what it is: a legal presumption, but a rebuttable one[525]. The presumption shifts the burden of proof from the Commission to the parties, and provides a structure within which to analyse agreements. Decisions and/or informal guidance finding that object agreements satisfy the conditions of Article 101(3) might lead to fewer cases in which undertakings challenge the object–effect distinction: this sometimes happens because of the misperception that only restrictions by effect can benefit from Article 101(3)[526].

(vii) Object restrictions and per se rules under the Sherman Act

Section 1 of the US Sherman Act 1890 characterises some agreements as per se illegal, whereas others are subject to so-called rule of reason analysis: application of the rule of reason requires a balancing of the pro-and anti-competitive effects of an agreement[527]. Where there is a per se infringement it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that has, by law, been found to be restrictive of competition. There is an obvious analogy between an agreement that is per se illegal under the Sherman Act and one that is restrictive of competition by object under Article 101(1). However, there is an important difference between section 1 of the Sherman Act and Article 101 TFEU in that, even if an agreement has as its object the restriction of competition, that is to say that it infringes Article 101(1) per se, the parties can still attempt to justify it under Article 101(3). This possibility does not exist in US law, since there is no equivalent of Article 101(3) in that system. In this sense a judgment such as that of the US Supreme Court in *Leegin*[528], in which it determined that minimum resale price maintenance should be analysed under the rule of reason rather than being per se illegal, brings US law into alignment with that of the EU: it has always been possible to argue that resale price maintenance satisfies Article 101(3), even though it is classified as having as its object the restriction of competition for the purpose of Article 101(1)[529].

(viii) The contents of the object box

The Court of Justice in *Competition Authority v Beef Industry Development Society Ltd*[530] stated that the notion of restriction of competition by object cannot be reduced to an exhaustive list, and that it should not be limited just to the examples of anti-competitive

[525] On the use of presumptions see Bailey 'Presumptions in EU Competition Law' (2010) 31 ECLR 20 and Ritter 'Presumptions in EU Competition Law' (2018) 6 Journal of Antitrust Enforcement 189; see also the OECD Roundtable *Safe Harbours and Legal Presumptions in Competition Law* (December 2017), available at www.oecd.org/competition and *The Pros and Cons of Presumptions* (Swedish Competition Authority, 2020); Choné-Grimaldi 'Presumptions in Competition Law' (2022), Concurrences 4-2022, Art. 109146, available at www.concurrences.com.

[526] Note that the Competition Commission of Singapore, applying a provision that is substantially the same as Article 101, has on several occasions concluded that agreements that restricted competition by object produced 'net economic benefits' and were therefore lawful: see eg *United Airlines, Continental Airlines and All Nippon Airways*, 4 July 2011, available at www.ccs.gov.sg; see also the Australian Competition and Consumer Commission's authorisation of minimum retail prices for power tools under the Competition and Consumer Act 2010, 5 December 2014, available at www.accc.gov.au.

[527] For discussion of the rule of reason under US law see Areeda and Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Kluwer, 4th ed, 2020), Vol VII, ch 15; Hovenkamp *Principles of Antitrust* (West Academic Publishing, 2nd ed, 2020), ch 5; Holmes *Antitrust Law Handbook* (Boardman Co, updated annually).

[528] *Leegin Creative Leather Products Inc v PSKS Inc* 551 US 877 (2007), reversing the earlier judgment of the Supreme Court in *State Oil Co v Khan* 522 US 3 (1997); see similarly *Continental TV v GTE Sylvania* 433 US 36 (1977), where the Supreme Court overruled an earlier judgment, *US v Arnold Schwinn & Co* 388 US 365 (1967), that had subjected non-price vertical restraints to a per se rule and instead subjected them to the rule of reason.

[529] See 'Is it possible to justify object restrictions under Article 101(3)?', pp 134–135, earlier in this chapter.

[530] Case C-209/07 EU:C:2008:643.