightforwardness of the orthodox approach on the basis that it “eradicates the need to prove, at cost, the adverse consequences of provisions which are in practice likely to lead to inefficiency and are unlikely to have any

¹⁹⁸ Case C-56/65 *STM*. See also (Gerard, 2013), p14, though he argues that under the effects-based approach, which is premised on the need for tailored competitive analysis depending on the economic context of the case (such as the market) and the related market power of the parties, this reduces the value of the case-law as precedents as their value is constrained to their own set of facts.

¹⁹⁹ (King, 2011), p274; for similar reasoning see (González, 2012), p10.

²⁰⁰ (King, 2011), p279.

²⁰¹ See Case T-14/89 *Montedipe SpA v Commission*, para 265 and Case T-148/89 *Tréfilunion v Commission*, para 109.

²⁰² See (Whish, 2009), p122: which agreements come within or outside the object box are dependent on the Courts (and indeed the Commission through its Guidelines). Whish recognised the object box requires “refinement” from time to time as its size and content is capable of change. This undermines its administrable benefits, particularly if the contents of the object box are unclear.

²⁰³ See eg, Case C-439/09 *Pierre Fabre*.

redeeming justification”.²⁰⁴ *SA Binon* is a good illustration of a case in which the CJEU did not automatically link particular (hardcore) restrictions with the object criterion, instead finding that certain provisions in an agreement simply amounted to restrictions of competition.²⁰⁵ The Court held that provisions fixing prices “constitute, of themselves, a restriction on competition”, particularly as these types of agreement are listed in Article 101(1) TFEU.²⁰⁶ This cannot be interpreted to mean the object criterion is synonymous with particular restraints.²⁰⁷

It is contended that the MAAP therefore makes better sense of the functioning of Article 101(1) TFEU as a whole. If ‘object’ was used as a more limited analytical tool when determining whether an agreement restricts competition by focusing on its ‘aim’ or ‘purpose’, then the ‘restriction of competition’ element of Article 101(1) TFEU would more clearly centre around the examples in Article 101(1)(a) to (c) TFEU as types of agreements that can harm competition. Included in such definition of what constitutes a ‘restriction of competition’ are other restrictions which the Courts have held to be ‘obvious’, ‘serious’ or indeed just ‘restrictions of competition’, as well as novel types of restrictions. The object criterion would then be used to clarify whether the agreement indeed has the aim or primary purpose to restrict competition by, for example, fixing prices or sharing markets. The agreement’s success in this regard is irrelevant as is its non-implementation.

Moreover, it is increasingly accepted that the object concept is not limited to an object box: not every hardcore restriction will be a restriction of competition by object and vice-versa.²⁰⁸ This establishes - in the case of hardcore restrictions in particular - a rebuttable presumption of anti-competitiveness. The value of categorisation is therefore questionable. For this reason, as with the orthodox approach, the merits of the hybrid approach as a methodology are not promoted in this thesis. What is needed is an alternative vision of the law. This is found in the

²⁰⁴ (Jones & Sufrin, 2014), p232.

²⁰⁵ Case C-243/83 *SA Binon*, [1985] ECR 2015.

²⁰⁶ *Ibid*, para 44.

²⁰⁷ See chapter 2.

²⁰⁸ See eg (Ibáñez Colomo, 2012), (Jones, 2010), ‘*Left Behind By Modernisation*’, (González, 2012), (Whish & Bailey, 2012).

MAAP. An interesting example where the MAAP could be more effectively deployed is that of RPM. RPM is a form of vertical price fixing, which many economists and lawyers believe should not be a restriction of Article 101(1) TFEU *per se*.²⁰⁹ The orthodox approach risks over enforcement when it finds RPM is always restrictive by object. It is not inconceivable that the MAAP (with its focus on an agreement's specific legal and economic context) could find that, despite containing a form of RPM, an agreement does not have the precise purpose of restricting competition. The agreement would then need to be considered under 'effect' to determine if it did in fact restrict competition to an appreciable extent. In such a scenario, there is a possibility that either the agreement would be found not to restrict competition by effect, or would be able to benefit from an exemption under Article 101(3) TFEU.

4. The distinction between restrictions by object and by effect

With its focus on the legal and economic context an obvious criticism of the MAAP is that the distinction between restrictions by object and by effect is ambiguous, which thereby diminishes the role of 'effect'.²¹⁰ This criticism is seemingly exacerbated by cases such as *Allianz Hungária*.²¹¹ It can be rejected, however, as the research does not support such a criticism. Rather, understanding the object concept in accordance with the MAAP enhances and explains the relationship between the two substantive elements. They complement each other, and have divergent roles in the determination of whether a given agreement restricts competition.²¹²

The roles of object and effect are thus distinct. The object concept looks to identify whether the purpose, indeed the rationale behind the agreement, objectively determined, is to restrict competition. The effect concept looks to confirm that an agreement does in fact restrict competition (whether actually or potentially) if the

²⁰⁹ See (Ibáñez Colomo, 2012), p504.

²¹⁰ See (Graham, 2013), '*Comment on Allianz Hungária*'; (Vedder, 2013).

²¹¹ Case C-32/11 *Allianz Hungária*, where the CJEU referred to the need for an agreement to reveal a "sufficient degree of harm" when determining its object (paras 34-36).

²¹² See eg (González, 2012); (Kolstad, 2009).

object of an agreement cannot be determined. Furthermore, under the MAAP, the object criterion does not require the actual effects of the agreement to be determined, which is not due only to the necessary consequence of the agreement, but because the agreement aims to harm competition.²¹³

Over time, many commentators have considered that it was only when determining the effect of an agreement that the “whole economic context” need be taken into account (that is, defining the relevant market and the parties’ positions on it, as well as examine the counterfactual).²¹⁴ From this perspective, it was unnecessary when examining an agreement’s object to carry out such a detailed examination. The Article 81(3) Guidelines, for example, are “unequivocal on the point”.²¹⁵ This has been proven to be inaccurate. That the initial assessment process for both object and effect is similar under the MAAP is not to be seen as a flaw, but rather as a positive factor. The MAAP raises the standard of proof on the part of the claimant or regulator. This is crucial given the tendency for the Commission to frame all Article 101(1) TFEU cases in object terms thereby exploiting the object concept to avoid an in-depth effects analysis. That approach incontrovertibly does mean a reduced role for ‘effect’.²¹⁶ Moreover, the levels of fines imposed on undertakings infringing Article 101(1) by object justify a more robust assessment under that criterion.²¹⁷ The decisive factor, however, is the re-emergence and acknowledgment of *STM* as a leading case on the object concept.

From an economic perspective, it has been argued that the dividing line between restrictions by object and restrictions by effect is whether restraints found in an agreement can be “plausibly explained on efficiency grounds”.²¹⁸ When

²¹³ The analogy made by AG Kokott with risk offences is pertinent in this regard.

²¹⁴ (Howard, 2009), p2.

²¹⁵ *Ibid.*

²¹⁶ The CJEU addressed this in Case C-67/13P *Cartes Bancaires*.

²¹⁷ See (Killick & Berghe, 2010) for comments regarding the human rights aspect of the significant fines imposed by the Commission. For a discussion on the quasi-criminal nature of fines and the impact of the European Convention of Human Rights see (Wils, 2010) and (Forrester, 2010). See *infra* the concluding chapter of this thesis.

²¹⁸ (Ibáñez Colomo, 2012), pp561-562. Cf (Nazzini, 2006), pp497-498. Nazzini sees the distinction as follows: the object criterion is either a presumption of anti-competitive effect or (in line with Odudu)

determining an agreement's object, the CJEU concentrates on whether an agreement lacks redeeming virtues as opposed to its potential to restrict competition.²¹⁹ For Ibáñez Colomo, a given restraint will only restrict competition by object where "it is not a plausible source of efficiency gains".²²⁰ Utilising the MAAP methodology, he argues that:

"The true question does not seem to be whether the restraint...can be presumed to have anti-competitive effects, or whether it bears a particular form; but whether, in the light of the nature of the agreement, and the context in which it is concluded, it is a convincing means to enhance efficiency and not simply a means to extract wealth from customers or suppliers...the crucial factor is not that the agreement can be presumed to deteriorate the conditions of competition on the relevant market(s), but the fact that it cannot be expected to improve them".²²¹

Therefore it is only where the particular restraint has "no redeeming virtues" (such as naked price fixing) that 'anti-competitive intent' can be presumed.²²² Hence, where the agreement cannot be reasonably explained on efficiency grounds or where, for example as in *BIDS*, there is no clear link between the efficiency claims and the restraint, it can be assumed that the primary motivation of the parties is to restrict competition.²²³ Ibáñez Colomo believes that the CJEU does not see the notion of restriction by object as a presumption of the likely effects of the agreement. Instead, the CJEU views the object concept as enabling the Court to understand the agreement's genesis, whereas the effect criterion establishes the likely (negative) effects of an agreement on the market.²²⁴

This reasoning is persuasive and compliments the methodology of MAAP. The economic arguments presented by Ibáñez Colomo are untested for the purposes of this thesis, but the explanation is an interesting one and would seem to fit neatly

an objectively determined anti-competitive intention, whereas effect focuses on whether there are anti-competitive effects.

²¹⁹ (Ibáñez Colomo, 2012), pp561-562.

²²⁰ *Ibid*, p549. Put differently, is it realistic to expect pro-competitive effects from the agreement in light of the context in which it is implemented.

²²¹ *Ibid*, p549.

²²² *Ibid*, p549.

²²³ *Ibid*, p549.

²²⁴ (Ibáñez Colomo, 2014), 'More on AG Wahl and restrictions of competition by object'.

with the understanding of the law postulated herein. Ultimately, he finds that an increase in market power is not determinative when assessing whether an agreement restricts competition.²²⁵ He recognises that there is an innate flexibility with which Article 101(1) TFEU has been interpreted.²²⁶ The crucial distinction in the argument advanced in this thesis is that what is proffered is a legal explanation as opposed to an economic one. First and foremost, judges apply the law, not a series of economic models. In that vein, under the MAAP the object concept is concerned with determining the agreement's purpose in its legal and economic context and the effect concept is concerned with its actual effect on competition. In contrast, the orthodox approach makes little sense from an economic perspective as it is unable to react to nuances or changing economic circumstances, which is why an improved dichotomy is needed.²²⁷

It is therefore proposed that viewing the dichotomy in a different light is of more benefit given the limitations of categorisation, its proven anomalies and the prominence of the legal and economic context in any assessment by object. Using the object criterion as a more powerful and flexible legal tool means that 'effect' is reserved for those agreements that cannot truly be said to be restrictive by object and therefore require a full market analysis in order to reveal their concrete effects.²²⁸ The CJEU attempted to address the dichotomy in its judgment in *Cartes Bancaires*.²²⁹ It appears that the CJEU wanted to reinforce the point that the object concept is not a gateway to allow any type of coordination to be found restrictive by object. Otherwise, "the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal

²²⁵ (Ibáñez Colomo, 2012), pp555-557.

²²⁶ *Ibid*, p562.

²²⁷ See the new *De Minimis* Guidance, section 1 where the Commission has attempted to respond to this. It describes the distinction between object and effect stating that it is unnecessary to demonstrate any actual *or* likely effects as restrictions by object are those that by their very nature have the potential to restrict competition. However it then concedes that in "exceptional cases" a restriction by object may be compatible with Article 101 TFEU because it is objectively necessary or protects a legitimate goal and thus falls *outside* Article 101 TFEU.

²²⁸ See Case C-67/13P *Cartes Bancaires*, para 58.

²²⁹ *Ibid*.

competition”.²³⁰ To this end, the CJEU relied heavily on the concept of necessary effect, but supported this with the requirement that such agreements must demonstrate a “sufficient degree of harm to competition” determined in accordance with the *STM* Test.²³¹ Hence, the CJEU continues to keep the hybrid approach alive.²³²

There is no doubt that the object concept should be interpreted restrictively. Under the hybrid approach (as interpreted under *Cartes Bancaires*), this stems from the concept of necessary effect. From the perspective of the MAAP, it is because the agreement lacks the precise purpose to restrict competition. Moreover, applying the *STM* Test ensures that an agreement’s context supports that assessment, which - as the CJEU emphasises - must demonstrate a sufficient degree of harm. It is submitted that if the CJEU insists on relying on *STM*, then it should do so absolutely. *STM* does not support categorisation. The hypothesis that there should be a narrow category of agreements restrictive by object is unworkable in practice owing to the case law of the European Courts. This is exacerbated by the CJEU’s continued use of nebulous wording.²³³ Instead, it is more prudent to work with the case law than against it. Therefore the distinction between restrictions by object and by effect needs to be recast as suggested under the MAAP.

Andreangeli uses the US antitrust rules to help demonstrate her explanation of the dichotomy.²³⁴ As discussed in chapter 4, she postulates that the CJEU has *moved away* from a stark distinction between infringements by object and by effect and instead has embraced a concept of ‘restriction of competition’ that forms a continuum or spectrum ranging from more serious to less obvious infringements.²³⁵

²³⁰ *Ibid*, para 58.

²³¹ *Ibid*, para 49.

²³² See eg *supra* n37 *BIDS*, para 17. The CJEU’s attempt to confine the application of object in *Cartes Bancaires* makes more sense if the orthodox is applied, so as to prevent the abuse of the object criterion by resource-stricken competition authorities.

²³³ The CJEU is fond of using words such as ‘may’ as opposed to definitive statements of intent, which therefore leaves room for interpretation. See eg *supra* n228 *Cartes Bancaires*, paras 49, 51.

²³⁴ (Andreangeli, 2011), pp242-243: the US Supreme Court has moved away from a sharp distinction between ‘*per se*’ and ‘rule of reason’ following its judgment in *California Dental Association*.

²³⁵ *Ibid*, pp236, 242-243.

‘Serious’ restrictions refer presumably to hardcore restraints.²³⁶ The type of inquiry would therefore depend on the nature and seriousness of the agreement in hand: “the more serious the prima facie breach is, the more likely it will be for it to have anti-competitive effects and, consequently, to justify ‘early antitrust intervention’ by way of the application of a presumption of anti-competitive impact”.²³⁷ The position adopted herein is that the CJEU has always had an in-context approach to the object criterion and has rarely been as formalistic as the Commission.

This leads to the following conclusion: the dichotomy between restrictions by object and by effect does not encapsulate a stark distinction as proffered in *ENS*. The case law is unequivocal on this point. Moreover, understanding the object concept as applying to ‘serious’ restrictions, depends on how ‘serious’ is defined. Andreangeli does not define ‘serious’, though she suggests that it encapsulates more than classic ‘object box’ restrictions and uses the premise of ‘experience’ as a guide. If the Courts were to adopt the MAAP as opposed to the currently favoured hybrid approach, then there is better scope to utilise the object concept in a more economically orientated way. Thus, serious restrictions would be those agreements that *aim* to restrict competition ‘sufficiently deleteriously’, which are objectively determined based on their content and context. Experience would continue to be an important feature of such assessment, but would not be the only denominator. The effect criterion would then ensure that those agreements that do not have such an aim, but which in fact result in anti-competitive harm are also caught. Moreover, the role of the object criterion is enhanced as it has the ability to cast certain agreements outside Article 101(1) TFEU altogether.²³⁸

²³⁶ See eg Case T-374/94 *ENS* [1998] ECR II-3141.

²³⁷ (Andreangeli, 2011), p238.

²³⁸ For instance, if the restriction is ancillary to a pro-competitive purpose, is objectively justified or the agreement pursues a legitimate objective.

5. Article 101(3) TFEU: the legal exception

5.1. Introduction

The enhanced role envisaged for the object criterion under the MAAP in contrast to its orthodox function raises questions regarding the impact on the scope of Article 101(3) TFEU.²³⁹ This section discusses the relationship between the object concept and Article 101(3) TFEU, and the implications for Article 101(3) TFEU that would be generated by the consistent application of MAAP. It may be that the application of Article 101(3) TFEU would be reduced on account of two factors. On one hand, a more thorough assessment of an agreement's object would be undertaken within Article 101(1) TFEU,²⁴⁰ while on the other hand, the object assessment may remove agreements outside the remit of Article 101 TFEU altogether. However, this does not mean the death of Article 101(3) TFEU, merely that the emphasis shifts back to Article 101(1) TFEU as is proper following modernisation and in view of the extensive case law adopting a more economic and analytical approach when establishing whether an agreement restricts competition. Furthermore, the application of Article 101(1) TFEU is more flexible than the more rigid provisions requiring satisfaction under Article 101(3) TFEU: this is also exemplified by the continued debate over whether aspects aside from economic arguments can be considered under Article 101(3) TFEU.²⁴¹

²³⁹ More significantly, Alexander Italianer also raised this question in relation to his understanding of the "sliding scale" approach in terms of the analysis undertaken under Article 101(1) being proportional to the seriousness of the restraint. He queried what impact such "continuum" approach would have on Article 101(3) as "Article 101(1) would probably find its mirror image when making the balancing in Article 101(3)": (Italianer, 2013).

²⁴⁰ This could mean that arguments traditionally reserved for Article 101(3) TFEU are employed under Article 101(1) TFEU and therefore an agreement that may satisfy elements of Article 101(3) TFEU could potentially ensure a finding that an agreement does not restrict competition by object and therefore should be assessed by 'effect'. The resultant impact on the availability of Article 101(3) TFEU should the agreement then be found to be restrictive by effect would be interesting in terms of whether more agreements traditionally seen to be restrictive by object could be exempted by Article 101(3) TFEU if they became 'effect' cases. A prime example of this is the decision in *Visa International - MIF*. This proposition would need to be tested further however.

²⁴¹ See generally (Townley, 2009) and (Monti, 2002) on public policy considerations and Article 101(3) TFEU.

5.2. The relationship between restrictions by object and Article 101(3) TFEU

Article 101(3) TFEU is the legal exception and allows for agreements found to be restrictive of competition under Article 101(1) TFEU to be exempted on the grounds such agreements satisfy four strict conditions. Historically, the role of applying Article 101(3) TFEU was the exclusive preserve of the Commission, though the burden of proof is placed on the defendant. This monopoly ended with the advent of Regulation 1/2003. However, the legacy of Regulation 17 of 1962 still remains given the continued existence of block exemption regulations (BERs) that fall within the remit of Article 101(3) TFEU. Provided undertakings ensure their agreements meet the conditions set out in the relevant BER such agreements are exempted under Article 101(3) TFEU. Whether BERs should still be framed in terms of Article 101(3) TFEU post-modernisation is debatable in view of the increased economic assessment of agreements under Article 101(1) TFEU. This is an important issue. If the effects-based approach is truly adopted under Article 101(1) TFEU it is then hard to reconcile the favourable economic arguments made in various BERs under the umbrella of Article 101(3) TFEU, which would be better placed under Article 101(1) TFEU at the point of determining whether an agreement restricts competition.²⁴²

It is well-documented that despite the availability of Article 101(3) TFEU for all restrictions of competition by object, the truth of the matter is that agreements containing such restrictions are rarely permitted.²⁴³ This is because such a strong presumption has been created that agreements containing restrictions by object, particularly hardcore restrictions, will not satisfy Article 101(3) TFEU.²⁴⁴ This is due in part to the lack of availability of the BER's for agreements containing 'hardcore

²⁴² This issue is outside the scope of this thesis, but is an area that would benefit from further research.

²⁴³ (Whish & Bailey, 2012), p153 citing T-17/93 *Matra Hachette v Commission*, para 85. Also see Case C-243/83 *SA Binon*, para 46; Joined Cases C-501 etc/06 P *GSK*, para 58; Joined Cases C-403 & 429/08 *FA*, para 145; Case C-439/09 *Pierre Fabre*, para 49 where the availability of Article 101(3) TFEU for restrictions by object is made clear. Alexander Italianer also endorsed the position that "no restraint is ever necessarily and irretrievably unlawful, and that includes restrictions by object": (Italianer, 2013). See below for further discussion.

²⁴⁴ (Jones, 2010), '*Left Behind by Modernisation*', p669.

restrictions’.²⁴⁵ More significantly, the advent of Regulation 1/2003 has exacerbated this presumption: the exemption process was abolished, hence there is scant jurisprudence providing clarification on when agreements containing hardcore restraints will satisfy Article 101(3) TFEU. Moreover, the Commission has not issued any non-infringement decisions since 2004, which it has the power to do under Regulation 1/2003.²⁴⁶

The scope of Article 101(3) TFEU has also been narrowed by the Commission in its Article 81(3) Guidelines. Jones contends that the Article 81(3) Guidelines “significantly raised the bar for those seeking to rely on Article 101(3)”.²⁴⁷ According to the Commission, Article 101(3) TFEU is intended “to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations”.²⁴⁸ This exposes a tension with the jurisprudence interpreted by scholars such as Monti and Townley.²⁴⁹

Therefore given the Commission’s clear message that agreements containing hardcore restrictions are unlikely to satisfy the requirements of Article 101(3) TFEU coupled with the lack of jurisprudence providing guidance on the application of the provision, “firms have been unwilling to take the risk of inserting hardcore restraints into agreements, especially as the consequences of getting the assessment wrong might be a significant fine from the Commission or a NCA”.²⁵⁰ That the Commission finds few salvaging features for agreements containing hardcore restrictions cannot be underestimated in terms of the impact this may have on how undertakings conduct their business. In particular, to have to apply

²⁴⁵ See Jones, *ibid*, p669 and ft 109; (Bailey, 2012), p595 reiterates how the various BER’s state that severe restrictions are unlikely to fulfil the conditions of Article 101(3) TFEU, because hardcore restrictions rarely enhance efficiencies or benefit consumers and frequently are dispensable; also Guidelines on Vertical Restraints, para 47.

²⁴⁶ Article 10 of Regulation 1/2003.

²⁴⁷ (Jones, 2010), ‘*Left Behind by Modernisation*’, p669. See Article 81(3) Guidelines, paras 51,52-59, 73, 83-104.

²⁴⁸ *Ibid* Jones, p669 citing Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1, para 57.

²⁴⁹ (Monti, 2002); (Townley, 2009).

²⁵⁰ (Jones, 2010), ‘*Left Behind by Modernisation*’, p670.

Article 101(3) TFEU means that an agreement would have already been found to be restrictive of competition. Hence, if the criteria under Article 101(3) are not satisfied then undertakings cannot exclude the possibility that they may be heavily fined.

To be able to conduct a wider ranging economic analysis of an agreement under Article 101(1) TFEU in accordance with the MAAP could, therefore, be an attractive alternative for businesses. Furthermore, as a result of applying the MAAP, aside from a finding that the agreement is restrictive by object, the agreement will either fall outside Article 101(1) TFEU entirely or be found not to restrict competition by object and therefore be required to be assessed by its 'effect'. Should the agreement be deemed to be restrictive by effect, then the availability of an Article 101(3) exemption may not seem as unrealistic. The point is that, particularly owing to the direction of recent case law confirming the application of a more in-depth methodology when assessing the object criterion, the Commission must work harder to discharge its burden of proof under Article 101(1) TFEU. It must look far more closely at factors that it previously may have given scant attention to, such as economic rationale and potential effects, or which it reserved for assessment under Article 101(3) TFEU.²⁵¹

Firms may therefore be inclined to take more commercial risk if they consider that their agreements - which they genuinely believe do not aim to restrict competition, but which under the orthodox approach may be seen automatically to restrict competition by object - at least have a possibility of being considered only restrictive by effect, if at all, when assessed in accordance with the MAAP. Given the lack of case law concerning Article 101(3) TFEU, this could be an attractive option.²⁵² Despite the CJEU now being at pains to point out that restrictions by object can benefit from Article 101(3) TFEU, until concrete judgments are handed

²⁵¹ See eg Case C-32/11 *Allianz Hungária*.

²⁵² (Svetlicinii & Sad, 2011) make a similar point though argue the judgment in *Pierre Fabre* introduced a type of Article 101(3) assessment when determining whether the object of an agreement is to restrict competition under Article 101(1) TFEU. They argue this may help parties "seeking to exempt their otherwise 'hardcore' agreement at an early stage, before the full-scale uncertainty of the Article 101(3) TFEU assessment".

down there is little real certainty as to the availability of an Article 101(3) TFEU exemption.²⁵³ Notably, the Commission, perhaps in recognition of the CJEU's stance, is modifying its tone on the availability of Article 101(3) TFEU.²⁵⁴

5.2.1. Application: division of labour between Articles 101(1) and (3) TFEU

For commentators such as Nicolaides, Article 101(3) TFEU permits only restrictions that are necessary for the agreement to generate the claimed efficiency gains: known as the indispensability requirement.²⁵⁵ Conversely, Article 101(1) TFEU:

“seeks to determine the overall, actual, potential and inter-temporal effect of an agreement on competition. By contrast...Article [101](3) asks whether an agreement with an overall anti-competitive effect should be allowed to go ahead, because it generates sufficient gains for consumers. In other words, Article [101](3) evaluates the desirability of the agreement from the point of view of consumers.”²⁵⁶

The tension between the acceptability of arguments under Articles 101(1) TFEU and contrarily under Article 101(3) TFEU is not new. This was highlighted by Korah who criticised the Commission for finding that restrictions were indispensable under Article 101(3) TFEU, while considering them simultaneously to be restrictive of competition under Article 101(1) TFEU.²⁵⁷ Therefore an agreement found to restrict competition under Article 101(1) TFEU could be found to be lawful if the “efficiencies relevant under Article 81(3) outweigh the negative effects the restriction of competition has on competition and allocative efficiency”.²⁵⁸ Kolstad calls it a “balancing test” as the allocative efficiency loss through reduced competition must be quantified: by applying Article 101(3) TFEU it is therefore

²⁵³ See *supra* n37 *BIDS*. The case was remitted to the Irish High Court, but BIDS subsequently withdrew the claim for exemption under Article 101(3) TFEU.

²⁵⁴ See (Italianer, 2013). Though previous examples of the Commission's tolerance of Article 101(3) TFEU arguments are the joint fixing of the price or the area of sale of a product manufactured through a joint venture, which is often seen to be indispensable to the functioning of the joint venture. Even the Commission in its decision in *Visa International - MIF* found that the agreement on MIF's between acquiring banks and issuing banks was indispensable to the functioning of the Visa network. See (Nicolaides, 2005), p129.

²⁵⁵ *Ibid*, Nicolaides citing Case C-258/78 *Nungesser*.

²⁵⁶ *Ibid*, Nicolaides, p134.

²⁵⁷ *Ibid*, Nicolaides, pp139, 144.

²⁵⁸ (Kolstad, 2009), pp54-55, 54.

necessary to assess the concrete effects on competition of agreements that restrict competition by object.

This is a pertinent point: the apparent benefit of applying ‘object’ under Article 101(1) TFEU is that actual effects do not need to be demonstrated thus easing the administrative burden and cost. The burden of proof is on the plaintiff, which is usually the Commission. Conversely under Article 101(3) TFEU the burden of proof is on the defendant. However, the Commission (or plaintiff) would still need appropriately to consider economic arguments raised (it has been criticised by the European Courts for not doing this in the past) by the defendant under Article 101(3) TFEU. Therefore, it is arguable that all the administrative savings made in a finding of ‘by object’ under Article 101(1) TFEU would be lost. This would not apply if the defendant chose not to seek exemption under Article 101(3) TFEU. If the MAAP was applied under Article 101(1) TFEU, then it is debatable whether defendants would still seek to apply Article 101(3) TFEU given that a form of ‘balancing’ has already occurred under Article 101(1) TFEU as economic arguments are taken seriously. Article 101(3) TFEU could then be reserved for those cases concerning arguments that are not necessarily as appropriately considered under Article 101(1) TFEU.²⁵⁹ Ibáñez Colomo argues that despite the Commission’s *prima facie* approach of rejecting non-economic considerations under Article 101(3) TFEU, the very fact that the analytical framework revolves around efficiency means that “the supposed peculiarities” of such situations are captured.²⁶⁰ This is because consideration of non-economic factors can be seen as a proportionate response to a particular market failure and therefore not to be in conflict with allocative efficiency.²⁶¹

It is submitted that applying the object criterion in accordance with MAAP would help allay a number of criticisms raised, simply because there is scope better to

²⁵⁹ Such as social, political and environmental considerations. Cf AG Mazák in Case C-439/09 *Pierre Fabre*. The Commission may not view this as a sensible solution given its stance on Article 101(3) TFEU set out in its Article 81(3) Guidelines.

²⁶⁰ (Ibáñez Colomo, 2012), p561.

²⁶¹ *Ibid*. Examples include environmental protection could be seen as a “reaction to the negative externalities generated by some economic activities”.

consider economic arguments under Article 101(1) TFEU. Criticism levelled at the Commission by scholars such as Korah was not misplaced when Article 101(1) TFEU was formalistically applied to agreements which restricted commercial freedom. However, with the more economics-based interpretation of Article 101(1) TFEU, economic arguments historically considered by the Commission under Article 101(3) TFEU should instead be relevant and appraised under Article 101(1) TFEU.²⁶²

Another point of debate is whether the criteria in Article 101(3) TFEU are applied more strictly to agreements found to be restrictive by object. Kolstad argues not.²⁶³ He recognises that it will be more difficult to prove that the Article 101(3) TFEU criteria are satisfied in respect of restraints by object.²⁶⁴ This is evident as agreements restricting competition by object generally have a greater potential for anti-competitive harm, so will tend to be detrimental to competition.²⁶⁵ For this reason, he argues that it would explain why agreements that restrict competition by object will normally have little chance of realising the type of production efficiencies needed under Article 101(3) TFEU.²⁶⁶ Moreover, as such agreements have greater potential for anti-competitive harm as a result the efficiencies must be rather substantial in order for the Article 101(3) TFEU criteria to be fulfilled.²⁶⁷ Therefore, it will only be in rare cases that agreements restricting competition by object will satisfy Article 101(3) TFEU.²⁶⁸

This interpretation can be contrasted with the position adopted by Andreangeli.²⁶⁹ In her paper, Andreangeli assesses the consequences of her “continuum” approach on the legal assessment of Article 101(3) TFEU. The outcome of her research highlights the need for a different appraisal depending on the seriousness of the

²⁶² For example see *Ford/Volkswagen* [1993], OJ L20/14. Here the Commission accepted that individually the parties could not act and that the agreement was necessary for the parties to manufacture a new car, but then went on to consider those arguments under Article 101(3) TFEU and granted an exemption: see (Nicolaidis, 2005), p139.

²⁶³ (Kolstad, 2009), pp54-55. See (Andreangeli, 2011).

²⁶⁴ *Ibid*, Kolstad.

²⁶⁵ *Ibid*, Kolstad.

²⁶⁶ *Ibid*, Kolstad.

²⁶⁷ *Ibid*, Kolstad.

²⁶⁸ *Ibid*, Kolstad.

²⁶⁹ (Andreangeli, 2011), pp238-241.

infringement under Article 101(1) TFEU. She recognises that the adoption by the Courts of a more flexible and economics-based approach to Article 101(1) TFEU raises issues for the scope of Article 101(3) TFEU and its application.²⁷⁰ Up until the judgment in *Metropole*,²⁷¹ she contends that the legal analysis under Article 101(1) TFEU focused more formalistically by ascertaining if an agreement was restrictive by reason of its object or effect rather than in accordance with her “continuum” concept.²⁷² The function of Article 101(3) TFEU here was to “gauge the extent to which the practice, despite its harmfulness, nonetheless enhances the competitive process. Gains in terms of ‘allocative’ as well as of ‘productive’ efficiency would have to be taken into account and weighed against its anticompetitive effects”.²⁷³

For Andreangeli this traditional understanding of Article 101(3) TFEU does not provide a complete picture.²⁷⁴ This is because Article 101(3) TFEU has been used to consider objectives that are not plainly economic efficiency arguments. Townley and Monti have both argued how other factors, such as environmental, social and political issues, have played a part in exempting agreements under Article 101(3) TFEU.²⁷⁵ In view of this, Andreangeli proposes a solution that depends on the nature of the agreement in accordance with her continuum. Accordingly, she differentiates the application of Article 101(3) TFEU between serious and less serious breaches as opposed to by object and by effect infringements.²⁷⁶ For less serious restraints, the role of Article 101(3) TFEU is limited to an inquiry into the extent to which the practice furthers productive efficiency and seeks to achieve

²⁷⁰ *Ibid*, p238.

²⁷¹ Case T-112/99, *Métropole*, paras 74-79.

²⁷² (Andreangeli, 2011), p238. She contends the continuum means that instead of the Courts revolving around a formalistic dichotomy between by-object and by-effect infringements, it is now evolving towards a continuum between “nefarious” breaches and “less obvious” restrictions of competition under Article 101(1) TFEU. As a result the type of inquiry as to its impact on the market, that is whether the effects are presumed or have to be actually demonstrated and therefore its (il)legality, would have to be determined: pp239-240.

²⁷³ *Ibid*, p238.

²⁷⁴ *Ibid*, p239.

²⁷⁵ As demonstrated, *inter alia*, in Case C-67/96 *Albany International* and *CECED* (Commission Decision 2000/475/EEC). See also (Odudu, 2006), p160 who recognises this phenomenon, though does not agree with it as he considers goals other than efficiency are external to competition law; p174.

²⁷⁶ (Andreangeli, 2011), p239

specific public policy goals.²⁷⁷ Given the ability for Article 101(1) TFEU to engage in, as Andreangeli sees it, a limited degree of balancing for less serious restraints, Article 101(3) TFEU would be confined to assessing the benefits of such agreements for instance technological advancement or the ultimate goals of the Treaty, even those “less obviously” economic in nature.²⁷⁸

Conversely, Andreangeli contends that if a restraint is found to be a serious one under Article 101(1) TFEU, the prohibition clause must then consider a wider range of issues than less obvious restraints.²⁷⁹ Not only would productive efficiency and public policy arguments be assessed, but also any allocative efficiency benefits. Thus such inquiry would look at any types of ‘gains’ arising from the agreement and must therefore be viewed as more probing.²⁸⁰ Andreangeli dismisses criticism that her approach would contradict the logic of her continuum, as her approach would ostensibly demand a more in-depth inquiry into serious restrictions of competition and vice versa for less serious restraints.²⁸¹ Her justification is that the Commission has argued that a “pressing justification” would be needed in order to apply Article 101(3) TFEU to serious infringements, hence the need for a more extensive inquiry in those circumstances.²⁸² Then for less serious infringements, given they would have already been subjected to an in-depth assessment under Article 101(1) TFEU, the focus on only public policy and productive efficiency-related objectives would be justified. The fact such restraints were already subject to a probing analysis of their actual effects under Article 101(1) TFEU means they would “be less likely to be inconsistent with the objectives” of the EU competition regime.²⁸³

Andreangeli’s arguments have merit and are logical if the continuum approach is supported.²⁸⁴ It is submitted that what Andreangeli’s position underlines ultimately

²⁷⁷ *Ibid*, p240 referencing Odudu and Townley. Odudu contends that Article 101(3) TFEU concerns only a productive efficiency enquiry, (Odudu, 2006), p157.

²⁷⁸ (Andreangeli, 2011), p240.

²⁷⁹ *Ibid*.

²⁸⁰ *Ibid*.

²⁸¹ *Ibid*, pp240-241. Also p226.

²⁸² *Ibid*, p241 citing *Visa International*, paras 74 et seq.

²⁸³ *Ibid*, p241.

²⁸⁴ See chapter 4, section 4.

is a simple point: that when applying Article 101(3) TFEU it is done on a case by case basis, which mirrors the position of Article 101(1) TFEU as expressed in accordance with the MAAP. The influence of considerations other than economic ones is not in doubt and this thesis does not support Odudu's pure economic interpretation, as the case law does not uphold such an understanding. However, it seems rational that the application of Article 101(3) TFEU to restrictions by object as understood in accordance with MAAP should be more demanding or wider in scope depending on the nature of the restraints. The case itself therefore determines the type of enquiry needed under Article 101(3) TFEU.

As to the precise delineation between Articles 101(1) TFEU and 101(3) TFEU, the following points can be considered.²⁸⁵ Given MAAP supports a raft of economic arguments, including pro-competitive benefits of an agreement, it is difficult to see what Article 101(3) TFEU could bring to the table. This is because agreements that do fall foul of Article 101(1) TFEU when assessed under the MAAP and are found to be restrictive by object must be serious indeed. Therefore an in-depth assessment as postulated by Andeangeli for more serious restraints could be justified as it would be difficult to see what other economic arguments could salvage the agreement. As such, the focus on factors other than economic ones is a more appealing role for Article 101(3) TFEU. The points raised by Kolstad ring true. If an agreement is restrictive by object in accordance with MAAP it will be more difficult to prove the Article 101(3) TFEU criteria. This is not to say, however, that economic factors would not be pertinent under Article 101(3) TFEU, rather that the economic benefits gauged thereunder would rarely, if ever, outweigh the harm on competition. Hence, the delineation between Articles 101(1) and 101(3) TFEU will arguably turn on the specific case in issue.

²⁸⁵ See Monti's interpretation: (Monti, 2007), pp26-28.

5.2.2. The practical implications and practice of applying Article 101(3) TFEU

It is notable, however, that the Commission has not always refused to exempt all apparent hardcore restrictions from Article 101(3) TFEU.²⁸⁶ It is therefore possible to envisage scenarios when Article 101(3) TFEU would be relevant. For example, the Commission has been willing to exempt crisis cartels.²⁸⁷ More recently, the CJEU was fairly encouraging about the use of Article 101(3) to justify a reduction in capacity in order to rationalise the beef industry in Ireland.²⁸⁸ The Commission submitted written observations to the Irish High Court regarding how it would approach the restructuring under Article 101(3) TFEU.²⁸⁹ It would seem that the Commission does support the idea that certain types of coordinated industry reorganisation in particular markets could be capable of satisfying Article 101(3) TFEU, and has provided limited guidance on how the requirements under Article 101(3) TFEU could be satisfied.²⁹⁰

The Commission has also been more lenient when regarding multilateral interchange fees (MIF) for card payment systems. There were a number of cases where, despite a finding that Article 101(1) had been infringed, the Commission exempted the agreements.²⁹¹ What is so interesting about MIF is that it relates to horizontal pricing practices, usually an immediate classification of restriction by object under the orthodox approach. Hence, it is an anomaly in the Commission's

²⁸⁶ See (Jones, 2010), '*Left Behind by Modernisation*', pp668-675, 671 and (Bailey, 2012), pp593-598. Though contrast with the Article 81(3) Guidelines, which make crisis cartels harder to justify, *ibid* (Jones, 2010), p671.

²⁸⁷ *Synthetic Fibres* [1984] OJ L207/17. Though exempting crisis cartels have not been consistently supported by the Commission. Former Commissioner Neelie Kroes made clear that the Commission would not turn a blind eye to crisis cartels despite the financial crisis: (Kroes, 8 October 2009). *Ibid*, (Jones, 2010), ft 119.

²⁸⁸ *Supra* n37, *BIDS*. Even though the case was not ruled on by the Irish Supreme Court, it was clear the Court was favourably disposed to arguments in support of the crisis cartel under Article 101(3) TFEU and stated that providing *precise* estimates or calculations of efficiencies was not required. See also (Bailey, 2012), pp597-598.

²⁸⁹ Observations of the Commission under Article 15, para 3, of Regulation 1/2003, Case 2003 No.7764P.

²⁹⁰ (Bailey, 2012), pp597-598.

²⁹¹ See eg *Visa International - MIF* [2002]; *Reims II* [1999]; *CECED* [1999]; *Société Air France/Alitalia Linee Aeree Italiane*, OJ 2004, L362/17 (paras 107, 132, 138-141). In *CECED* the Commission found that despite the agreement restricting output, it nonetheless helped promote the production of energy efficient washing machines, which benefited consumers and the environment generally. See also (Bailey, 2012), p596.

enforcement and description of the object criterion under its Article 81(3) Guidelines. The Commission's position has now modified following its decision in *Mastercard*, though in that case it could not quite bring itself to condemn the agreement as restrictive by object despite clearly veering towards that conclusion, and instead found the agreement was restrictive by effect.²⁹² The Commission then chose not to exempt the MIF, and subsequently brought proceedings against *Visa Europe*.²⁹³

Examples of where the Courts have shown a willingness to exempt agreements found to be restrictive by object by the Commission have included agreements containing ATP, restraints on parallel trade and RPM provisions.²⁹⁴ Notably, the Courts did not in fact exempt the agreements, but made clear that they were capable of meeting the exemption criteria.²⁹⁵ The Courts have also been willing to criticise the Commission for its application of Article 101(3) TFEU, even when it had sole jurisdiction under pre-modernisation. In *GSK*, the GC criticised the Commission for rejecting evidence and arguments that appeared to be credible and relevant.²⁹⁶ Overall, the “case law indicates that the parties must put forward convincing evidence and arguments showing that the conditions of Article 101(3) are met”.²⁹⁷

The Commission has answered some of the criticism that it should move in line with progressive economic thinking and recognise, for instance, that in certain circumstances even hardcore restraints as being indispensable within the parameters of a vertical arrangement.²⁹⁸ It therefore conceded in its 2010 Guidelines on Vertical Restraints that it would “assess substantiated efficiencies of hardcore restraints against the negative impact under Article 101(3)”, and that in

²⁹² *Europay (Eurocard – Mastercard)* [2009] OJ C264/8.

²⁹³ *Visa* Case COMP/39.398, decision 8 December 2010. Notably the parties in the *Mastercard* COMP/34.579 and *Groupement des Bancaires* COMP/38.606 decisions both appealed to the GC arguing the Commission had raised the evidential bar too high under Article 101(3) TFEU. See (Bailey, 2012), p593.

²⁹⁴ (Jones, 2010), ‘*Left Behind by Modernisation*’, ft132 citing, *inter alia*, Joined Cases 56&58/64 *Consten & Grundig*; Case 30/78 *Distillers Co Ltd v Commission* [1980] ECR 2229.

²⁹⁵ *Ibid*, (Jones, 2010), p674.

²⁹⁶ Case T-168/01 *GSK*, paras 233-307. This point was upheld by the CJEU on appeal.

²⁹⁷ (Bailey, 2012), p594.

²⁹⁸ (Jones, 2010), ‘*Left Behind by Modernisation*’, p674.

particular circumstances parties could plead an efficiency defence to justify ATP and price restraints.²⁹⁹ The Commission has even recognised the need for RPM for a limited amount of time in order to introduce a new product to the market.³⁰⁰ However, the appropriateness of these concessions by the Commission under Article 101(3) TFEU is questionable. Such arguments could also be made within the legal and economic context. Moreover, real efficiencies brought about as a result of an agreement cannot be said truly to be *aimed* at restricting competition within the meaning of Article 101(1) TFEU.

5.2.3. A new order?

In his speech at the Fordham Competition Law Conference in September 2013, the Director General for Competition, Alexander Italianer, gave an enlightening insight into the Commission's approach to the Article 101(1)/101(3) division.³⁰¹ As well as confirming that any restriction by object is never irretrievably unlawful nor the "end of the story", he highlighted what he considered was the important distinction between Article 101(1) TFEU and Article 101(3) TFEU.³⁰² He reiterated the standard line that the contextual analysis under Article 101(1) TFEU for both object and effect "never goes as far as balancing the anti- and pro-competitive effects. It only aims at gauging the negative consequences of the restraint for the process of competition...in other words, the analysis under Article 101(1) deals exclusively with identifying competitive harm."³⁰³ This means that "the balancing between competitive harm and redeeming virtues is made exclusively under 101(3)."³⁰⁴ This summation may not tally entirely with the evidence of what the Courts, let alone the Commission, have considered within the legal and economic context under Article 101(1) TFEU assessments. Nonetheless it is a salutary lesson in how the Commission has not entirely moved on in its thinking, despite the significant

²⁹⁹ *Ibid*, (Jones, 2010), p674. Vertical Guidelines 2010, paras 60-4, 223-9. See generally (Bailey, 2012), p595.

³⁰⁰ Vertical Guidelines 2010, para 225.

³⁰¹ (Italianer, 2013).

³⁰² *Ibid*, p7.

³⁰³ *Ibid*, p7.

³⁰⁴ *Ibid*, p7.

advances made by certain sectors of the Commission in its understanding of restrictions by object.³⁰⁵

Italianer stressed how parties seeking to apply Article 101(3) TFEU need to provide “sufficient and verifiable evidence that a restraint is ultimately pro-competitive and beneficial for consumers.”³⁰⁶ He was at pains to point out how the availability of Article 101(3) TFEU is not dead in respect of restrictions by object. He used the decision in the *Star Alliance* case to highlight how restrictions by object may satisfy the legal exemption.³⁰⁷ The decision involved an “innovation in the way [the Commission] looks at efficiencies under Article 101(3)” as it accepted “out-of-market efficiencies” for the first time.³⁰⁸ This means the Commission looked at efficiencies generated on a market other than the market which entailed competitive concerns. The Decision in *Star Alliance* broadens the general test set out in the Article 81(3) Guidelines, though does not replace it.³⁰⁹ As a result of the new test the Commission was able to allay its concerns over the negative effects to consumers stemming from the cooperation between the airlines.³¹⁰ For Italianer this new test demonstrated how Article 101(3) TFEU is still alive and available to restrictions by object and that the Commission is willing to review its policy under Article 101(3) TFEU “where this is justified and appropriate”.³¹¹ This is positive, but also highlights how undertakings are firing into the dark with efficiency arguments as it is unlikely that the Commission will often be willing to change its policy, and it does not specify the circumstances in which it will do so.³¹²

Given the increased economic enlightenment of the Commission post-modernisation, any concessions by the Commission are to be welcomed.

³⁰⁵ As demonstrated in Italianer’s speech, *ibid*, pp4–6. See also comments made regarding the decision in *Lundbeck* in chapter 1. Cf *De Minimis* Notice.

³⁰⁶ (Italianer, 2013), p7. This point is often made by the Courts too, but is ultimately unhelpful unless the Courts go out of their way to demonstrate how this could be achieved.

³⁰⁷ *Ibid*, p8. *Continental/United/Lufthansa/Air Canada*, 23 May 2013, COMP/AT.39595.

³⁰⁸ *Ibid*, p11.

³⁰⁹ *Ibid*, p11-12.

³¹⁰ *Ibid*, p12, though for 5 out of 6 routes.

³¹¹ *Ibid*, p12.

³¹² Note that *Star Alliance* was ultimately a commitment decision. Also the Courts can now rule on how the Commission applies Article 101(3) TFEU.

Moreover, some of the considerations that the Commission sees as belonging to the realm of Article 101(3) TFEU assessments could, if not should, just as easily be considered under Article 101(1) TFEU within the 'legal and economic context'. It is this proposition that gives rise to a certain panic amongst some commentators regarding the death of Article 101(3) TFEU. Such worry is misplaced or, perhaps, incorrectly elucidated. Moreover, it is unwarranted as Article 101(3) TFEU is highly specific. That a more measured role for Article 101(3) TFEU might come about cannot be a bad thing in view of the Commission's previous monopoly over its application. The function of Article 101(1) TFEU has evolved into a more economically orientated provision and therefore it should be unsurprising if the application of Article 101(3) TFEU were also to adapt in view of this. This does not indicate the death of Article 101(3) TFEU, merely its reincarnation.

The precise role of Article 101(3) TFEU will continue to be debated. Arguments regards 'balancing' have skewed matters: it is predominantly a labelling exercise as it is unquestionable that the European Courts and indeed the Commission have engaged in a form of balancing of effects under Article 101(1) TFEU.³¹³ Overall, opinions regarding the role of Article 101(3) TFEU are divided. For instance, González claims the enquiry under Article 101(3) TFEU focuses on whether "the agreement objectively produces pro-competitive benefits that outweigh its (previously established) anti-competitive impact, and in light of which a general exemption from the general prohibition can be obtained at all."³¹⁴ Odudu suggests that Article 101(3) is concerned with productive efficiency whilst Townley and Monti have argued that other non-competition factors have and should come into play. Italianer is correct in the sense that Article 101(1) TFEU is concerned with identifying restrictions of competition or as he puts it "competitive harm".

A more pertinent question may be whether Article 101(3) TFEU is hampered by what happens under Article 101(1) TFEU. It is not. Article 101(3) TFEU specifically asks for positive factors to be demonstrated that would counter the negative

³¹³ See Chapter 4 and (Ibáñez Colomo, 2012), p559.

³¹⁴ (González, 2012), p8.

finding under Article 101(1) TFEU. Article 101(1) TFEU, on the other hand, deals with the determination of whether competition is restricted, which in itself may require positive attributes of an agreement to be considered. That does not then mean that similar or even the same arguments cannot be raised again under the exemption provision if an agreement is found to be restrictive by object or effect.

Jones raises the point that despite the various gestures by the Commission towards progressive economic thinking, the fact remains that there is insufficient guidance as to when parties could be sure of raising a convincing efficiency argument and a restraint be considered indispensable.³¹⁵ This is the major hindrance to the application of Article 101(3) TFEU. More importantly, in relation to the contentious area of RPM, she considers that the structure of Article 101(3) TFEU does not allow the argument that RPM imposed by a manufacturer lacking market power for the purposes of increasing dealer services and sales would not cause anticompetitive effects.³¹⁶ This is because anticompetitive effects are already presumed under Article 101(1) TFEU, though doubtless also because an agreement has already been found to be restrictive by object or effect. This is why such economic arguments are better utilised under Article 101(1) TFEU and why presumptions should be seen to be rebuttable.

Overall, it remains a “daunting task” to justify an infringement by object on efficiency grounds under Article 101(3) TFEU.³¹⁷ The success rate for exempting restrictions by object is pretty rare.³¹⁸ Given that the Commission had a monopoly over the application of Article 101(3) TFEU for so long, its legacy will be hard to shift. Further, the Commission was able to mould its application as it desired. The Commission does not have the same level of control over Article 101(1) TFEU. Rather than rely on a judgment for clarification, Bailey observes that it would be

³¹⁵ (Jones, 2010), *‘Left Behind by Competition’*, p675. This position is also supported by (Bailey, 2012), p598.

³¹⁶ *Ibid*, Jones, p675, citing *Leegin*, ft 139.

³¹⁷ (Padilla, 2010); (Bailey, 2012), p585 quotes para 46 of the Article 81(3) Guidelines where the Commission highlight that severe restrictions of competition are unlikely to fulfil the conditions of Article 101(3) TFEU.

³¹⁸ See (Bailey, 2012), p593.

more useful for the Commission to adopt a decision under Article 10 of Regulation 1/2003, which would show how the criteria under Article 101(3) TFEU are satisfied for different types of situation.³¹⁹ This is unlikely to happen soon. Therefore any clarification may be a long time coming.

5.3. Conclusion: the death of Article 101(3) TFEU?

The lack of clarity between the division of labour between paragraphs (1) and (3) still rings true.³²⁰ That the bifurcation of Article 101 TFEU is the “original sin” of EU competition law remains a valid point.³²¹ As such, few may mourn the arguable demise of Article 101(3) TFEU if the trend for object-only cases under Article 101(1) TFEU continues in light of the Commission’s enforcement priorities.³²² For authors such as Ibáñez Colomo, the fact that balancing of the pro- and anti-competitive effects of an agreement is conducted “in some form” under Article 101(1) TFEU does not then mean that Article 101(3) TFEU is devoid of purpose.³²³ Contrast this with the judgment in *Métropole* whereby the GC was categorical that it was only within the framework of Article 101(3) TFEU that the pro- and anticompetitive aspects of a restriction could be weighed.³²⁴ Otherwise, if such balancing were to occur under Article 101(1) TFEU, Article 101(3) would lose much of its effectiveness.³²⁵

Ibáñez Colomo believes that Article 101(3) TFEU allows undertakings to quantify efficiency gains explicitly and to show that the agreement is pro-competitive on the whole.³²⁶ This is in contrast to Article 101(1) TFEU where efficiency gains are not expressly quantified. By this understanding of the relative scope of the two provisions, one can see the arguments in favour of using Article 101(3) TFEU. Ibáñez Colomo submits that Article 101(3) TFEU would come into its own where it is

³¹⁹ *Ibid*, p598

³²⁰ (Odudu, 2006), p176.

³²¹ Whish, panel discussion, 1998.

³²² (Hawk, 1995), pp987-998 who argued the bifurcation of Article 101 “grossly complicates with little or no redeeming virtues, both the formulation and enforcement of specific rules”.

³²³ (Ibáñez Colomo, 2012), p559.

³²⁴ Case T-112/99 *Métropole*, para 74ff.

³²⁵ *Ibid*. See (González, 2012), pp6-8.

³²⁶ (Ibáñez Colomo, 2012), p559.

necessary to quantify efficiency gains because an agreement “creates or strengthens market power beyond a certain degree” or where the context in which an agreement is concluded “suggests the negative impact on prices and output may weigh more than the allocative efficiency gains achieved”.³²⁷ Alternatively, Article 101(3) TFEU would be a useful forum in which to investigate whether restraints go beyond what is deemed necessary to achieve the gains identified.³²⁸

It is submitted that the greatest, albeit misplaced, concern is that Article 101(3) TFEU will have no function if the assessment under Article 101(1) TFEU has a greater emphasis on economic analysis. Moreover, the European Courts have been accused of applying a light standard of review in respect of Article 101(3) TFEU, because they consider it “too complex and abstract”.³²⁹ Arguably, this then aided the Commission’s control over Article 101(3) TFEU. Perhaps more concerning are different factors, which have impacted on the so-called demise of Article 101(3) TFEU. Modernisation has meant that the Commission shifted its priorities to serious infringements of competition, which tend to be those restrictive by object in the context of Article 101(1) TFEU. *La Madrid* and *Petit* illustrate how this meant cases where Article 101(3) TFEU would be more applicable were left to the NCAs and national courts to determine.³³⁰ As a result, chiefly due to the difficulty and uncertainty in applying Article 101(3) TFEU and the perception (amongst NCAs and national courts in particular) that an effects-based assessment is only relevant in ‘effect’ cases under Article 101(1) TFEU, has meant that very few Article 101(3) TFEU assessments are undertaken.

There is a greater problem. Not all NCAs and national courts have caught up with the developments in the case law regarding the object criterion and instead rely heavily on the Article 81(3) Guidelines, and thus on the orthodox approach. This is evident in submissions made to the Community Courts and in national decisions.³³¹

³²⁷ *Ibid.*

³²⁸ *Ibid.* Though this could potentially conflict with the application of MAAP in terms of the arguments raised about ancillary restraints. See chapter 4.

³²⁹ (*La Madrid de Pablo & Petit*, 2011).

³³⁰ *Ibid.*

³³¹ See eg *supra* n37, *BIDS*.

This indicates that developments in the application or understanding of the law take time to “trickle down”, which could ultimately lead to a divided approach not only to the object criterion under Article 101(1) TFEU, but also to the application of Article 101(3) TFEU.³³² This undermines the entire ethos behind the modernisation process.

If the MAAP were consistently adopted by the Commission and European Courts then some of the concerns should fall away. It is clear that arguments traditionally reserved for Article 101(3) TFEU are relevant under Article 101(1) TFEU. This means the role of Article 101(3) TFEU would need to adapt and evolve. By doing so its role will become less vital if undertakings are able to come up with strong reasoning for their ostensibly restrictive agreements under Article 101(1) TFEU. The uncertainties surrounding the application of Article 101(3) TFEU would thereby be somewhat alleviated and non-economic arguments could then play a clearer role.³³³ The application of Article 101(3) TFEU would therefore be seen to be case specific. It is thus apparent there is no perfect answer to the bi-furcation of Articles 101(1) and 101(3) TFEU and the division of labour. However using the MAAP is one solution that is able to address the concerns facing Article 101 TFEU.

Overall, this chapter demonstrates that the MAAP, despite its shortcomings, makes better sense of our understanding of Article 101 TFEU as a whole within a modernised EU. This is due to a number of factors, including in particular the legitimacy it derives from the case law of the CJEU. Furthermore, it is more adaptable to the general trend for an ‘effects-based’ approach to Article 101 TFEU and is able to respond to the need for deeper economic assessment where required, as it is not constrained by categorisation. As such, the MAAP is a flexible legal tool that is able to react to economic developments and fits intelligently within the framework of Article 101 TFEU as a whole.

³³² Not aided by the distinct lack of decisional guidance on its application by both the Commission and European Courts.

³³³ See eg (Hawk, 1995), pp987-988.

Conclusion: The function of the object criterion under Article 101(1) TFEU

1. Introduction

This thesis established the legal essence of the object criterion under Article 101(1) TFEU based on a careful assessment of the jurisprudence of the European Courts. Consequently, it found that the Commission's approach to restrictions by object set out in its Article 81(3) Guidelines does not fully reflect the case law. Instead, the analysis of the case law revealed three key tests that the Courts have applied to assess the object of an agreement, namely:

1. The orthodox approach: a class or category of agreements that by 'their very nature' restrict competition.¹ There is an irrebuttable legal presumption that those types of agreements automatically harm competition and thus infringe Article 101(1) TFEU given their serious nature.
2. The more analytical approach: focuses on whether the aim or purpose of the agreement is to *restrict competition* determined in its legal and economic context.² Ostensibly *any* restriction of competition could therefore have the object of restricting competition under Article 101(1) TFEU.
3. The hybrid approach: a combination of the orthodox approach and the MAAP. The concept of object is still limited to those restrictions that by 'their very nature' restrict competition, but the agreement is assessed in its 'legal and economic context' in accordance with the *STM* Test.³ As such, the legal presumption of harm is apparently rebuttable under Article 101(1) TFEU.

It was shown how the case law falls in to one of these three approaches, though the precise parameters of these approaches are not stark. Chapter 1 focused on the orthodox approach, whereas chapter 2 found that historically the jurisprudence predominantly supports the MAAP and that a hybrid approach has also evolved.

¹ Joined Cases T-374, 385, 384 & 388/94 *ENS* [1998] ECR II-3141.

² Case C-56/65 *STM* [1966] ECR 249.

³ Case C-209/07 *BIDS* [2008] ECR I-8637; Case C-8/08 *T-Mobile* [2009] ECR I-4529; Joined Cases C-501, 513, 515, 519/06P *GSK* [2009] ECR I-9291. See chapter 2, section 2.1.

Chapters 3 and 4 probed the features comprising the legal structure of the object criterion in more depth in order to reveal its true meaning and application. By reference to the case law, the best interpretation of the object criterion was found to be that which accords with the MAAP. The implications of adopting the MAAP for Article 101 TFEU as a whole were also considered. It was found that the MAAP fits comfortably within the framework of Article 101 TFEU: it helps make sense of the wording of Article 101 TFEU, is able to adapt to the changing objectives of EU competition law and so is compatible with a move towards an effects-based approach.

However the story of the object criterion does not end there. The practical implications of this research bear some reflection. It has been shown that the Commission applies the object criterion irrationally. Together, the Commission and the European Courts have produced anomalous decisions and judgments that have little resemblance to the outcome predicted under the orthodox approach set out in the Article 81(3) Guidelines. The Commission's decisional practice demonstrates that it sometimes treats similar cases differently using diverse reasoning. Hence, there is an inequality between the cases.⁴ The orthodox approach is thus not strictly followed, nor indeed overwhelmingly supported, by the law. This creates a tension between the case law, the Commission's decisional practice and its guidance.

This thesis addresses this tension by highlighting the availability of an alternative approach to the object criterion supported by the case law: the MAAP. That approach accurately reflects not only the meaning and application of the law ascribed by the leading case, *STM*, but also explains how the context of a particular case may generate a different outcome from that predicted under the orthodox approach.

⁴ For example the *Visa and Mastercard* decisions: see Chapter 1. See also (Gerard, 2013), p30.

Nonetheless, the practical consequence of the status quo is that the Court and indeed the Commission are currently applying versions of the hybrid approach.⁵ The hybrid approach recognises the categorisation of object agreements, but focuses on a contextual analysis which permits any presumption of harm to be rebutted within Article 101(1) TFEU. It is therefore constrained by categorisation in the same way as the orthodox approach, and has the propensity to be expanded by the Courts or indeed by the Commission in its Guidelines and BERs.

The problem with this apparent resolution is that despite enjoying better judicial support than the orthodox approach, the hybrid approach is not accurately reflected within the Article 81(3) Guidelines.⁶ Hence, the legal application of the category of object agreements is inconsistent. Moreover, the practical limitations of having a category of agreements that are restrictive by object has been shown to be problematic given the difficulties with object classification and the increasing expansion of the so-called 'object box'. The impact that this status quo has on NCAs and NC's, and indeed on undertakings, is a live issue.⁷ This is particularly the case in view of the recent appeal of the *Lundbeck* decision and the subsequent warning call issued by the CJEU in *Cartes Bancaires* coupled with the requirement of consistency under Regulation 1/2003.⁸ This situation is unacceptable. A key question is therefore how best to move forward from this point.

One way would be to explore more closely the optimum function of the object criterion under Article 101(1) TFEU.⁹ What the function of the object criterion

⁵ Note that within the Commission itself are tensions between how the Legal Service and DG Competition interpret the law: compare (Italianer, 2013) against the revised *De Minimis* Guidance.

⁶ For instance, assessing an agreement within its legal and economic context is not optional, but a mandatory requirement, which means presumptions of harm are capable of rebuttal within Article 101(1) TFEU.

⁷ Particularly following the judgment in Case C-226/11, *Expedia*, 13 December 2012, nyr. The NCA's and NC's have an apparently impossible task of giving regard to the Commission's guidelines and decisional practice as well as the case law.

⁸ Recital 8 of Regulation 1/2003. The appeals in *Lundbeck* seek to remedy the errors in the Commission's decision including the misinterpretation of the object criterion and the imposition of fines on the parties despite the novelty of the factual and legal issues raised in the case, which violates the principle of legal certainty. See eg 2013/C 325/71 (Case T-460/13 *Ranbaxy v Commission*); 2013/C 325/74 (Case T-470/13). Case C-491/07 *Cartes Bancaires*, 11 September, nyr.

⁹ There are in fact a number of important areas stemming from the status quo that would benefit from further research. See *infra* ft 61.

ought to be can be approached in a number of ways. For instance, it could be assessed from the perspective of what makes good law or from the angle of effective enforcement. It is an important normative question. It has been argued that within the constraints of the law, the MAAP provides a workable solution that is able to overcome anomalous case law, developments in economic thinking, whilst still respecting presumptions of harm and raising the standard of proof. Nevertheless, having articulated the law and proposed that the MAAP is the best legal interpretation, a key factor is whether this outcome is then compatible with the object concept's optimum function. If not, in light of that function, which of the three tests fits best?

For the purposes of this concluding chapter, the role that the object criterion ought to play from an enforcement perspective has been selected.¹⁰ How the object concept could be used as a tool for effective enforcement is a pressing issue given the limited resources of competition authorities throughout the EU.¹¹ This concluding chapter therefore provides an outline of whether the optimum role of the object criterion is indeed best served by the MAAP from an enforcement perspective. While the advantages of the MAAP have been advocated throughout this thesis, it does have some weaknesses. It is susceptible to the criticism that it blurs the line between object and effect and increases the administrative burden in terms of enforcement costs, resources and time. Conversely, its application reduces Type I and II errors; it follows the wording of the Treaty and is supported by the case law. In particular, it applies the *STM* Test and hence is not constrained by the problems with categorisation. The following sections will address, first, the role ascribed to the object criterion by the Commission and the Courts, and then consider what function it ought to play in that light.

¹⁰ Due to the constraints of space, this concluding chapter provides only an outline of that function and would therefore benefit from further research.

¹¹ See also Kirchner, *Future Competition Law* in (Ehlermann & Laudati, 1998) ,pp513–523. Also within the same text, Panel Discussion (1998) *Future Competition Law*. Also (Motta, 2004).

2. The role of the object criterion: Commission and Courts

The role the object concept plays within Article 101(1) TFEU has been threaded throughout this research.¹² According to the Article 81(3) Guidelines, the Commission bases its view of the object criterion on the concept of necessary effect; restrictions of competition by object are deemed those that by their very nature have the potential to restrict competition given their known negative effects on competition.¹³ Hence, there is no requirement to demonstrate actual effects given the legal presumption that a category of particular restraints always harm competition.¹⁴ Merely identifying a particular restraint in an agreement is ostensibly all that is required. This view is comparable with the speed limit analogy. This thesis has been critical of this view in light of the case law.¹⁵

The CJEU on the other hand has been less transparent regarding its perception of object's role.¹⁶ Despite setting out its interpretation of the distinction between object and effect in *BIDS*, it was not until its judgment in *Cartes Bancaires* that it revealed that such belief is based largely on the hypothesis that experience shows that certain types of collusion harm competition.¹⁷ Nevertheless, it has not

¹² For instance, when considering the relationship between object and effect in chapter 5 and the definition of object of chapter 3.

¹³ Article 81(3) Guidelines, paras 20-21. It has been noted that the use of the phrase 'by its very nature' is problematic as it has rarely been defined, for instance, does it mean the rationale of the agreement or presumption of effects.

¹⁴ Article 81(3) Guidelines, paras 20-21. This view is endorsed by AG Cruz Villalón in Case C-32/11 *Allianz Hungária*, para 65.

¹⁵ Ibáñez Colomo claims the notion that the object category captures agreements that can be presumed to have anticompetitive effects is problematic, because it contradicts the principle that an agreement may restrict competition by object irrespective of the effects it produces: there is a distinction between assessing the nature of an agreement (that is its rationale) versus assessing its effects: (Ibáñez Colomo, 2014), '*Chapeau bas, Prof Wahl!*' and (Ibáñez Colomo, 2014), '*More on AG Wahl!*'.

¹⁶ Though the AG's have been more forthcoming: see AG's Kokott and Trstenjak in *T-Mobile* and *BIDS* (*supra* n3). Both AG's likened the object criterion to an inchoate/risk offence. NB: an inchoate offence is a criminal offence whereby an action or agreement prepares for an even bigger infringement. Thus a substantive offence may not have come to completion, but nevertheless an offence has been committed because the actions or agreements are in preparation for the substantive offence.

¹⁷ Case C-491/07 *Cartes Bancaires*, 11 September 2014, nyr, paras 50-52, 58. Bailey suggests experience is derived from economic theory, empirical research, comparative experience and policy judgment: (Bailey, 2012), p565. The Commission has, however, interpreted the judgment to mean that novel restrictions can still be found restrictive by object, but that a deeper assessment of an agreement's legal and economic is needed: (Italianer, 10 December 2014).

expanded upon the precise parameters of such a category, merely concluding that the types of agreement covered by Article 101(1) TFEU do not constitute an exhaustive list of prohibited collusion.¹⁸ This thesis has also raised concerns with this interpretation of the law.¹⁹ As to determine whether such collusion “reveals a sufficient degree of harm” requires an examination of the “objectives” of the agreement based on its content and its legal and economic context.²⁰

The reliance on categorisation may prove desirable from a normative perspective, but in light of the jurisprudence it has proved problematic. The contents of the category have proved fluid. The case law demonstrates that the types of hardcore restraint identified by the Commission in its Article 81(3) Guidelines have not always been found to be restrictive by object by either the Courts or the Commission. Conversely, agreements not typically seen as hardcore have been found to restrict competition by object. The jurisprudence thus limits the effectiveness of categorisation, which in turn undermines the value of precedent and reduces legal certainty.²¹ The rebuttal mechanism afforded by the application of the legal and economic context strengthens this assessment.²² In light of the case law, it is questionable whether categorisation is workable from an enforcement perspective.

3. The ought question: effective enforcement

Numerous commentators have proffered views on what function the object criterion ought to play within Article 101(1) TFEU.²³ A popular view that supports

¹⁸ *Ibid*, *Cartes Bancaires*, para 58. It is unclear whether the CJEU refers to formal categories such as price-fixing or market sharing or agreements based on experience and economic analysis.

¹⁹ For instance, categorisation ignores factors such as an assessment under the object criterion can result in an agreement coming outside Article 101(1) TFEU altogether. An interesting discussion on this issue took place in the comments section of the ‘chillingcompetition’ blog (Ibáñez Colomo, 2014), ‘*Chapeau-bas Prof Wahl*’.

²⁰ *Supra* n17, *Cartes Bancaires*, para 53.

²¹ The jurisprudence also shows that not all object cases are ‘obvious’ or ‘serious’ (depending on its definition). See (Gerard, 2013), pp29-32 for an informed discussion.

²² Though the legal and economic context is not just concerned with rebutting any presumptions of harm: see chapters 3 and 4.

²³ Such as, (Gerard, 2013); (Bennett & Collins, 2010); (Bailey, 2012), p562-570; (Kolstad, 2009); (King, 2011), p270. Howard asks “Is the object test an anachronistic legalistic device to facilitate the evidential burden on claimants and prosecutors who have asymmetric information and limited

the orthodox approach is that the object concept should be based on a narrow category of agreements presumed to restrict competition by their very nature due to their known serious harm to competition.²⁴ What is more, disregarding the need for a deep contextual analysis under the object criterion is convenient for bringing prosecutions with limited administrative resources.²⁵ It is clear, however, that the Article 81(3) Guidelines do not reflect the reality of the case law, which shows that object and effect are not quite so disparate. Furthermore, increasingly sophisticated business relationships mean “plain vanilla cartels” are no longer the norm.²⁶ For example, price fixing and market sharing arrangements often form part of vertical relationships between non-competitors. Therefore, using such labels to conclude that a particular collusion is restrictive by object is overly simplistic as there may well be wider commercial reasons for sharing information or allocating areas of responsibility between business partners.²⁷ Moreover the outcome of “complex collaborative arrangements [between businesses]...has become increasingly difficult to predict.”²⁸ The crux is that businesses need to be able to innovate, and if strait-jacketed into a constrained category then the concern is they will be more reluctant to do so.²⁹ Moreover, the objectives of competition law also come into play: what the law is seeking to protect may influence how the function of the object criterion is perceived. Whether effective enforcement is a greater priority than commercial freedom is moot.³⁰

Additionally, it may be that application of the object criterion should be compatible with the burden and standard of proof required in quasi-criminal proceedings by

resources? Or does it still serve a useful purpose in securing infringements that are clearly motivated by anti-competitive intent, even if they are inchoate and may only amount to an attempted infringement?": (Howard, 2009).

²⁴ See (Waelbroeck & Slater, 2013), pp131-156. Such application of the law may generate Type I errors, but is arguably justifiable given the serious harm such restrictions cause.

²⁵ See (Howard, 2009).

²⁶ (Howard, 2009).

²⁷ *Ibid.* See also (Ibáñez Colomo, 2014), '*Chapeau-bas Prof Wahl*', who considers such labels are arbitrary.

²⁸ (Gerard, 2013), p30.

²⁹ The nature of global markets and ability for companies to compete on a level playing field is important in this regard.

³⁰ The advent of the effects-based approach recognised the importance of commercial transactions and the benefit of economic analysis to determine whether an agreement did indeed harm competition.

the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950:

“If the law presumes that certain types of behaviour amount to a *per se* infringement with limited room for objective justification there are nagging doubts about the respect for the presumption of innocence and the right to a full hearing under art 6 of the Convention”.³¹

In view of the serious level of fines that can be imposed on undertakings that infringe the competition rules coupled with criminal sanctions imposed in some Member States, competition law is seen by some to be of a criminal nature.³² Notable also is the fact that the shifting landscape of enforcement has led to an increased emphasis on negotiated procedures such as leniency, settlement and commitments (which perhaps do not respond so well to concrete by-object categories). In light of this, the consequences of infringing Article 101(1) TFEU and the enforcement and procedural mechanisms in place to support such findings are of crucial significance. The role of the object criterion is a central part of this process.

3.1. How the object criterion should be delineated: criticising the effects-based approach

Having set out the features that influence the background to the normative question, this section sketches out those factors that make for effective enforcement. Cost-benefits are clearly important in this regard: if a particular agreement of a type is very rarely beneficial, it may not be worth incurring the enforcement costs needed to identify them.³³ One rationale for an easily identifiable object category that operates in relation to only the most serious infringements, which experience shows display significant harm to consumers and

³¹ (Howard, 2009). Though in the UK, the Competition Appeal Tribunal held that the Human Rights Act 1998 does not require the criminal standard of proof ‘beyond all reasonable doubt’ to be applied, rather the civil standard ‘balance of probabilities’, though the imposition of a fine would increase the standard of proof: (Whish & Bailey, 2012), p400 citing *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*, Case No 1000/1/1/01 [2002] Cat 1.

³² (Waelbroeck & Slater, 2013), p137; cf (Forrester, 2010).

³³ (Waelbroeck & Slater, 2013), pp152-157; (Posner, 2001), (ix); (Bailey, 2012), pp562-570.

can be presumed illegal, is that it reduces the costs of enforcement and increases legal certainty.³⁴ It is an administrable approach as actual effects are not required to be proven and increases the deterrence factor.³⁵ Waelbroeck and Slater argue that strong presumptions of harm based on past experience justify the reversal of the presumption of innocence.³⁶

Conversely, such an approach can be heavily criticised as being liable to generate errors of all types and is unable to deal with the greater sophistication of the competitive analysis of agreements.³⁷ Hence, the introduction of the effects-based approach to EU competition law sought to redress this by increasing the effectiveness of competition law and thus its predictability.³⁸ This move was captured under the guise of modernisation.³⁹

An effects-based approach to the object concept under Article 101(1) TFEU does have its opponents.⁴⁰ This is because it “reduces the precedential value of decisions which, combined with a scarcity thereof and the parallel development of negotiated procedures, tends to reduce legal certainty and to compel businesses of relying increasingly on abstract categories and guidance.”⁴¹ The effects-based approach also increases enforcement costs for both the authorities and companies.⁴²

³⁴ (Waelbroeck & Slater, 2013), p151. Such category must be narrowly defined based on solid empirical and theoretical foundations so that it provides the requisite level of predictability to justify the imposition of criminal sanctions; pp152-156.

³⁵ (Bailey, 2012), 568-570. *Ibid*, Waelbroeck and Slater argue that a presumption of culpability resulting from the categorisation of a restriction of competition by object is acceptable, so long as it is confined within very strict limits.

³⁶ (Waelbroeck & Slater, 2013), p156.

³⁷ See (Hawk, 1995). This is coupled with the question whether cost benefits should trump the burden of proof. Given the tendency for a *per se* system to generate false positives, how this can then be reconciled with basic civil rights to property and contract requires reflection.

³⁸ See (Gerard, 2013), p20 for an explanation of the meaning of ‘effect-based approach’ and pp33-35. The Nobel prize winning economist Jean Tirole argued, “The best regulation or competition policy should... be carefully adapted to every industry’s specific conditions.” <http://www.globaleconomicsgroup.com/antitrustcompetition-policy/a-tribute-to-jean-tirole-winner-of-the-2014-nobel-prize-in-economic-science/#sthash.WBoZJaxb.vNJ2ID67.dpuf>

³⁹ Regulation 1/2003.

⁴⁰ See (Waelbroeck & Slater, 2013); (Gerard, 2013).

⁴¹ (Gerard, 2013), pp13-14

⁴² (Gerard, 2013), p13.

The benefit of having a strictly enforced, narrowly defined object category is not in doubt, but it raises the prospect of whether it is at all workable in practice. Legal certainty is not improved by anomalous case law or exceptions. It is widely acknowledged that under specific market conditions even the most serious restrictions may be harmless.⁴³ Therefore, looking to the experience in the US may provide a useful example of the operation of such a system in practice.

3.1.1. *US per se offences: s.1 Sherman Act*

As previously stated, under the Sherman Act 1890, the American antitrust law system makes unequivocal use of presumptions in its set of '*per se* rules'. These rules allow the US courts to rule on the illegality of certain practices, which *prima facie* satisfy the conditions required by such rules without recourse to a detailed examination of all the relevant facts.⁴⁴ Moreover, where there is a *per se* infringement then the parties cannot argue that it does not restrict competition. This is because, US law has determined that a small, limited category of agreements automatically restrict competition and the parties cannot argue the contrary.⁴⁵ As such, all that the plaintiff need prove is that the prohibited practice occurred.

This system is not mirrored under EU law.⁴⁶ Hence analogies between the US *per se*/rule of reason and the EU object/effect dichotomy are inappropriate and tend to breed confusion.⁴⁷ What is perhaps more appropriate is the increasing recognition that the US has moved away from a bright line distinction between *per se* and rule of reason infringements toward one which is tailored to the suspect conduct in each case.⁴⁸ The Supreme Court held in *California Dental Association* that both

⁴³ (Waelbroeck & Slater, 2013), p146.

⁴⁴ (Svetlicinii, 2008), pp117-134, 122(C).

⁴⁵ (Bailey, 2010), p363, II, 2.

⁴⁶ Restrictions by object may be exempted under Article 101(3) TFEU and the analysis of an agreement's legal and economic context can rebut any presumptions of anti-competitiveness. Marquis argues that "the competition law systems in the EU and US may circle each other in their orbits, but they remain separate worlds", (Marquis, 2007), p46.

⁴⁷ See (Goyder, 2011), p7.

⁴⁸ Citing *California Dental Association*, Andreangeli also acknowledges that the US Supreme Court has moved away from a stark distinction between '*per se*' and '*rule of reason*' infringements to that of a continuum whereby the inquiry for a particular practice is determined in light of its nature and seriousness, (Andreangeli, 2011), p243. Jones reaches a similar conclusion, (Jones, 2010), '*Left*

elements consisted of the same type of appraisal focusing on the “competitive significance of the restraint” and how each case was assessed depended on the case itself:⁴⁹

“The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se’, ‘quick look’ and ‘rule of reason’ tend to make them appear. We have recognized, for example, that ‘there is often no bright line separating per se from Rule of Reason analysis,’ since ‘considerable enquiry into market conditions’ may be required before the application of any so-called ‘per se’ condemnation is justified. (...) As the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details and logic of a restraint.”⁵⁰

As with the development of the case law in the EU, in the US an agreement’s context plays an important role. The developments in the US thus highlight how a system specifically devised to support *per se* infringements may still invoke considerable analysis of an agreement, not least when restraints considered to be condemned *per se* are in fact determined under the rule of reason.⁵¹ Therefore the cost benefit arguments are questionable.⁵²

It has been suggested that the traditional dichotomy of *per se* rules versus rule of reason is outdated and “a continuum of intermediate solutions” which are rules that limit the extent of case analysis, but are not as basic as *per se* rules is more desirable.⁵³ A model for the optimal degree of rule differentiation is when decision errors (Type I and II) and the costs of regulation are minimised. Consequently

Behind by Modernisation, p660 citing *Polygram Holding, Inc v FTC* 416 F3d 29, 33-34 (DC Cir 2005). In the 1960’s Commissioner Loevinger of the US Supreme Court noted that the distinction between the two concepts was not particularly clear cut, (Loevinger, 1964), pp23-35. Also, (Kolstad, 2009), p51.

⁴⁹ (Andreangeli, 2011), pp237, 243.

⁵⁰ *California Dental Association v FTC*, 526 U.S. 756, 779, 780, 781 (1999). See *NCAA v Board of Regents of the University of Oklahoma*, 468 US 85 at 104.

⁵¹ See *Leegin*, 551 US 887 (2007) and *FTC v Actavis*, 570 US 756 (2013).

⁵² See (Christiansen & Kerber, 2006), pp215-244.

⁵³ *Ibid*, section I.

competition rules are likely to be different for different types of business behaviour.⁵⁴

The experience in the US shows, similarly to the EU, that the theory behind a narrow category of agreements does not necessarily reflect the actuality. Whether the hybrid approach is an efficient compromise of resources, despite its drawbacks from a legal perspective, is an interesting question.⁵⁵

4. Conclusion

That the object criterion should respect calls for legal certainty, predictability, ease of administrative burden and resources is not in doubt. The system currently in operation falls short on a number of these fronts given the tension between the Article 81(3) Guidelines and the jurisprudence. The normative answer may nominally point towards a narrow category of agreements in terms of enforcement, but the experience in the US legitimately questions whether this is the correct solution for the EU's particular legal system given the development of the case law. This thesis has clarified the law and opened it nuances up to scrutiny: the outcome of the analysis is that the law on the object concept is far from straightforward. Despite the Commission endeavouring to pursue the orthodox approach in its Article 81(3) Guidelines, the reality is that this has proved impossible to enforce in practice and has the propensity to be abused.⁵⁶ In response to criticisms, the Commission has acknowledged the significance of an agreement's legal and economic context and noted that particular restrictions may be objectively necessary or have a legitimate goal, which may then fall outside Article 101(1)

⁵⁴ *Ibid.*

⁵⁵ Using a crude estimation, the orthodox and hybrid approaches share similar costs of enforcement: the claimant in both cases can rely on a presumption of harm. The defendant then incurs the expense of rebuttal. If the claimant accepts the rebuttal there are three outcomes, (i) it declares the agreement lawful, (ii) conducts an 'effects' analysis, or (iii) decides not to proceed. Therefore the hybrid approach could be seen to have an administrable benefit in line with the orthodox approach. This must be viewed against the Commission's decisional practice: often it undertakes a comprehensive assessment of the market and an agreement's effects in any event. Whether the MAAP involves far higher costs of enforcement needs to be modelled.

⁵⁶ Gerard considers that by widening the object category the Commission has avoided the effects-based approach, (Gerard, 2013), pp 38-40.

TFEU.⁵⁷ In parallel to this, however, it has also attempted to re-simplify the object concept by following the unsatisfactory judgment in *Expedia*. It may yet regret this choice in light of judgments such as *Cartes Bancaires*.

An alternative solution is needed that is able to recognise both the parameters of the law and the need for effective enforcement which is administrable. A suggestion would be more clearly to delineate the functions of the Commission's policy approach versus its understanding of the jurisprudence. The words 'policy' and 'law' are at times used interchangeably, which is unhelpful as the European Courts will often cede to the Commission's policy-devising role as the executive, though will not always do so in respect of the Commission's interpretation of the law.⁵⁸ It is axiomatic that businesses require guidance on the types of prohibited collusion and have knowledge of a coherent strategy for the application of EU competition law across the Member States. It is also self-evident why the Commission should set out its enforcement priorities and its interpretation of the law in its Guidelines, guidance, Notices and BERs. That said, it is concerning that the Commission's policy approach sometimes masquerades as law. The strongest example of this is the link made between its categorisation of 'hardcore' restraints and the object concept. The Commission's policy approach must be applied within the legal framework as interpreted by the European Courts. Hence, the link between hardcore restrictions, those which are black listed and the object concept is not as clear cut as the Commission professes. This distinction between the law and policy is rarely highlighted, and has played a major role in the confusion surrounding the interpretation and function of the object criterion.⁵⁹ Separating the functions of law and policy would help ensure that businesses know the law, but also understand how the Commission interprets it and when it will pursue particular types of behaviour.⁶⁰ It would allow businesses sensibly to make their

⁵⁷ Gerber noted the Commission has made substantive changes under the radar during the modernisation process; (Gerber, 2008). This trend continues; see eg *De Minimis* Guidance, 1.

⁵⁸ (Townley, 2011), pp442-443. Also, (Conway, 2014), pp517-518.

⁵⁹ See (Townley, 2011), p443; for an interesting discussion on the Commission and 'myth-making' see (Akman & Kassim, 2010). See (King, 2011), p296.

⁶⁰ This envisages, eg, the Article 81(3) Guidelines are recast to reflect the law more accurately and its actual application, which largely follows the hybrid approach. Therefore the requirement that an

own judgment calls in respect of their commercial decisions through recourse to the case law.

Further research into the function of the object criterion is needed, particularly as effective enforcement is not the only parameter upon which good law is made.⁶¹ The orthodox approach, despite having normative support, does not accurately reflect the law. This thesis supports the notion that the object criterion is a powerful tool that has the propensity to be more effectively utilised in accordance with an effects-based system. Its potential remains unfulfilled. The meaning and application of the object concept have been revealed. The debate over its function is set to continue.

agreement is assessed within its legal and economic context would draw attention to the fact that presumptions of harm are technically rebuttable under Article 101(1) TFEU.

⁶¹ See (Odudu, 2006), pp1-8. Further research into several areas arising as a result of the findings of this thesis would be of benefit. Such as the practical implications for the NCA's and NC's in view of the discord between the case law and the Commission's guidelines (given their obligations under Regulation 1/2003); the relationship between the object concept and the level of fines, human rights implications and the standard of proof; the role of soft law and its impact on the object concept; the purpose of competition policy and its relationship with the law, and how economics may provide an alternative view of the law. Recommendations as to how the Commission should amend its Article 81(3) Guidelines are also required.

Glossary/Abbreviations

AG – Advocate General

All ER - All England Law Reports

ATP – absolute territorial protection

BER – Block Exemption Regulation

CAT - Competition Appeal Tribunal (UK)

CJEU – Court of Justice of the European Union (formerly the European Court of Justice)

CMA – Competition Markets Authority

CMLRev - Common Market Law Review

CMLR - Common Market Law Reports

Commission - European Commission

Community Courts – the General Court and Court of Justice

CompAR - Competition Appeal Reports

DG COMP - Directorate General for Competition

DoJ - Department of Justice (United States)

ECHR – European Convention for the Protection of Human Rights

ECLR - European Competition Law Review

ECN - European Competition Network

ECR - European Court Reports

ECSC – European Coal and Steel Community

EEA – European Economic Area

EEC – European Economic Community

EL Rev - European Law Review

EU – European Union

European Courts – The General Court and Court of Justice

EWCA - England and Wales Court of Appeal

EWHC - England and Wales High Court

Fordham – Fordham Competition Law Institute

FTC – Federal Trade Commission (US)

GC – General Court (formerly the Court of First Instance)

Harv. LR - Harvard Law Review

ILCQ - International and Comparative Law Quarterly

IP - Intellectual Property

IPRs - Intellectual Property Rights

KB - Kings Bench

MAAP – the more analytical approach

MIF – Multilateral Interchange Fee

NCA – National Competition Authority

NC – National Court

OECD – Organisation for Economic Co-operation and Development

OFT - Office of Fair Trading

OJ - Official Journal

OJLS - Oxford Journal of Legal Studies

Para - paragraph

QB - Queens Bench

RPM – resale price maintenance

SI - Statutory Instrument

TFEU - Treaty on the Functioning of the European Union

UKCLR - United Kingdom Competition Law Reports

US – United States

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