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# Vertical Agreements after *Cartes Bancaires*

Giorgio Monti



*“It was in 1962 that EEC competition lawyers began asking themselves in earnest by what criteria a contractual restriction should be judged under Article 85(1) of the EEC Treaty. **They are still asking the question”.***

Don Holley, 1992



# Competition Act (2009) South Africa

S.5(1): An agreement between parties in a vertical relationship is prohibited **if it has the effect of substantially preventing or lessening competition in a market**, unless a party to the agreement can prove that any technological, efficiency or other procompetitive, gain resulting from that agreement outweighs that effect.

S.5(2) The practice of **minimum resale price maintenance is prohibited**.



# A sliding scale approach

Clearly anticompetitive by reference to conduct observed

Welfare effects positive under certain circumstances

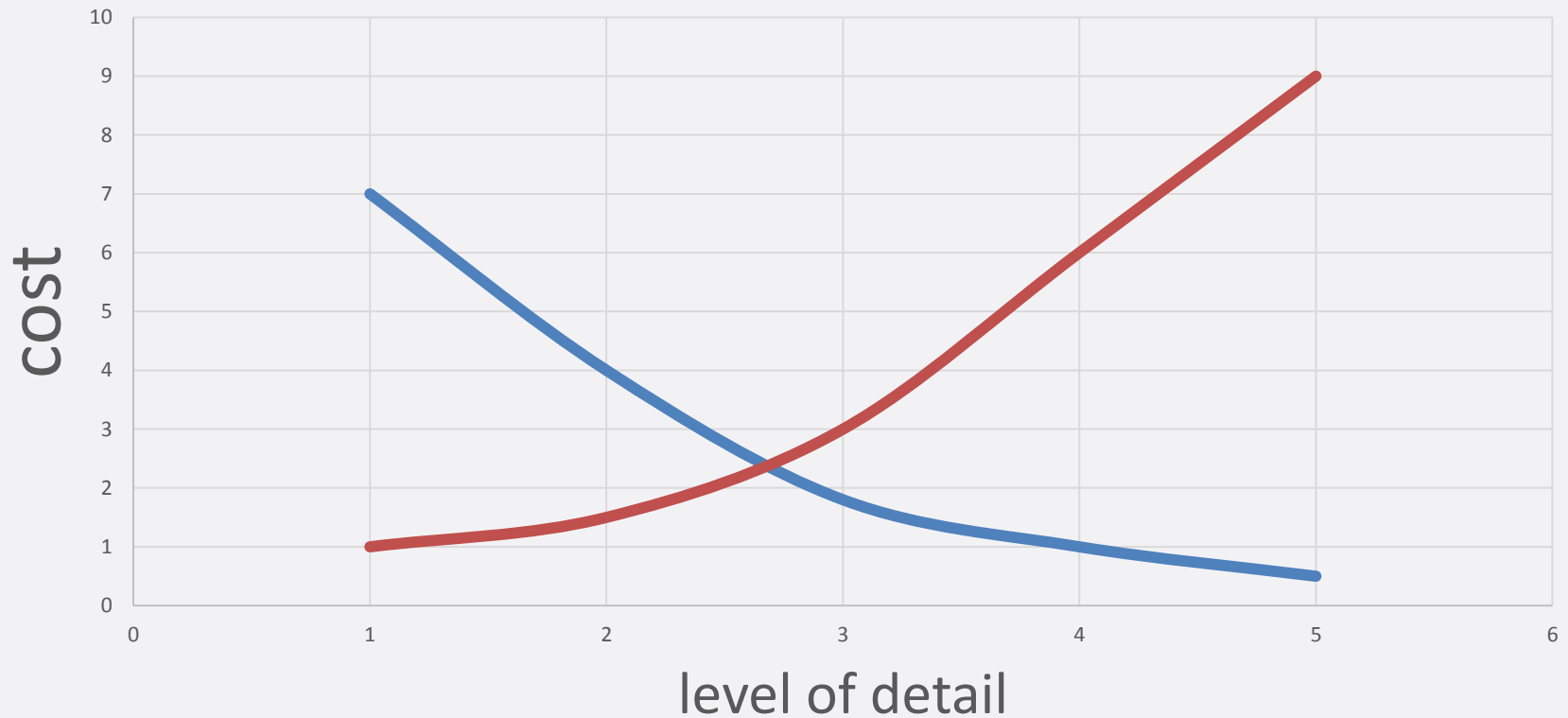
Welfare effects negative under certain circumstances

Welfare effects ambiguous

Welfare effects always positive



# Christiansen & Kerber – Optimally Differentiated Rules (2006)

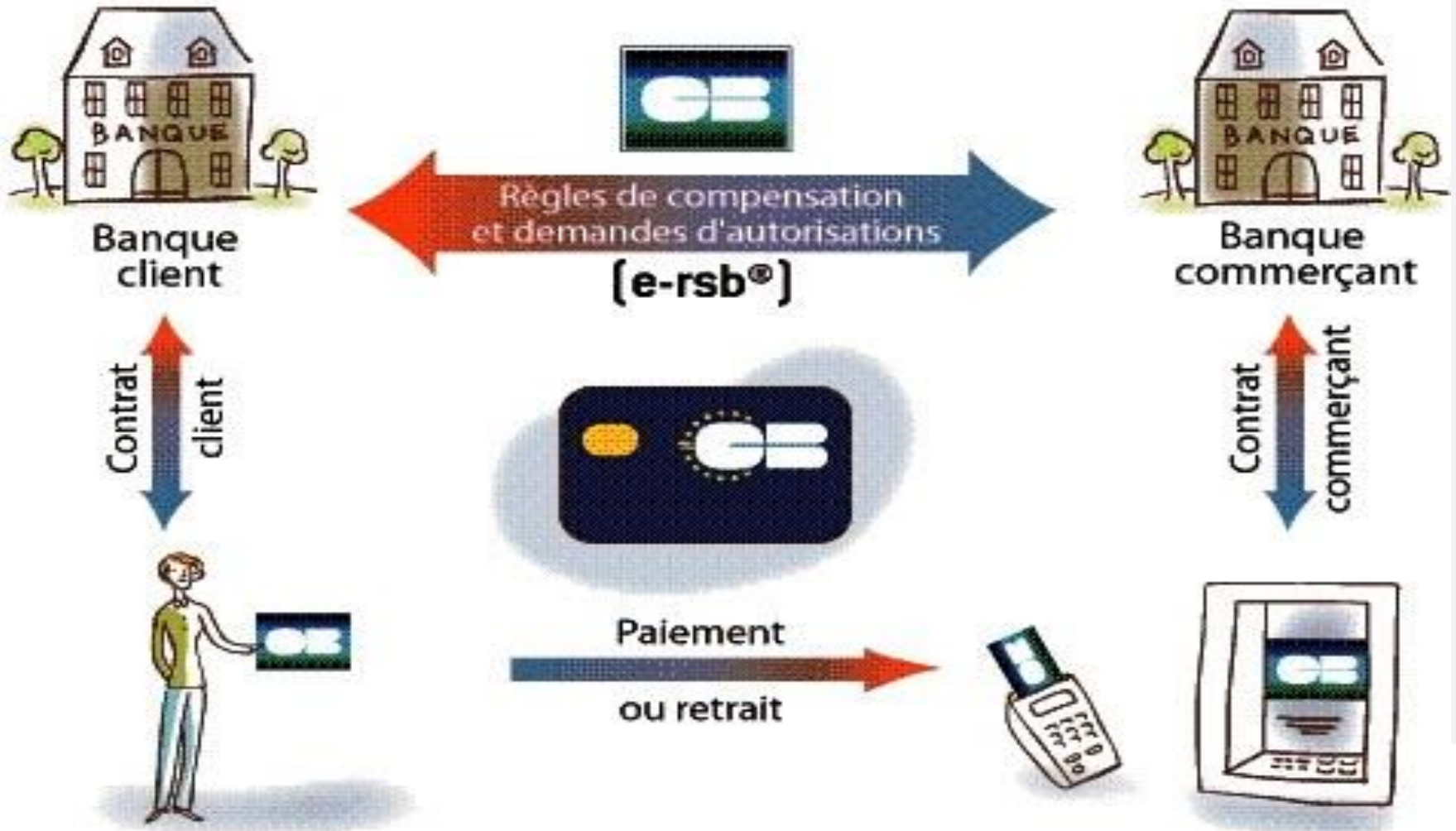


—  $M_{cerror}$     —  $M_{cresources}$



# Case C-67/13P *Groupement des cartes bancaires v Commission*

## Le système Cartes Bancaires





## Reading 1:

# a 'thick' line between object and effect

### New phrase:

'Certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.' (49)

'essential legal criterion' (57)

Example: '**horizontal price fixing by cartels**': '**experience** shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.' (51)



## Reading 2:

# a 'thin' line btw object and effect (53-55)

### Two necessary elements

1. Content of the provisions

2. Economic and legal context

(nature of goods/services and functioning and structure of the market) (c.f. AG Whal paras 44-45: this evidence can 'only reinforce or neutralise' a finding of object)

Intention – not necessary but may be taken into account (cf AG Wahl para 110: intention 'not directly relevant' in object cases)





# A sliding scale by the ECJ?

- A small set of 'simple' object cases
- A set of 'complex' object cases (economic/legal context)
- The effects-approach
- Compare with English contract law
  - Condition
  - innominate terms
  - warranty



## Case C-230/16 *Coty v Parfümerie Akzente GmbH*: *the CB effect?*

- Selective distribution agreements:
  - ‘are to be considered, in the absence of objective justification, as “restrictions by object”’ *Pierre Fabre* [39]
  - may be considered, generally, to have neutral, or indeed beneficial, effects from the aspect of competition. AG 45
  - ‘necessarily affect competition in the internal market’ *Coty* [23]



## Case C-230/16 *Coty v Parfümerie Akzente GmbH*: *the CB effect?*

The aim of maintaining a prestigious image is not a legitimate aim for restricting competition’  
*Pierre Fabre* [46]

‘a selective distribution system for luxury goods designed, primarily, to preserve the luxury image of those goods complies with [Article 101(1) TFEU]’ [36]



# Can you legitimately block sales through third-party platforms?

- Coty guides national court:
  - Is the restriction appropriate to preserve luxury?
    - Guarantees website is associated with its brand
    - Coty can check compliance with conditions on authorized websites
    - Coty cannot require compliance by third party platforms, absent contract
  - Is the restriction proportionate?
    - Not an absolute prohibition on on-line sales
    - Inability to control 3<sup>rd</sup> party platforms relevant



# How to characterize the antitrust treatment of selective distribution?

- **Restriction by object with a form based objective justification?**
  - Relative legal certainty on parameters
  - What happens if you fail the justification? Can you apply 101(3)?
- **Restriction only if effects are shown**
  - Start from Metro 2's foreclosure analysis
  - Relatively under-developed case law