What’s in the box?

- The Scope of Restrictions by Object under Article 101(1) TFEU

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# Table of Content

Abbreviations ................................................................................................................. 1

1 Introduction .................................................................................................................. 3
   1.1 The Purpose ........................................................................................................... 4
   1.2 Delimitation .......................................................................................................... 5
   1.3 Method, Material and Definitions ......................................................................... 5
   1.4 Structure ................................................................................................................ 7

2 Article 101 TFEU and the object box ....................................................................... 8
   2.1 Introduction ............................................................................................................ 8
   2.2 EU competition law ............................................................................................. 8
      2.2.1 Background .................................................................................................... 8
      2.2.2 The objectives of EU competition law ......................................................... 9
   2.3 Article 101 ............................................................................................................ 13
      2.3.1 The construction of Article 101 TFEU ......................................................... 13
      2.3.2 Background to the construction of Article 101 ........................................... 15
   2.4 Article 101(1) TFEU .......................................................................................... 16
   2.5 Object or effect the prevention, restriction or distortion of competition ............ 17
      2.5.1 The object box ............................................................................................ 18
      2.5.2 The effect box .............................................................................................. 21

3 How to determine the scope of the object box .......................................................... 23
   3.1 Introduction .......................................................................................................... 23
   3.2 Why is there an object box? ................................................................................ 23
      3.2.1 Experience .................................................................................................... 24
      3.2.2 Risk offences ............................................................................................... 25
   3.3 Different approaches to the object box ............................................................... 26
      3.3.1 The textual approach .................................................................................. 27
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.3.2</td>
<td>The contextual approach</td>
<td>36</td>
</tr>
<tr>
<td>3.3.3</td>
<td>The extended contextual approach</td>
<td>41</td>
</tr>
<tr>
<td>4</td>
<td>The US Antitrust System</td>
<td>47</td>
</tr>
<tr>
<td>4.1</td>
<td>Introduction</td>
<td>47</td>
</tr>
<tr>
<td>4.2</td>
<td>The per se prohibition in the US system</td>
<td>48</td>
</tr>
<tr>
<td>4.3</td>
<td>The rule of reason in the US system</td>
<td>49</td>
</tr>
<tr>
<td>4.4</td>
<td>The truncated rule of reason in the US system</td>
<td>50</td>
</tr>
<tr>
<td>4.5</td>
<td>Disparities between the EU and US system</td>
<td>51</td>
</tr>
<tr>
<td>5</td>
<td>Competition economics and the object box</td>
<td>54</td>
</tr>
<tr>
<td>5.1</td>
<td>Introduction</td>
<td>54</td>
</tr>
<tr>
<td>5.2</td>
<td>Economics and competition law</td>
<td>54</td>
</tr>
<tr>
<td>5.2.1</td>
<td>What is competition economics?</td>
<td>54</td>
</tr>
<tr>
<td>5.2.2</td>
<td>The economic doctrines</td>
<td>55</td>
</tr>
<tr>
<td>5.2.3</td>
<td>The Chicago School</td>
<td>57</td>
</tr>
<tr>
<td>5.2.4</td>
<td>The post-Chicago School</td>
<td>59</td>
</tr>
<tr>
<td>5.2.5</td>
<td>An example – GlaxoSmithKline</td>
<td>60</td>
</tr>
<tr>
<td>5.3</td>
<td>The scope of the object box</td>
<td>63</td>
</tr>
<tr>
<td>5.3.1</td>
<td>Advantages and disadvantages with the textual approach</td>
<td>63</td>
</tr>
<tr>
<td>5.3.2</td>
<td>Advantages and disadvantages with the contextual approach</td>
<td>65</td>
</tr>
<tr>
<td>5.3.3</td>
<td>Advantages and disadvantages with the extended contextual approach</td>
<td>67</td>
</tr>
<tr>
<td>5.3.4</td>
<td>A collected assessment</td>
<td>67</td>
</tr>
<tr>
<td>6</td>
<td>Conclusion</td>
<td>71</td>
</tr>
<tr>
<td></td>
<td>Bibliography</td>
<td>73</td>
</tr>
</tbody>
</table>
**Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>TEU</td>
<td>The Treaty on European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>The Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>RPF</td>
<td>Resale Price Fixing</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>GC</td>
<td>General Court</td>
</tr>
<tr>
<td>SMEs</td>
<td>Small and medium-sized enterprises</td>
</tr>
</tbody>
</table>
1 Introduction

In order to have a stable and well-functioning competition and to maximize consumer welfare it has been necessary to govern the area of competition law in the EU. The area is regulated by a vast amount of instruments, such as treaty provisions, regulations, directives, guidelines, notices etc. The Treaty on the Functioning of the European Union (TFEU) contains the general rule of application for situations regarding different types of anti-competitive agreements; Article 101 TFEU.

The article aims to protect consumer welfare by prohibiting certain types of conduct between market participants. In the strive to protect consumer welfare not only measures directly affecting consumers are prohibited. The consumers are also protected from being indirectly affected by actions that harms “the structure of the market and, in so doing, competition as such”.

Article 101(1) TFEU states that “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market” shall be “prohibited as incompatible with the internal market”.

As will be seen, the article sets up a number of criteria for its application. Two out of these criteria, the object and effect criteria, are concerning the question of how agreements are restricting competition. The focus in this thesis will be on the object criterion. The object criterion allows for agreements to be established as restrictions on competition without having actual or potential anti-competitive effects in the individual case. In the object cases it is sufficient that the agreement is found to have as its object to restrict competition.

It has long been established that the object and effect criteria are alternative and that they should be read disjunctively. It is hence of importance to establish where to draw the line between the two criteria. It is, however, not clear where this line is to be drawn.

1 Joined Cases C-501/06, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services and others / Commission and others [2009] ECR I-9291, para 63.
Discrepancies in how the object criterion is and should be interpreted can still be found in today's case law. This was recently confirmed by Advocate General Wathelet who stated, regarding the distinction between object and effect, that “a clarification of the case-law in that regard is no doubt desirable”.\(^3\)

Depending on where the line is drawn between the object and effect criteria different consequences will appear. Ambiguity in the application of the object criterion obviously results in reduced legal certainty. The scope of the object criterion also affects a number of other aspects, such as enforcement costs, single market integration, the level of difficulty and time of enforcement procedures, and hence also the conduct of market participants. It is therefore of importance that the scope of the object criterion is established.

1.1 The Purpose

The purpose of this thesis is to examine where the line - if there is one - between the object and effect criterion is, and also to provide arguments for where the line should be. The purpose is, hence, to establish the scope of the object criterion. The thesis will include an examination of possible patterns in case law and, to some extent, also an examination of what current primary and secondary EU law indicate should be the right division between the object and effect criteria. Arguments for possible divisions will be provided mainly by a systematization and interpretation of case law, opinions by advocate generals and by legal scholars.

The purpose with this thesis is not to provide a clear answer to how the object criterion should be defined but more to, on a theoretical level, conclude and explain the different effects of various interpretations. The examination of the effects of the interpretations will include aspects such as legal certainty, enforcement costs and similar. The different effects will be discussed in the light of competition economics and of the objectives of EU competition law.

\(^3\) Case C-373/14 P, Toshiba Corporation v European Commission [2015], Opinion by AG Wathelet.
1.2 Delimitation

The thesis will concern current state of law and different possible interpretations regarding the object criterion in Article 101(1) TFEU. The discussion will focus on finding arguments for where the outer walls to the object criterion are and also for where they should be placed. Article 101(3) TFEU will be left without any more in-depth examination and will only be discussed briefly where relevant for the discussion of Article 101(1) TFEU. Also the other criteria in Article 101(1) TFEU will be left outside the scope of this thesis, due to the lack of relevance in the discussion.

1.3 Method, Material and Definitions

The method used in this thesis is legal dogmatic. The focus of the method lies on analysing traditional legal sources, such as legislation, judgments and legal dogmatic literature. The method is normative and allows the writer to balance sources of law and to hence make conclusions regarding the current state of law. In this sense the legal dogmatic method gives room for a reconstruction of the legal system and for finding arguments for different interpretations. Using the method, different arguments will be interpreted in light of the legal question at heart and appropriately systematized in accordance with the purpose of the thesis. Since the traditional sources in EU law differs from traditional legal sources the legal dogmatic method will only be applied analogously. Hence, objectives of the legal rules will be interpreted in accordance with the EU hierarchy of norms.

This thesis will have the EU primary law as a starting point, and in particular Article 101(1) TFEU. To explain, analyse and argument for different interpretations of the article a number of other sources of law will be used as well. Since the focus will almost

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5 With considerations taken to the hierarchy of the norms - Claes Sandgren 'Är rättsdogmatiken dogmatisk?' [2005] Tidsskrift for Rettsvitenskap 118:4-05, page 651.
9 Primary law, secondary law, case law and doctrine. The named order constitutes a hierarchy of the norms that will be used in this thesis.
exclusively be on EU law, legal sources describing domestic law of the EU Member States will be left outside the scope of this thesis. The main sources that will be used are secondary EU law, judgments from the EU Courts and opinions by advocate generals, but also other sources such as EU doctrine. A limited amount of material will also be collected from US competition law. The reason for this is to highlight certain aspects of the construction of Article 101 TFEU and also to work as a foundation for the following discussion in the thesis. It should be noted that a full-sized comparative analysis will not be made, but only an overview of discrepancies and similarities in the EU and US system will be provided.

In line with the legal dogmatic method the thesis will begin with a presentation of the background to the topic and then continue to a more in-depth description of different interpretations and lines of argumentation regarding the legal question. This part will lastly be followed by a discussion and analysis, and finally result in a conclusion. The analysis will, however, not only be made as a final element, but will also be inserted continuously throughout the thesis.

Rather than to bring an exact answer to the legal question to the table, the conclusion of the thesis will mainly focus on a systematization of information, an analysis of the different argumentations and solutions, and on making a critical examination of the current state of law.\(^{10}\) There is a rather broad consensus in doctrine that the usage of the legal dogmatic method does not require the writer of a work to provide a “right answer”\(^{11}\) and that it is of greater importance to draw up the delimitations for what is considered to be a justifiable argumentation.\(^{12}\) Even if no clear answer to the question “what’s in the (object) box?” will be provided a personal view in the matter will still be provided.

Scholars have referred to agreements being restrictive by object and restrictive by effect as agreements falling within an object and effect box.\(^{13}\) This terminology allows for a

\(^{10}\) Compare with Claes Sandgren ‘Är rättsdogmatiken dogmatisk?’ [2005] Tidsskrift for Rettsvitenskap 118:4-05, page 652.


\(^{13}\) Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 120, Arianna Andreangeli ‘From mobile phones to cattle: How the Court of Justice is reframing the approach to Article 101 (formerly 81 EC Treaty) of the EU Treaty’ [2011] World Competition 34(2), page 236.
simplified rhetoric when explaining the object and effect criteria and will hence be used in this thesis.

A clarification is perhaps also needed regarding “restrictions on competition”. Restrictions on competition should be read as including the elements in Article 101(1) TFEU of “prevention” and “distortion” of competition as well. “Restrictions” will be used as a collective name purely to simplify formulation of the text.

1.4 Structure

Chapter 2 will contribute with a background to the object box and an overview of the main differences between the object and effect criteria. The chapter will focus on the undisputed characteristics of the two types of assessment. Chapter 3 will provide a more in-depth analysis of different approaches that can be used when interpreting the scope of the object box. The chapter will provide three different types of assessments of the object criterion. Chapter 4 will include an account of the US system and examine some similarities and differences between the two systems. The chapter has as its main purpose to give a new angle to the discussion of the object box and, as stated above, not to provide a comparative analysis. Chapter 5 has a two part construction. The first part concerns competition economics and give an overview of the EU standpoint in the matter. The second part is a conclusive exposition assembling the previous discussions together with competition economics and also with other aspect that should be taken into consideration when determining the scope of the object box. No clear answer will be provided in the chapter, but the chapter will merely contain a summary of different arguments concerning the scope of the object box. Some personal views on the subject will, however, be shared in the chapter. Chapter 6 will lastly contain some brief conclusive and final remarks.
2 Article 101 TFEU and the object box

2.1 Introduction

As stated in Chapter 1, this thesis will focus on the object criterion in Article 101(1) TFEU. To understand the meaning and the relevance of the object criterion it is important to examine the criterion in the context of the entire Article 101 TFEU. This chapter will therefore, after an introduction to the background and objectives of EU competition law as such (2.2), provide an examination of the background, function and construction of Article 101 as a whole (2.3). The Chapter will then present Article 101(1) TFEU and more specifically discuss its construction, content and scope of application (2.4). The actual presentation of the object criterion and the difference between the object and effect boxes will then finally be made (2.5).

2.2 EU competition law

2.2.1 Background

A brief historic overview will here initially be provided to place the following discussion into a context. Since a too in-depth examination of the history of competition law would be contrary to the purpose of this thesis, the presentation will be made rather short.

After pressure from both European and Americans scholars, the first European competition rules came into force with the ECSC Treaty. The purpose of these initial competition rules was that they should function as complements to the internal market rules “by preventing businesses from partitioning the internal market and by encouraging competition across borders”. This rather formalistic and economically uninformed notion was the prevailing approach to competition law until the 1990s. However, during the 1990s the European competition law changed from the, by some

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14 Article 65 and 66.
called, ordoliberal attitude\textsuperscript{17} to a more economic approach, thereby constituting a mean
to “secur[e] economic welfare”.\textsuperscript{18} The previous more formalistic competition law, with
its focus on internal market goals, thereby changed to focus more on maximization of
consumer welfare in accordance with economic rationality.\textsuperscript{19}

\textbf{2.2.2 The objectives of EU competition law}

To fully understand how to interpret rules in the best possible way it is important to
know the underlying objectives of the rules. This section will provide an overview of
different objectives to competition law in general, but also of the current objectives to
EU competition law in particular. The purpose of the section is only to introduce the
reader to the subject, and it should therefore be noted that there are a range of additional
objectives connected to EU competition law, that will not be mentioned here. This
section, instead, only includes a brief introduction to the most important objectives
of competition law.

Competition law can function as “an interventionist tool used by governments to
structure the operations of markets”.\textsuperscript{20} Different objectives can hence be achieved
depending on how the competition rules are designed and enforced. “[C]onsumer
welfare, redistribution of wealth, protection of small and medium sized industries, and
regional, social and industrial considerations” are examples of interests that can be
recognized through competition law.\textsuperscript{21}

In EU competition policy, consumer welfare has a very central role.\textsuperscript{22} This can, for
instance, be derived from a statement made by Neelie Kroes, one of the previous
European Commissioners of competition. She has stated that “[c]onsumer welfare is
/…/ well established as the standard the Commission applies when assessing mergers
and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to
protect competition in the market as a means of enhancing consumer welfare and

\textsuperscript{17} Kiran Patel and Heike Schweitzer, \textit{The Historical Foundations of EU Competition Law} (1st edn, 
Oxford University Press 2013) 207.
\textsuperscript{18} Damian Chalmers, Gareth Davies and Giorgio Monti, \textit{European Union Law} (2nd edn, Cambridge 
University Press 2010) 909.
\textsuperscript{19} Kiran Patel and Heike Schweitzer, \textit{The Historical Foundations of EU Competition Law} (1st edn, 
Oxford University Press 2013) 207-208.
\textsuperscript{20} Lee McGowan and Michelle Cini ‘Discretion and Politicization in EU Competition Policy: The Case of
\textsuperscript{21} Lee McGowan and Michelle Cini ‘Discretion and Politicization in EU Competition Policy: The Case of
\textsuperscript{22} Richard Whish and David Bailey, \textit{Competition Law} (7th edn, Oxford University Press 2012) 19.
ensuring an efficient allocation of resources”. The focus on consumer welfare does, however, not only concern consumers being directly affected by actions of market participants. It has been stated in case law that “like the other competition rules of the Treaty, [Article 101 TFEU] is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such”. This means that an agreement still can be caught under Article 101 TFEU even if there is no direct link between the restrictive conduct and prices to end users. It is instead arguable how much focus EU competition law actually gives the immediate protection of consumers, in the sense of “taking direct actions against offending undertakings”, since interventions in the area can contradict other policy interests under EU competition law. To directly protect consumers in short-term, can for instance have negative long-term consequences for consumer welfare.

EU competition policy is, however, not only having consumer welfare and consumer protection as objectives. EU competition law also, to some extent, includes objectives such as the protection of individual competitors.

The objective to protect competitors has been given some focus in EU competition law. The protection of competitors is mainly directed towards smaller undertakings against larger rivals, so that “the ‘small guy’ is given a fair chance to succeed”. The protection of small and medium-sized enterprises (SMEs) is not particular for the area of competition law; in his opening speech in the European Parliament the current President of the European Commission Jean-Claude Juncker emphasized the importance

24 As mentioned in Chapter 1, Article 101 TFEU is the article in the Treaty on the Functioning of the European Union that includes competition rules for agreements between undertakings.
28 An example: if a producer forces its dealers to sell products to a certain price consumers may be directly harmed by high prices. If the conduct, however, is prohibited the producer could be inclined to leave the market instead of complying with the prohibition. This results in short-term benefits being “outweighed by long-term harm to consumer welfare”. Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 20-21.
30 Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 22.
31 Protection of individual competitors can be argued to work as a means to the overall objective of protecting market structure. It is therefore hard to say whether the protection of individual competitors is an objective of EU competition law in itself or just a means to an end.
of supporting SMEs in the EU during his presidency.\textsuperscript{33} Hence, it is no surprise that the protection of SMEs forms an objective also under EU competition law. The protection of competitors is closely connected to the objective of wealth redistribution and is thereby allowing equity considerations to win precedence over efficiency considerations in some cases.\textsuperscript{34} Since the protection of competitors thereby may run contrary to the objective of consumer welfare, it is hard to state what its significance is as an objective to EU competition law today. Following the statement in section 2.2.1, regarding the purpose to the introduction of the initial competition rules, it is, however, apparent that the objective to protect competitors was a lot more important during the first years of EU competition law.

The above mentioned objectives of EU competition law are, as stated, not particular for the EU. The same objectives can be, and have been, applied also in other competition law systems during different times.\textsuperscript{35} EU competition law, however, distinguishes itself from other competition law systems by adding another dimension to its objectives; single market integration. The single market integration is not only one of “the most original aspects of European competition policy”, but is also one of the most important objectives of EU competition law.\textsuperscript{36} Some have even stated that “European competition policy [has as] its primary aim /…/ that of closer integration”.\textsuperscript{37} The prominent role of market integration in competition law is connected to the heart of the EU: the creation of a common market within the borders of EU. This can be seen, for instance, in Article 3.3 TEU where it is stated that “[t]he Union shall establish an internal market” and in Article 26 TFEU where the internal market is defined.\textsuperscript{38}

\textsuperscript{34}Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 21.
\textsuperscript{35}See Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 19-23.
\textsuperscript{38}According to Barnard the terms single, common and internal market ”are largely synonymous”. Hence, the terms are to be understood as synonyms here, especially considering the lack of relevance of any discrepancies between the terms for the purpose of this thesis. See Catherine Barnard, The Substantive Law of the EU: the four freedoms (4 edn, Oxford University Press 2013) 12.
The core of the single market is that internal barriers should be removed and that the four freedoms are to move freely within the EU. In this way undertakings are given the possibility to outgrow their domestic markets and become more competitive in an international perspective. A single market does not only open up the market for economies of scale but also for a more efficient allocation of resources. Restrictive practices between undertakings may act as barriers to trade between Member States and thereby also as obstacles to single market integration. EU competition law regulates such restrictive practices and does thereby play a big part in the endeavor to uphold single market integration. EU competition rules contribute to market integration by playing both a positive and negative role: it both “encourage[s] trade between Member States, partly by ‘levelling the playing field of Europe’ /…/ and partly by facilitating cross-border transactions and integration” and also “prevent[s] measures which attempt to maintain the isolation of one domestic market from another”. To what extent the above mentioned different objectives of EU competition law affect the assessments in individual cases is, however, not an easy question. It can be noted, though, that many have advocated that competition law should be run purely by economic considerations and hence focus only on consumer welfare. Unlike some of the objectives mentioned above, the single market integration is not always contrary to competition economics, but might even have positive effects on consumer welfare. The correlation between the objectives of EU competition law and competition economics will be connected to in section 5.2.5, after an introduction to competition economics.

39 Free movement of goods, services, workers and capital.
2.3 Article 101

2.3.1 The construction of Article 101 TFEU

As a starting point to the discussion regarding Article 101 TFEU, the article in its entirety will be presented. Even if the thesis mainly will focus on the object criterion, it cannot, as noted in the introduction to this chapter, be examined without understanding its context in form of the article as a whole.

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to
the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a
substantial part of the products in question.

Article 101 TFEU is divided into three different sub-paragraphs. Article 101(1) TFEU
sets up the outlines for what should be considered to be in conflict with EU competition
law and thereby prohibited. Article 101(3) TFEU provides the criteria for the
inapplicability of Article 101(1) TFEU and Article 101(1) TFEU and Article 101(3)
TFEU are to be read successively.\(^{47}\) The construction of Article 101(3) TFEU results in
a balancing of interests to determine if an agreement should be exempted or not from
the prohibition in Article 101(1) TFEU. If an agreement is exempted by Article 101(3)
TFEU it is also exempted from sanctions. It has been stated in case law that it is
possible for all agreements prohibited under Article 101(1) TFEU to be exempted under
Article 101(3) TFEU.\(^{48}\) In other words, there are “no type of agreement[s] that, on a
priori grounds, can be said to be incapable of satisfying the criteria of Article 101(3)
[TFEU]”.\(^{49}\)

If an agreement is caught under Article 101(1) TFEU and not exempted under Article
101(3) TFEU it is automatically void according to Article 101(2) TFEU. The sanctions
connected to Article 101(2) depend on the enforcer of the sanctions. The Commission
can, under EU law, both set fines for an infringement\(^{50}\) and require the infringement to
end.\(^{51}\) At Member State level an agreement declared void under Article 101(2) TFEU
cannot be enforced by its parties in national courts\(^{52}\) and the parties injured by the


competitive practice can exist which, whatever the extent of its effects on a given market, cannot be
exempted, provided that all the conditions laid down in Article [101(3) TFEU] are satisfied…”.


\(^{50}\) Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and
82 of the Treaty, recital 4 and articles 1, 5, and 6 [2003] OJ L1/1, Article 23.2.

\(^{51}\) See Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and
82 of the Treaty, recital 4 and articles 1, 5, and 6 [2003] OJ L1/1, Article 7.

\(^{52}\) Case C-126/97 *Eco Swiss China Time Ltd v Benetton* [1999] ECR I-3055. See Damian Chalmers,
972: “a precedent which allows a party in breach to avoid paying damages where the agreement is held to
infringe Article 101 TFEU” (the so-called ‘Eurodefence’).
prohibited anti-competitive conduct have the possibility to sue the parties of the prohibited agreement for damages.\textsuperscript{53}

The construction of Article 101 TFEU with a prohibition in one sub-paragraph and its exceptions in another sub-paragraph has its reasons. For instance, the burden of proof vary depending on what paragraph that is applied. Under Article 101(1) TFEU it is the plaintiff that has the burden of proof, while the burden shifts to the defendant under Article 101(3) TFEU.\textsuperscript{54}

2.3.2 Background to the construction of Article 101

In section 2.2.1 a background to EU competition law as such was given. To narrow down the discussion, a short background to the construction of Article 101 TFEU will now also be provided. The reason for this is to give the following discussion more depth and to illustrate that EU competition law is not set in stone, but is alive and changeable.

The assessment under Article 101 TFEU has not always been the same. Previously, Article 101(1) TFEU had a wider scope of interpretation and hence caught a lot more agreements.\textsuperscript{55} To avoid sanctions the agreements then needed to be exempted, in the same manner as today, under Article 101(3) TFEU. During that time it was, however, only the Commission that could grant individual exemptions\textsuperscript{56} and the exemptions could only be granted if the Commission had been notified of the agreement in advance.\textsuperscript{57} The exemptions were not often provided and the process for getting an individual exemption was both expensive and time-consuming.\textsuperscript{58} This resulted in undertakings making sure either that their agreements would be covered by block exemptions under Article 101(3)

\textsuperscript{54} See section 4.4.
\textsuperscript{56} Regulation (EEC) 17 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed 13/204, Article 9(1).
\textsuperscript{57} Regulation (EEC) 17 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed 13/204, Article 4(1). See Damian Chalmers, Gareth Davies and Giorgio Monti, \textit{European Union Law} (2nd edn, Cambridge University Press 2010) 942: “The undertakings hence also needed to notify the Commission about agreements that were highly unlikely to harm competition. This process lead to the Commission having a vast over-load of agreements that needed to be reviewed. The large work-load resulted in the Commission not being able to make a deeper analysis where actually needed and both business and the enforcement procedure was suffering due to the rule that demanded notification by the undertakings”.
The consequences of the wide discretion of Article 101(1) TFEU yielded a lot of criticism which eventually culminated in the previously mentioned changes in EU competition law in the 1990s. However, the most significant change came with the introduction of Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty in 2004, which also allowed national competition authorities and national courts to make assessments under Article 101(3) TFEU and removed the requirements of notifying the Commission about agreements. The changes also included the abolishment of individual exemptions and, as stated above (section 2.3.1), all agreements are now entitled to an assessment under Article 101(3) TFEU. When considering the legality of an agreement today, the real question is therefore “whether an agreement infringes Article 101 [TFEU] as a whole”. The changes in EU competition law also resulted in the Commission getting a more reasonable approach to how Article 101(1) TFEU and Article 101(3) TFEU are to be interpreted and the assessment is today much more in line with economic principles. Both sub-paragraphs do today have much narrower interpretations.

2.4 Article 101(1) TFEU

This section will provide a brief presentation of Article 101(1) TFEU. As stated above, Article 101(1) TFEU sets up the conditions for when an agreement should be prohibited due to its anti-competitive object or effect. A more in-depth examination of all the criteria in the article will not be made. It is, however, important to know that the

59 The block exemptions emerge from the Block Exemption Regulation (In 1967 the first block exemption was implemented: Regulation (EEC) 67/67 on exclusive purchase agreements [1967] OJ Spec Ed 84/67. These exemptions are certain criteria that, without prior notification, lead to agreements being automatically exempted from Article 101. The problem with this system is that undertakings are adapting their conduct to be guaranteed to fall under one of the block exemptions and hence might not base the agreement on the most efficient commercial interests. In this way the parties to an agreement was “sacrific[ing] commercial practicality in order to gain legal security”. Damian Chalmers, Gareth Davies and Giorgio Monti, European Union Law (2nd edn, Cambridge University Press 2010) 942.


61 Regulation 1/2003/EC on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, recital 4 and articles 1, 5, and 6 [2003] OJ L1/1.


different criteria exist and that they all should be taken into consideration when assessing an agreement under Article 101(1) TFEU.

For a collusion to be caught under Article 101(1) TFEU it should be set up between undertakings or by associations of undertakings. There are certain criteria in case law establishing when a party is to be considered an undertaking.\(^{65}\) The collusion should also constitute an agreement, a decision or a concerted practice. The bar is rather low for a collusion to be found to fulfill this second criterion.\(^{66}\) The collusion has to affect the trade between Member States. Finally, to fulfill the criteria in Article 101(1) TFEU, as already noted, the collusion has to have its “object or effect the prevention, restriction or distortion of competition within the internal market”.

As seen in section 2.3.1, Article 101(1) TFEU provides a list of agreements that should be prohibited. The reason for this exemplification is not to set up an exhaustive list of agreements that should be considered prohibited, but only to point out some agreements that are more likely to be caught by the prohibition. The significance of the list will be discussed more in detail under section 3.3.1.2.1.

It can be noted that Article 101(1) TFEU concerns both horizontal and vertical agreements. This statement cannot be derived directly from the wording of Article 101 TFEU, but has long been established in case law.\(^ {67}\)

2.5 Object or effect the prevention, restriction or distortion of competition

This section begins with a brief and joint assessment of the object and effect criteria to give the reader the relevant context and background. After this the discussion will continue to, separately, examine the assessments under the object and effect boxes.

It has long been established in case law that the object and effect criteria in Article 101(1) TFEU are alternative and to be read disjunctively.\(^ {68}\) The alternative nature

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\(^{67}\) See Joined Case 56/64 and 58/64 Consten / Commission de la EEC [1965] ECR 556.

\(^{68}\) First established in Case 56/65 Société Technique Minière / Maschinenbau Ulm [1966] ECR 235, p. 375. See also Case C-209/07 Beef Industry Development and Barry Brothers [2008] ECR I-8637, paras 15-16, Joined Cases C-501/06, C-513/06 P, C-515/06 P, C-519/06 P GlaxoSmithKline Services and
derives from the conjunction “or” and results in “the need to [first] consider the precise purpose of the agreement, in the economic context in which it is to be applied”. If this does not result in a discovery of a sufficient degree of harm to competition, and the agreement thereby not being found to have the object to restrict competition, the assessment has to continue to an analysis of the effects of the agreement. A contrario; if the agreement is found to have the object to prevent, restrict or distort competition no assessment regarding actual or potential effects of the agreement should be made. Even if an agreement, restrictive by its object, could not be found to have any actual effects on competition it should still be considered as prohibited. Any other interpretation would result in the distinction between the object and effect criteria disappearing.

2.5.1 The object box

This section will provide a presentation of the object box. The section will thereby include some general points to consider when assessing an agreement by its object. The actual scope of the object box will, however, not be discussed until Chapter 3.

Restrictions by object have been defined both in Commission Guidelines and case law in a similar manner. The Guidelines on the applicability of Article 101 TFEU states that restrictions by object are “those that by their very nature have the potential to restrict competition within the meaning of Article 101(1)” and in case law it has been...
stated that “certain forms of collusion between undertakings can be regarded, by their
very nature, as being injurious to the proper functioning of normal competition”.

In the assessment of whether an agreement falls within the object box “regard must be
had inter alia to the content of its provisions, the objectives it seeks to attain and the
economic and legal context of which it forms part”. For an agreement to be restrictive
by object it should “reveal a sufficient degree of harm to competition” and if not, the
actual consequences of the agreement should be examined.

To conclude that an agreement is restrictive by its object it is of importance that the
agreement has “the potential to have a negative impact on competition” and thereby is
“simply /.../ capable in an individual case, having regard to the specific legal and
economic context” to restrict competition. The criterion of being “simply capable” is
however rather vague and, according to van Cleynenbreugel, does hardly provide “a
detailed and insightful criterion to classify particular types of behavior as restrictive by
object in a precise and predictable fashion”.

Unlike the assessment under Article 102 TFEU, regarding abuse of dominant position,
Article 101(1) TFEU does not require an initial examination of the relevant market.
However, as will be seen below, the effect assessment does include an examination of
the relevant market and also a requirement of affecting trade to an appreciable extent. In
case law it has been stated that “an agreement escapes the prohibition laid down in
Article [101(1) TFEU] if it restricts competition or affects trade between Member States
only insignificantly”. This means that even if an agreement could be found to be
restrictive by its object the agreement will still fall outside Article 101(1) TFEU if its

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77 Case C-209/07 Beef Industry Development and Barry Brothers [2008] ECR I-8637, para 17, Case C-
ECLI:EU:C:2012:795, para 36.

78 Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 118,

79 Case C-32/11 Allianz Hungária Biztosító and others [2013] ECLI:EU:C:2013:160, para 34. In previous
case law it was instead stated that “the effect on competition [should be] sufficiently deleterious” – Case 56/65 Société Technique Minière / Maschinenbau Ulm [1966] ECR 235, p. 8.


81 Pieter van Cleynenbreugel ‘Article 101 TFEU and the EU Courts: adapting legal form to the realities of

82 Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 117.

market impact is minimal.\footnote{Whish & Bailey \textit{Competition Law} (7th edn, Oxford University Press 2012) 120.} In \textit{Expedia}, however, the requirement of appreciability was excluded from the object box.\footnote{Case C-226/11 \textit{Expedia} [2012] ECLI:EU:C:2012:795.} The same also follows from the \textit{de Minimis Notice}.\footnote{Commission Notice 2001/C 368/07 on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [2001] C 368, Article 2.}

When determining whether an agreement is restrictive the subjective intentions of the parties are not a determining factor. In the overall assessment the intentions may however be taken into account.\footnote{Joined Cases C-501/06, C-513/06 P, C-515/06 P, C-519/06 P \textit{GlaxoSmithKline Services and others / Commission and others} [2009] ECR I-9291, para 58, Case C-8/08 \textit{T-Mobile Netherlands and others} [2009] ECR I-4529, para 27 and Case C-32/11 \textit{Allianz Hungária Biztosító and others} [2013] ECLI:EU:C:2013:160, para 54.} It has been stated in case law that it is irrelevant whether the parties to an agreement had a commercial interest with it\footnote{Joined Cases C-403/04 P, C-405/04 P \textit{Sumitomo Metal Industries / Commission} [2007] ECR I-729, para 46.} and that, if an agreement is found to have an anti-competitive object, it will continuously be regarded in that manner “even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives”.\footnote{Case C-209/07 \textit{Beef Industry Development and Barry Brothers} [2008] ECR I-8637, para 21.}

The presentation above, regarding the assessment under the object criterion, can briefly be summarized (and complemented) as follows. When examining whether an agreement is restrictive by object regard should be held to the content of the agreement, its economic and legal context, its sequent objective aims, the actual conduct of the parties, how the agreement is implemented and additionally, but not necessarily, to the parties’ subjective intent with the agreement.\footnote{Pieter van Cleynenbreugel ‘Article 101 TFEU and the EU Courts: adapting legal form to the realities of modernization?’ [2014] Common Market Law Review 51: 1381, page 1411.}

Hence, it can be established that “certain agreements are so clearly inimical to the objectives of the EU that they can be permitted only where they can be shown to satisfy the requirements of Article 101(3)”.\footnote{Richard Whish and David Bailey, \textit{Competition Law} (7th edn, Oxford University Press 2012) 121.} In those cases the effects of the agreements may only have relevance in relation to the setting of fines or the award of damages.\footnote{Case C-8/08 \textit{T-Mobile Netherlands and others} [2009] ECR I-4529, para 31.}
2.5.2 The effect box

When an agreement cannot be found to be restrictive by its object an analysis of the effects of the agreement should be made. The effect assessment involves a more extensive analysis of the market than the object assessment. The need for a more thorough analysis derives from the fact that it would be unnecessary to examine the effects “distinct from the market in which they are seen to operate” since an agreement cannot be examined isolated from the factual and legal circumstances in which it functions.

When performing an assessment of the effects of an agreement it is necessary to examine the “counter-factual” position. According to this approach an agreement’s effect on competition should be seen “within the actual context in which it would occur in the absence of the agreement”. To examine the effects of an agreement the agreement should be analyzed in light of the actual “context in which it is situated”. Particular regards should be taken to “the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question”. To then find the agreement to have an effect restrictive of competition it must “affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability”. The competition has to, in fact, have been restricted to an “appreciable extent”.

The effect assessment includes certain steps that have to be examined. In Delimitis v Henninger Bräu the assessment included the following parts. First the relevant

97 Case C-1/12 Ordem dos Técnicos Oficiais de Contas [2013] ECLI:EU:C:2013:127, para 70.
98 Case C-1/12 Ordem dos Técnicos Oficiais de Contas [2013] ECLI:EU:C:2013:127, para 70.
market was defined; both the product and geographic market. Second it was assessed whether access to this market was impeded or not. Third – after establishing that the market in fact was impeded - the Court of Justice of the European Union (CJEU) examined if the contested agreement contributed to the foreclosing effect. These exact three steps should not necessarily be applied in the same manner for all assessments within the effect box. The important part is instead that “a full analysis of the agreement in its market context must be carried out” to determine if an agreement is restricting competition by its effect.

It should be noted that it is not only the effects on the actual competition that are to be examined under the effect assessment; also restrictions on potential competition should be analysed. The scope for assessing restrictions of potential competition should, however, not be allowed a too broad room of interpretation. In *European Night Services and others / Commission* (European Night Services) the General Court (GC) stated that a “hypothesis unsupported by any evidence or any analysis of the structure of the relevant market” could not be taken into consideration under the effect assessment.

In the above described manner the assessment of restrictions by object enables the enforcer to “consider particular behavior as restrictive, without in-depth analysis of the actual effects such behavior produces on the relevant market”. The advantages with not having to make an “in depth contextual inquiry” under the effect criterion are hence that the assessment is simplified and thereby less time-consuming and costly. An account of how much simplified the object assessment really is in relation to the effect assessment will be made in Chapter 3.

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3 How to determine the scope of the object box

3.1 Introduction

After the general presentation of the object criterion in Chapter 2, a more thorough analysis of restrictions by object will be provided in Chapter 3. Chapter 3 has a two part structure of which the first part concerns arguments regarding the mere existence of an object box, while the second part provides three different interpretations of how the scope of the object box should be determined. The first part of the chapter (3.2) mainly has as its purpose to give the reader a further understanding of the concept of the object box while the different approaches to the object box in the second part (3.3) will function as a basis for the further discussion throughout the thesis, by showing different methods for establishing restrictions by object.

3.2 Why is there an object box?

In accordance with the assessment described in section 2.5.1 “particularly pernicious types of agreements that are overwhelmingly likely to harm consumer welfare”\(^\text{107}\) are restrictive by their object due to the agreements, by their very nature, being “injurious to the proper functioning of normal competition”.\(^\text{108}\) It has also been established above (section 2.5.2) that the assessment under the effect criterion is more in-depth and provides a more detailed analysis than the assessment under the object criterion. This leads to the question of why Article 101(1) TFEU includes a division between object and effect and thereby opens up the door for the possibility to make less careful assessments in certain cases.

This section (3.2) answers the question by providing the rationale for having an object box. The section will merely concern some general economic and legal reasons for the existence of the object box and will thereby not consider the theoretical or practical effects of the object/effect division. The different methods to establish restrictions by object vary a lot, as will be seen in section 3.3. The consequences of having an object box


\(^{108}\) Case C-209/07 *Beef Industry Development and Barry Brothers* [2008] ECR I-8637, para 17.
box will therefore instead be accounted for separately in relation to the different approaches, in Chapter 5.

3.2.1 Experience

The Commission Guidelines on the Application of Article 101(3) TFEU states that agreements are restrictive by their object when they have “such a high potential of negative effects in competition that it is unnecessary /…/ to demonstrate any actual effects on the market”.\(^\text{109}\) The object criterion hence includes a presumption of harm that makes allowance for a less in-depth object assessment. The basis for the presumption is “the serious nature of the restriction” and “experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the [EU] competition rules”.\(^\text{110}\) In other words, the scope of the object box is ruled by the types of agreements that, by experience, are found to harm allocative efficiency, consumer welfare, single market integration or other objectives of EU competition law.\(^\text{111}\)

The statement that the scope of the object box should be guided by previous experience can easily lead one to believe that restrictions by object are only those that, under a certain amount of time, have been caught as restrictions by effect. Such an interpretation of the concept of “experience” is however not completely accurate. For example, agreements that were conferring “absolute territorial protection” were found of the CJEU to be restrictive by their object without previous judgments having established such agreements to have restrictive effects.\(^\text{112}\) According to Bailey there are instead (at least) three different criteria for an agreement to, by “experience”, be found as restrictive by object. Regards should, according to him, be taken to industrial organization, other jurisdictions, and policy judgments such as export bans.\(^\text{113}\) In this manner the concept of “experience” should be interpreted relatively broadly. If an agreement, however, is not by experience proven to have a “high potential of negative

\(^{111}\) See sections 2.2.2 and 5.2.5.
effects on competition” the agreement should instead be allowed an assessment under the effect criterion.

3.2.2 Risk offences

As seen above (section 3.2.1) the object assessment does not include the requirement to show the actual or potential effects of an agreement. As a result an agreement can be found restrictive even though there in practice is no harm to competition in the individual case. Advocate General Kokott has in one of her opinions illustrated the underlying reasons for such events with an analogy to criminal law. She compares the reasoning behind the object assessment with the reasoning for criminalizing to drive under influence. She means that when a person is driving under influence it is so likely that a car accident will occur that the legislator has chosen to prohibit the driving in itself as prevention of the harm. In a similar manner, agreements that possess a high risk of causing anti-competitive effects are falling within the object box irrelevantly of whether the actual harm can be shown in an individual case.\(^{114}\)

Advocate General Wahl has, in one of his opinions, expressed that once an agreement is caught within the object box the “ensuing prohibition has a very broad scope, that it is to say it can be imposed as a precautionary measure /…/ irrespective of the evaluation of the effects actually produced”.\(^{115}\) He continues his statement by saying that the scope of the object box should thereby include “conduct entailing an inherent risk of a particularly serious harmful effect”.\(^{116}\) This falls well in line with the remark made by Advocate General Kokott. The reasoning behind the object criterion is to act as a precautionary and preventative measure due to the substantial risk of harm.\(^{117}\)

What here has been stated regarding the scope of the object box excludes, what by some is referred to as, a “presumption of unlawfulness”. The assessment under Article 101(1) TFEU should not be interpreted in a way that certain types of agreements can be presumed to be unlawful and hence fall within the object box, but if the agreement in the individual case can be proven to not cause anti-competitive effects the presumption is rebutted and the agreement escapes being caught under Article 101(1) TFEU.

\(^{114}\) Case C-8/08 T-Mobile Netherlands and others [2009] ECR I-4529, Opinion by AG Kokott, para 47.
\(^{117}\) It should here be held in mind that even if an agreement falls within the object box it still has the possibility to be exempted through Article 101(3) TFEU.
Advocate General Kokott has expressed that “such an interpretation would be tantamount to an improper mingling” of the object and effect criteria.\textsuperscript{118}

The next section will clarify which types of agreements that, by experience, have been established to have anti-competitive effects and hence also show which agreements that are, so called, risk offences. The section will include a summary of the reasoning behind catching certain types of agreements within the object box. Since different methods have been used to establish restrictions by object the exact scope of the object box cannot be determined. Instead an account of different approaches to the object box will be provided to display how the scope of the agreement can be established.

3.3 Different approaches to the object box

As established above, an in-depth analysis of the effects of an agreement is not required to catch a collusion as restrictive under the object box. Hence the object box provides a category where “the Commission more easily and less thoroughly [can] conclude that [a] particular behaviour should be prohibited”.\textsuperscript{119} The exact scope of the object box is, however, rather unclear and it is difficult to determine where to draw the line between the object and effect boxes. Different methods can be used to establish when a restriction should fall within the object box or not. This section will provide a discussion concerning the size of the object box by presenting three different interpretations of the object criterion. It should be noted that this three-folded classification merely has its purpose to provide some clarity to which types of reasoning that can be used for establishing the content of the object box. The classification does hence not have as its purpose to mirror the reasoning of courts in practice.

The first interpretation is referred to as the textual approach and will be discussed in section 3.3.1. The textual approach focuses on the mere content of the agreements and limits the scope of the object box to only include the most obvious restrictions. The textual approach does hence provide the narrowest interpretation of the object box. In the section regarding the textual approach an examination of the list of examples in Article 101(1) TFEU will also be made. Due to the positioning of the list under the

\textsuperscript{118} Case C-8/08 T-Mobile Netherlands and others [2009] ECR I-4529, Opinion by AG Kokott, para 45.

textual approach, section 3.3.1 will be rather lengthy. The length of section 3.3.1 should, however, not be interpreted as indicating the textual approach to be the most eminent of the three approaches. On the contrary it is the contextual approach in section 3.3.2 that has been dominating case law. The contextual approach, unlike the textual approach, allows for external circumstances in form of the economic and legal context of an agreement to be taken into consideration when classifying a restriction as falling within the object box. Lastly the extended contextual approach will be examined in section 3.3.3. The extended contextual approach is an extension of the contextual approach and includes a more in-depth case-by-case analysis. The extended contextual approach is one of the most recently used in case law. The extended contextual approach provides the broadest frame to the object box and does thereby fall dangerously close to containing an actual effect assessment.

3.3.1 The textual approach

The foundation of the textual approach is that an agreement should only be found to fall within the object box where it is sufficient to only look at the internal circumstances of the agreement to find it being restrictive. This means that the object box is interpreted very narrowly and only includes agreements which by a textual assessment, without examination of their outer context, can be found to be restrictive by object. The textual approach hence means that there are certain types or categories of agreements that are such obvious restrictions that they should be prohibited in almost all cases and that agreements not including such obvious restrictions have to be assessed under the effect box to be caught under Article 101 TFEU. When using the textual approach the economic and legal context of the agreement still has to be analysed, but only in so far as to establish the actual content of the agreement.

The section covering the textual approach will mainly focus on describing which types of agreements that constitute such obvious restrictions that they are caught within the object box can still be exempted through Article 101(3) TFEU, see section 2.3.1.

Nagy has given an example to shed some light on this statement. According to the textual approach sharing commercial data between undertakings can be restrictive and such behavior should therefore be caught under the object box. However, if an examination of the context of the agreement shows that the data is historical or that the data is only aggregated statistical there is no restriction of competition. In this manner a glance at the economic and legal context of an agreement is required to establish the content of the agreement. Csongor Nagy ‘The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?’ [2013] World competition 36(4):541, pages 558-559.

120 Note that agreements falling within the object box can still be exempted through Article 101(3) TFEU, see section 2.3.1.

121 Nagy has given an example to shed some light on this statement. According to the textual approach sharing commercial data between undertakings can be restrictive and such behavior should therefore be caught under the object box. However, if an examination of the context of the agreement shows that the data is historical or that the data is only aggregated statistical there is no restriction of competition. In this manner a glance at the economic and legal context of an agreement is required to establish the content of the agreement. Csongor Nagy ‘The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?’ [2013] World competition 36(4):541, pages 558-559.
object box. In connection, an overall discussion of how the approach is used, only examining the content of an agreement, will be provided throughout the section (3.3.1).

To give a good overview of the textual approach the discussion will take its aim from different perspectives. Initially, in section 3.3.1.1, obvious restrictions in case law will be discussed. This will be followed by a presentation of obvious restrictions in primary and secondary EU legislation in section 3.3.1.2. Finally, in section 3.3.1.3 some attention will be given the doctrinal discussion regarding the textual approach. The structure of the section regarding the textual approach (3.3.1), with an examination of case law before an examination of primary and secondary legislation, is not to be read as to indicate a hierarchy of norms. The construction of the section has instead purely and only been chosen for pedagogical purposes.

3.3.1.1 The textual approach and EU case law

EU case law has established a number of types of agreements as containing obvious restrictions. The most eminent types of obvious restrictions will be accounted for below. It should be noted that this section is not supposed to provide an exhaustive list of the obvious restrictions discussed in case law but only to provide a good overview of the most fundamental restrictions by object according to the textual approach.

In European Night Services, a ruling from the GC, it was stated that agreements such as “price-fixing, market-sharing or the control of outlet” should be seen as obvious restrictions of competition.\(^{122}\) The concept of obvious restrictions cannot be interpreted in other ways than as restrictions by object.\(^{123}\)

In T-Mobile Netherlands and Others\(^{124}\) it was again concluded that price-fixing form a restriction by object. In this case the CJEU stated that an agreement where there is an “exchange of information between competitors” is restrictive by its object if “the exchange is capable of removing uncertainties concerning the intended conduct of the


\(^{123}\) Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 121.

\(^{124}\) Case C-8/08 T-Mobile Netherlands and others [2009] ECR I-4529.
participating undertakings”. Price-fixing has also been concluded to fall within the object box in *Fresh Del Monte Produce v Commission*, a case from the GC.

Regarding market sharing the CJEU did in *Beef Industry Development and Barry Brothers* (Beef Industry) state that the agreement at question was intended to “enable several undertakings to implement a common policy which [had] as its object the encouragement of some of them to withdraw from the market”. Since such conduct conflicts with the concept that all economic operators within the internal market independently should determine its policies the agreement was restrictive by its object.

Concerning the control of outlets the case *GlaxoSmithKline v Commission* (GlaxoSmithKline) can be enlightening. The case concerned an agreement restricting parallel trade. Initially the GC, somewhat wrongfully, concluded its ruling with the fact that an indirect export ban, in some situations, should not fall within the object box and instead stated that the effects of the agreement should be assessed. The CJEU, however, changed the judgment of the GC and stated that an agreement intending to restrict parallel trade is restrictive by object and that the GC had committed an error of law by stating that such an agreement would not fall within the object box due to it not depriving final consumers of advantages, since Article 101 TFEU aims to protect “not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such”.

125 Case C-8/08 *T-Mobile Netherlands and others* [2009] ECR I-4529, para 43.
128 Case C-209/07 *Beef Industry Development and Barry Brothers* [2008] ECR I-8637.
130 Case C-209/07 *Beef Industry Development and Barry Brothers* [2008] ECR I-8637, paras 34 & 36.
133 Joined Cases C-501/06, C-513/06 P, C-515/06 P, C-519/06 P *GlaxoSmithKline Services and others / Commission and others* [2009] ECR I-9291, para 64.
3.3.1.2 The textual approach and EU legislation

3.3.1.2.1 The list of examples in Article 101(1) TFEU

In section 2.3.1 it was shown that Article 101(1) TFEU includes a list of examples of those agreements that in particular should be considered as restricting competition. The article does however not explicitly state whether these agreements should be considered as falling within the object or effect box. In the following the connection between the list in Article 101(1) TFEU and the textual approach shall be made.

The restrictions exemplified in Article 101(1) TFEU are to:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As was seen in the previous section price-fixing and market sharing are mentioned in the list, while the control of outlets is not. The other way around is the limiting of output not mentioned in European Night Services, but must still be restrictive by its object since it appears in the list and clearly restrict competition. These statements result in a few different questions: is the list in Article 101(1) TFEU exhaustive; in what way does the scope of the object box correlate with the list in Article 101(1) TFEU; and what is the actual function of the list? These questions will jointly (and concisely) be examined below.

As a preliminary comment Advocate General Trstenjak has said that restrictions falling within the object box “cannot be reduced to an exhaustive list”. She thereby means that the words “in particular” in the article “make clear that the restrictions of competition covered by Article [101(1) TFEU] are not limited to the restrictions of competition

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136 Paragraph (b).
137 Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 123.
mentioned in Article [101(1)] (a) to (e) [TFEU]” and that the scope of the object box thereby not should be narrowed down to only include an exhaustive list.\(^{138}\)

Regarding the above mentioned case law Advocate General Trstenjak has also stated that restrictions by object cannot be narrowed down to “price-fixing, market-sharing or the control of outlets” either. She says that the fact that the EU Courts often have treated these particular types of restrictions as falling within the object box does not result in other types of restrictions not being able to be restrictive by their object.\(^{139}\) It is hence the EU Courts that are responsible for determining the list of object restrictions. The list should be flexible and expand and contract over time.\(^{140}\) The statements by Trstenjak complicate the use of the textual approach, since the types of agreements being obviously restrictive cannot be established with certainty. This problem is however slightly clarified by Advocate General Wathelet.

Advocate General Wathelet has said that, after 60 years of experience, it can be established that the list in Article 101(1) TFEU consists of restrictions being “intrinsically harmful”. According to this it is established that agreements containing the restrictions accounted for in Article 101(1) TFEU in fact are falling within the object box.\(^{141}\) Wathelet means that the designation of the restrictions in the Article 101(1) TFEU-list as object restrictions goes well hand in hand with what has been established in previous case law; it is both in line with the fact that the list of object restrictions should not be exhaustive and that the scope of the object box should be interpreted narrowly.\(^{142}\) The consequence of his interpretation should, according to Wathelet, be that the hard core of restrictions exemplified in Article 101(1) TFEU should be found to be restrictive by object already by using, what is here referred to as, the textual approach, while other possible restrictions by object should be allowed a more extensive assessment by using something more similar to the contextual or extended contextual approach. Wathelet however stretches the importance of the more in-depth object analysis not tipping over to be an effect assessment.\(^{143}\)


\(^{139}\) Case C-209/07 Beef Industry Development and Barry Brothers [2008] ECR I-8637, Opinion by AG Trstenjak, para 49.

\(^{140}\) Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 122.

\(^{141}\) Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet, para 72.

\(^{142}\) Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet, para 73.

\(^{143}\) Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet, para 74.
There are of course scholars that disagree with Wathelet, in his opinion that the list in Article 101(1) TFEU is an exemplification of restrictions all falling within the object box. Bailey, for instance, points out that it is “questionable” whether the examples in points (d) and (e) should be seen as restrictions by object. Bailey means that “[a] finding of substantial market power is generally a prerequisite for such practices to be capable of harming competition” and that it thereby would be more appropriate to examine the effects of such agreements.\textsuperscript{144} How to interpret the list of restrictions in Article 101(1) TFEU is hence highly arguable. To make some conclusions in the matter it can, however, be noted that, of the statements above, the one made by Wathelet is the most recent. It would thereby not be all too remarkable to assume that the opinion by Wathelet is an acceptable interpretation of the list in Article 101(1) TFEU.

3.3.1.2.2 Secondary EU legislation

To establish the different types of agreements that can be caught within the object box by mainly looking at the mere content of the agreement, and thereby use the textual approach to establish the scope of the object box, some guidance can be found in secondary EU law. In this section (3.3.1.2.2) some examples of this guidance will be provided.

In the \textit{Commission Guidelines on the application of Article 101(3) TFEU} it is stated that guidance for what can be considered as restrictions by object is provided in regulations, notices and guidelines.\textsuperscript{145} These restrictions are then often considered by the Commission as falling within the object box.\textsuperscript{146} Restrictions such as “price fixing, limiting output or sharing of markets and customers” are to be seen as object restrictions in the case of horizontal agreements\textsuperscript{147} and “fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including

restrictions on passive sales” in the case of vertical agreements. According to Guidelines “information exchanges between competitors of individualised data regarding intended future prices or quantities” are also falling within the object box. The guidance deriving from the mentioned sources of law is however not exhaustive.

In the de Minimis Notice it is stated that the notice does not cover agreements restricting by their object. This is due to object restrictions having as their nature to affect trade to an appreciable extent. The result of this statement is that restrictions by object can never benefit from the de Minimis Notice. It hence becomes of great importance as to whether the assessment falls within the object or effect box, since all agreements assessed under the effect criterion has to affect competition appreciably. The Notice continues to state that it will not apply in particular to horizontal agreements with the object to “fix /…/ prices when selling products to third parties; limit /…/ output or sales; or allocat[e] markets or customers”. In the same manner the Notice neither applies for “agreements containing any of the restrictions that are listed as hardcore restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object”. This clarifies the scope of the hardcore restrictions in EU law and also clarifies that these certain agreements cannot benefit from the de Minimis Notice. In the Commission Regulation on the application of Article 101(3) TFEU a list of hardcore restrictions are also stated. The EU Courts are however free to expand the scope of the object box irrespectively of what here has been said.

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152 See section 2.5.2.
3.3.1.3 The textual approach in doctrine

As can be expected, there are a number of different views in doctrine regarding the scope of the object box and hence also regarding which approach that should prevail. This section will provide some of the basic standpoints regarding the textual approach.

A person who is strictly advocating the textual approach is Nagy. He has stated that it should be sufficient to only look at the circumstances within “the four angles of the contract” to determine whether an agreement is restricting competition and means that even a person with only basic knowledge in economics should be able to determine if an agreement is restricting competition or not.\textsuperscript{156}

Nagy explains that an agreement should fall within the object box if it is anti-competitive by its nature and that it thereby is the “characteristics” of the agreement and not “the conjunct effect of the agreement and the market circumstances it operates in” that should determine if the agreement has anti-competitive potential. This means that restrictions by object should be caught irrespectively of the market structure, the parties’ market shares and similar.\textsuperscript{157} If the circumstances of an agreement are such that the market shares have to be examined to determine whether the agreement is falling under the object assessment or not the agreement does not have an anti-competitive nature.\textsuperscript{158} According to Nagy, \textit{Expedia}\textsuperscript{159} strengthens this fact by excluding the use of the \textit{de Minimis Notice}, and thereby the requirement of appreciability, from the object assessment.\textsuperscript{160}

As stated above (section 3.3.1), Nagy acknowledges the fact that, under certain circumstances, there is a need to examine the economic and legal context of an agreement. This examination is however only relevant “to the extent it is necessary to permit the understanding of the agreement’s economic logic, mechanism and function”.

\textsuperscript{159} Case C-226/11 \textit{Expedia} [2012] ECLI:EU:C:2012:795.
The context of an agreement should hence not be given any broader significance than to help “understand” the agreement.\textsuperscript{161}

Van Cleynenbreugel has also stated that a restriction by object can be found by looking at the mere content of the provisions of an agreement. He however continues by saying that “in order to derive a restriction from the mere content of the provisions, the restrictive scope of those provisions should be \textit{unequivocally obvious}”.\textsuperscript{162} In other cases van Cleynenbreugel means that a further analysis should be made to find an agreement to be restrictive by its object. In this “second stage” of the assessment regards should be taken to the “\textit{objectives [the agreement] seeks to attain and the economic and legal context of which it forms a part}”\textsuperscript{163} and the assessment should hence include an examination of “the facts underlying the agreement and the specific circumstances in which it operates”.\textsuperscript{164} This implies that, according to van Cleynenbreugel, certain types of agreements falling within the object box should be interpreted using the textual approach and some agreements using the contextual approach, depending on the type of agreement.\textsuperscript{165}

Whish and Bailey have compiled the agreements that are to be found as restrictive by object. They state that the scope of the object box looks as follows: “horizontal agreements to fix prices, to exchange information that reduces uncertainty about future behaviour, to share markets, to limit output, including the removal of excess capacity, to limit sales and for collective exclusive dealing and vertical agreements to impose fixed or minimum resale prices and to impose export bans”.\textsuperscript{166} According to the textual approach it is then established that, at least according to Whish and Bailey, agreements

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\textsuperscript{166} Richard Whish and David Bailey, \textit{Competition Law} (7\textsuperscript{th} edn, Oxford University Press 2012) 124.
\end{flushleft}
that by their content can be found to include such restrictions are to fall within object box. Whish and Bailey however continue by stating that a precise definition of the object box cannot be made and that its scope can change over time.\textsuperscript{167} To what extent the two scholars are advocating the textual approach is hence not clear to say.

3.3.2 The contextual approach

It has been established above that by using a textual approach agreements can be caught within the object box by mainly looking at the content of the agreement. The previous section also showed which types of agreements that can be caught with the textual approach. In the following the contextual approach will instead be examined. The contextual approach is the approach most used in case law. Unlike the formalistic textual approach the contextual approach also takes external circumstances into account in the assessment under the object box. Since external circumstances vary for all individual situations the contextual approach amounts to somewhat of a case-by-case analysis. In practice, using the contextual approach to assess the object criterion, out of two agreements with the same content one can be found to fall within the object box while the other falls within the effect box.

In this section an overview will be made of the scope of the contextual approach. The exposition will have its starting point in how the contextual approach is applied in case law (3.3.2.1), continue with some short remarks on the contextual approach in connection to secondary EU law (3.3.2.2) before some standpoints in doctrine are assessed (3.3.2.3).\textsuperscript{168} The section regarding the contextual approach is not as lengthy as the previous section regarding the textual approach. The reason for this is simply that this section will not include a summary of different types of agreements that should fall within the object box, but will instead purely focus on how the assessments are made when using the contextual approach.

3.3.2.1 The contextual approach and EU case law

Looking at case law it is rather clear that the EU Courts prefer the contextual approach. It has many times been stated that when assessing the nature of an agreement regard must be had to “the objectives which it seeks to attain and the economic and legal

\textsuperscript{167} Richard Whish and David Bailey, \textit{Competition Law} (7\textsuperscript{th} edn, Oxford University Press 2012) 124.

\textsuperscript{168} The structure of this section is also based on providing a pedagogical exposition and not to indicate a hierarchy of norms. See the statement in the introduction to section 3.3.1.
context of which it forms part”.\(^{169}\) When assessing this context the courts may examine what the parties to the agreement have “written, said or done”.\(^{170}\) It has repeatedly been stated in case law that even though the subjective intentions of the contracting parties are not determining for assessing the nature of the agreement it can still be taken into consideration.\(^{171}\) This last comment implies that the courts are using the contextual approach; by using the textual approach, only looking at the content of an agreement, the parties’ intentions would not be given any significance.

It has been stated in case law, for instance in *Beef Industry* that the object box should not be interpreted so narrowly that it only contains the agreements exemplified in the list in Article 101(1) TFEU.\(^{172}\) Also this statement can preferably be interpreted as the EU courts preferring the contextual approach over the narrow textual approach.

The above mentioned case *Beef Industry* concerned a Beef Industry Development Society (BIDS) that was set up between the large majority of beef processors in Ireland. The objective with the BIDS was to reduce overcapacity in the processing industry and to thereby avoid decreased profitability in the industry. To achieve the objective some of the processors were to leave the industry in exchange for compensation from remaining processors. The deal also included a non-compete clause for a period of two years.\(^{173}\) When examining the content of an agreement, it should be demonstrated “why the agreement should be prohibited solely on the basis of its purpose”.\(^{174}\) In *Beef Industry* the CJEU focused on the objective of the agreement and stated that the agreement had “as its object the encouragement of [undertakings] to withdraw from the market…” and that the arrangement “conflict[ed] patently with the concept inherent in the [EU] Treaty provisions relating to competition, according to which each economic operator must determine independently the policy it intends to adopt on the common


\(^{173}\) Case C-209/07 *Beef Industry Development and Barry Brothers* [2008] ECR I-8637, paras 3-8.

market”. The agreement was hence caught within the object box after a contextual analysis.

It should be noted that the assessment of the context is differently significant in object and effect cases. In object cases there is a presumption of restrictiveness which reduces the relevance of the context, while a much more elaborate market analysis is required in effect cases that allows the context to be given more significance.

If an agreement prima facie is found as restrictive by object the context of the agreements is not meant to exclude the agreement from falling within the object box. Advocate General Trstenjak pointed this out in Beef Industry where she stated that the context “is not to be seen as a gateway for any factor which suggests that an agreement is compatible with the [single] market”. Instead, the context may provide grounds for catching an agreement, which based merely on its content not clearly is a restriction by object, to fall within the object box.

However, “the context of an agreement may [also] exclude a prima facie finding of a restrictive object”. In this way some agreements, despite having contractual restrictions, fall outside the scope of the object box, and maybe even outside the entire Article 101(1) TFEU. In EU case law these agreements have been argued to fall outside the object box due to their ancillary nature. The main ground for this line of reasoning is that if the “restrictions /…/ are necessary to enable the parties to an agreement to achieve a legitimate commercial purpose” they may be considered lawful. Some scholars have referred to this type of reasoning as commercial ancillarity, since they mean that the legitimacy lies in the restrictions only being ancillary to the legitimate commercial purpose. According to case law a restriction can be seen as ancillary when it is “directly related and necessary to the implementation

175 Case C-209/07 Beef Industry Development and Barry Brothers [2008] ECR I-8637, paras 33-34.
180 Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 129.
181 See, for example, Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 129.
of a main operation”. The principle of proportionality is also an important part in determining whether the contractual restriction should be considered a restriction of competition or not. A typical case where the context, in this manner, excluded a restrictive agreement from being caught under Article 101(1) TFEU is Erauw-Jacquery / La Hesbignonne. In this case, the CJEU stated that the interest to protect a licensor’s right to select its licensees allowed for the existence of a provision that entitled a plant breeder to determine who could use its seeds, and the agreement thereby escaped the object box.

Based on the discussion in this section (3.3.2.1) and on case law it is apparent that the use of the contextual approach can result in cases being determined in a number of different ways. It is hence safe to say that the contextual approach is rather more flexible than the formalistic textual approach. The presentation of the contextual approach now continues with a brief discussion regarding the contextual approach and secondary EU legislation before continuing to an examination of how the contextual approach is viewed by legal scholars.

3.3.2.2 The contextual approach and EU legislation

It has also in secondary EU law been indicated that the contextual approach should be the prevailing method. For instance, in the Commission Guidelines on the Application of Article 101(3) it is stated that “an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object”. According to this statement it may be required to examine the context of the agreement for catching it within the object box. The statement is clearly opening up for the possibility to apply the contextual approach in object cases and also seems to imply that the contextual approach should prevail.

3.3.2.3 The contextual approach in doctrine

As the most eminent approach in case law, the contextual approach has widely been discussed in doctrine. This section will present a few of the remarks that have been

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made in these doctrines. Some scholars have also been arguing, what can be interpreted as, a partial use of the contextual approach when determining the scope of the object box. This dual approach will also be discussed since it sheds some light on the contextual approach in itself while also providing a further understanding of the function of the approach.

The contextual approach has often been advocated by scholars. For instance, Advocate General Trstenjak has, in one of her opinions stated that when assessing if an agreement is restrictive by object regard should be taken “not only [to] the content of an agreement but also /the/ legal and economic context must be taken into account”.  

Even though the contextual approach is prevailing in case law the textual approach, however, has an advantage with its simplicity. Some scholars therefore seem to be advocating a mix between the textual- and contextual approach. For agreements that “inherently /…/ have a degree of seriousness or harm such that their negative impact on competition seems highly likely” a textual approach may be used to establish a restriction by object. However, in some less apparent cases these scholars mean that external circumstances should be examined to find a restriction by object. This contradicts the views of, for example Nagy, who means that such cases instead require an effect assessment. The dual approach here mentioned is however not examining the effects of an agreement until it is established that a restriction by object can neither be found through a textual approach nor through a contextual approach (or, in some cases, even by using the extended contextual approach).

Van Cleynenbreugel is one that has described this two-step analysis. He has explained that “[t]he first stage of the Court’s restriction by object test consists in an assessment of the content of the provisions of an agreement” and that “[i]f the content of the provisions does not immediately warrant the finding of a restriction, the second stage predicts that attention should be paid to the ‘objectives it seeks to attain and the

188 Case C-67/13 P CB / Commission [2014] ECLI:EU:C:2014:2204, Opinion by AG Wahl, para 58. In the matter, references have also been made to agreements containing “obvious restrictions” or “hardcore restrictions”. The important part is, however, that the object box is divided into some type of apparent restrictions on one side and less apparent restrictions on the other side.
economic and legal context of which it forms a part”.¹⁸⁹ Using this line of reasoning, the second stage is only supposed to be examined if a restriction by object is not found under the first stage¹⁹⁰, hence the initial textual approach is used followed by the contextual approach.

Advocate General Wahl carefully agrees with the contextual approach, but highlights that caution should be taken so the actual or potential effects of the agreement are not, in practice, examined under the object assessment. Wahl has also stated that “consideration of the context in identifying anti-competitive object can only reinforce or neutralise the examination of the actual terms of a purported restrictive agreement”.¹⁹¹

The contextual approach can be described as a “quick look” of the actual or potential effects of an agreement.¹⁹² It is however of importance that the object assessment is clearly separated from the effect assessment, even when using a contextual approach. Anything else would make the division between the two criteria lose its function. Using the contextual approach the consequences of an agreement should only be regarded when setting fines for the prohibited collusion.¹⁹³

3.3.3 The extended contextual approach

The extended contextual approach originates from Allianz Hungária Biztosító and others (Allianz)¹⁹⁴. The approach can be seen as an extension or a sub-category to the contextual approach and it expands the scope of external circumstances that can be taken into consideration when examining the context of an agreement within the object box.

The extended version of the contextual approach has only marginally been used in case law and it is hence hard to give a completely accurate picture of what may be included in the assessment.¹⁹⁵ The choice has, however, anyway been made to divide the

contextual approach into two different parts since the extended contextual approach includes some rather distinguishable points. The approach is also of interest, being one of the more recently used approaches in case law.

Due to its central role to the extended contextual approach, the following examination will mainly focus around the Allianz case. Allianz was a preliminary ruling where the CJEU established, by doing a more in-depth analysis of an agreement than what had previously been done, that the agreement at question could be restrictive by its object. The case has been criticized for blurring the line between the object and effect criteria\(^\text{196}\) and has fueled the discussion regarding the scope of the object box.

Since the extended contextual approach differs from the more traditional textual and contextual approaches, this section (3.3.3) will differ in its structure from the other two approaches. The assessment will begin with an examination of Allianz (3.3.3.1), continue to some criticism of the approach (3.3.3.2), and finally some justifications to the approach will be provided (3.3.3.3).

3.3.3.1 Allianz

3.3.3.1.1 Circumstances in Allianz

The case at question concerned bilateral horizontal agreements between Hungarian insurance companies on one side and car dealers and the association representing the dealers on the other side. The insurance company Allianz had a number of agreements with the association, while Generali, another insurance company, had similar agreements directly with the car dealers. One part of the agreement was that the car dealers should sell insurances together with selling the cars. The car dealers were however also acting as repair shops and their roll towards the insurance companies hence became two-folded; besides selling insurances as intermediaries they also repaired vehicles insured at the insurance companies.

The dual relationship between the car dealers and the insurance companies was exploited by the hourly charge standing in relation to the number and percentage of insurances sold by the dealers. Since an increase in sold insurances resulted in a higher remuneration regarding the repairs the dealers were incited to convince their customers

to purchase their insurances from Allianz and Generali. The lawfulness of this collusion was questioned in Hungarian Court. To answer the question the court turned to the EU Courts to ask whether the conduct could be restricting competition by object.\footnote{Case C-32/11 Allianz Hungária Biztosító and others [2013] ECLI:EU:C:2013:160, para 6-16.}

3.3.3.1.2 What new was brought to the table in Allianz?

Regarding the object assessment the CJEU began, as in previous cases, to say that “[i]n order to determine whether an agreement involves a restriction of competition ‘by object’, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part”.\footnote{Case C-32/11 Allianz Hungária Biztosító and others [2013] ECLI:EU:C:2013:160, para 36.} The CJEU however continued by saying that to assess the context it is “also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question”.\footnote{Case C-32/11 Allianz Hungária Biztosító and others [2013] ECLI:EU:C:2013:160, para 36.} Later in the case the CJEU also stated that to determine the likeliness of competition on a market being “eliminated or seriously weakened” particular account should also be taken to “…the existence of alternative distribution channels and their respective importance and the market power of the companies concerned”.\footnote{Case C-32/11 Allianz Hungária Biztosító and others [2013] ECLI:EU:C:2013:160, para 48.}

By applying these additional criteria to its object assessment the CJEU did a more in-depth analyze of the agreement than ordinarily. The CJEU concluded the case by saying that, under the specific circumstances of the case, the agreement \textit{can} be restrictive by its object.\footnote{Case C-32/11 Allianz Hungária Biztosító and others [2013] ECLI:EU:C:2013:160, para 51.} The reason that the CJEU only stated that the agreement “can be” restrictive by its object derives from the fact that the case only was a preliminary ruling.\footnote{Regarding preliminary rulings see Article 267 TFEU.}

3.3.3.2 Did Allianz stretch the object box too far…?

The reasoning in Allianz has a great resemblance to an effect assessment. In \textit{Ordem dos Técnicos Oficiais de Contas}\footnote{Case C-3/12 Ordem dos Técnicos Oficiais de Contas [2013] ECLI:EU:C:2013:127.} (OTOC) the CJEU stated that, when looking at the effects of an agreement, regards should in particular be taken to “the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market
or markets in question”. What differs in the two assessments is mainly the examination of the relevant market. Whereas in OTOC the CJEU did a complete examination of the relevant market only the “likelihood” of the effects on the market was assessed in Allianz. The case seems to open up for the courts to include as much economic reasoning as they please to the object assessment without having to do an actual effect assessment.

When Advocate General Cruz Villalón gave his opinion in the case he came to a conclusion more in line with previous case law and stated that the circumstances in the case required an assessment by effect. Advocate General Cruz Villalón also made a reference to previous case law, regarding similar types of agreements, where it also had been stated that the agreements should be assessed under the effect box.

It hardly comes as a surprise that Nagy has condemned the reasoning in Allianz. He says that the CJEU in the case has left the well-established object formula that restrictions by object derives from the experience that “certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition” and that the additional criteria added by the CJEU in Allianz are the factors that should be examined under the effect assessment.

Nagy continues by describing that paragraph 48 in Allianz is “disastrous” since it implies that a case-by-case assessment and a market analysis should be done under the object criterion. Nagy means that it is “the very essence” of a restriction by object that it does not include a case-by-case assessment but “rests on category-building”. He concludes this statement by saying that the analysis in Allianz removes the line between object and effect and “eliminates the merits of the notion of ‘anticompetitive object’: such as legal certainty, predictability, and simplicity”.

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204 Case C-1/12 Ordem dos Técnicos Oficiais de Contas [2013] ECLI:EU:C:2013:127, para 70.
208 See section 2.5.1.
3.3.3.3 …or does the extended contextual approach have a place in Article 101(1) TFEU?

Advocate General Wathelets opinion in Toshiba Corporation v European Commission\(^{212}\) can be interpreted as advocating the extended contextual approach. He, however, speaks about something that can be perceived as a two-staged assessment. The first stage includes the established position that “regard must be had to the content of its provisions, to its object, that is to say, to the objectives which it seeks to achieve, and to the economic and legal context of which it forms a part” to determine if an agreement is restrictive by object.\(^{213}\) If this assessment results in a finding of a restriction by object that is mentioned in the list in Article 101(1) TFEU is the context of the agreement only “a secondary consideration”.\(^{214}\) In this way the first stage of the object assessment, according to Wathelet, consists of a textual or narrowly interpreted contextual approach, depending on the room of interpretation that is given to the context examination. If a restriction by object however is not found through the first stage of the assessment the analysis should continue to the second stage and “the analysis of the economic and legal context will have to be more thorough”.\(^{215}\) In this assessment Wathelet means that it is possible to use the additional criteria added in Allianz to determine a restriction by object.\(^{216}\) By this statement it is apparent that Wathelet thinks that, at least in certain cases, the extended contextual approach should be used.

The reasoning of Wathelet can be compared with van Cleynenbreugels two-stage assessment that was described in section 3.3.2.3. While van Cleynenbreugel approves of a dual interpretation between the textual and contextual approach, Wathelet, however, seems to believe that the assessment can be taken one step further to also include the extended contextual approach. These dual approaches are dividing the object and effect boxes in Article 101(1) TFEU into a three-step assessment; obvious object restrictions, less obvious object restrictions and effect restrictions.

\(^{212}\) Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet.
\(^{213}\) Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet, para 88.
\(^{214}\) Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet, para 89.
\(^{215}\) Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet, para 90.
\(^{216}\) Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet, para 91. In the assessment both the criteria lined up in paragraph 36 and 48 in Allianz can be taken into consideration.
In conclusion it should, although, be noted that the judgment in *Allianz* can be seen to have its origin in the specific circumstances of the case. Also Advocate General Wathelet has pointed out this fact and has stated that the additional criteria added to the object assessment in *Allianz* is to be explained “solely by the specific nature of the facts giving rise to the request for a preliminary ruling and by the Court’s desire to provide the referring court with the fullest possible answer”.\(^{217}\) The allowance for making an analysis of the parties’ market power under the object assessment is thereby “specific to that case and cannot be applied generally”.\(^{218}\) The case law following Allianz confirms the “isolated nature” of the judgment.\(^{219}\) This can especially be seen in the judgment *CB v Commission*\(^{220}\) where the CJEU rejected the position that restrictions by object are “notion[s] to be interpreted broadly” and clarified that “the essential legal criterion for ascertaining a restriction of competition ‘by object’ is the finding that such coordination in itself reveals ‘a sufficient degree of harm to competition’”.\(^{221}\)

Three possible interpretations of the object box have now been provided; one catching agreements within the object box due to their mere content, one requiring an assessment of the context, and one final, limited in its scope, allowing the courts a wide discretion in determining which external circumstances to take into account in the assessments. To get a broader insight into possible interpretations of the object box attention will now be pointed towards the US system. The reason for this is mainly to provide a broader perspective to the discussion, but also that the US rules will function as a basis for the presentation of competition economics in Chapter 5. Chapter 4 will both include an account of the US system in itself, but also a comparison to the EU system and the different approaches. The nods will finally be tied together in Chapter 5 where advantages and disadvantages with the different approaches will be pointed out in connection to an overall discussion of competition economics.


\(^{218}\) Case C-373/14 P, *Toshiba Corporation v European Commission*, Opinion by AG Wathelet, para 84.

\(^{219}\) Case C-373/14 P, *Toshiba Corporation v European Commission*, Opinion by AG Wathelet, para 85, see for example Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe / Commission* [2015] ECLI:EU:C:2015:184, where the new Allianz criteria were mentioned in para 117, but an object restriction was found using only the old formula, paras 118 -135.

\(^{220}\) Case C-67/13 P *CB / Commission* [2014] ECLI:EU:C:2014:2204

4 The US Antitrust System

4.1 Introduction

This chapter will provide a brief introduction to the US standpoint in the discussions regarding the division between the object and effect criteria in Article 101(1) TFEU. The purpose of the chapter is not to educate in the US system, but merely to provide a comparative outlook in the matter and to widen the perspective regarding possible interpretations of the object box. The purpose with this chapter is also to function as a basis for the presentation of competition economics in Chapter 5; in order to provide an overview of competition economics some basic knowledge of the US antitrust rules is required.

The rules that will be investigated in this chapter have their foundation in section 1 of the Sherman Act. The Sherman Act divides anti-competitive agreements into two categories; one category where agreements are found to be restrictive per se and one category where the agreements have to be further examined using the so called rule of reason.222 In more recent years some sort of truncated rule of reason has also been developed through case law.

An overview of per se prohibitions and of the rule of reason will be made below. A brief examination of the truncated rule of reason will also be provided, due to the slightly more recent developments in the US system. This will be followed by an account of some distinctions in the EU and US systems. The distinctions will only be made of the substance of the two systems and an examination of the underlying reasons for the disparities will not be examined until Chapter 5. The presentation will be concluded with an example of how a specific situation is covered under the EU and US systems respectively.

4.2 The per se prohibition in the US system

The per se prohibition includes agreements which, without in-depth examination, can be found to contain certain categories that “always or almost always” are anti-competitive. It is up to the US Courts to determine which restrictions that should be included in such a per se illegal category.223 The reasoning behind per se restrictions has been discussed in case law, and the US Supreme Court has stated that “there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use”.224

The quote also sheds light on the fact that agreements that per se are considered to be illegal lack “redeeming virtue”. In this regard it should be noted that the US per se prohibition does not include any exceptions; unlike the existence of Article 101(3) TFEU in EU law the US system does not contain rules allowing a per se prohibition to be rebutted by pro-competitive justifications. The prohibition hence includes a “conclusive presumption of illegality.”225

No detailed examination is required to establish an agreement to fall under the per se category.226 If a restriction falls within one of the categories decided by the courts to be per se illegal the agreement is prohibited under any circumstances.227 This is due to the fact, as expressed by the US Supreme Court in another case, that a per se prohibition is “so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality”.228

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The per se prohibition have certain similarities with the object criterion in Article 101(1) TFEU. Both categories include some kind of presumption of harm and agreements caught within the categories can be found prohibited even anti-competitive effects are lacking in the specific case. The categories are, however, not identical; since the restrictions caught under the per se prohibition are irrebuttable the US category have a narrower scope than the EU category. To connect the presentation of the per se prohibition to the discussion in Chapter 3, the assessment of a per se prohibition can be compared to an irrebuttable object assessment made with the textual approach. This is due to the fact that both the textual approach and per se prohibitions focus on certain categories of restrictions that by experience have been established to have anti-competitive effects and that the mere contents of the agreements hence are enough for catching the agreements as being restrictive of competition. It should also be noted that, even though it is possible for all agreements to be exempted under Article 101(3) TFEU in EU antitrust law, it is highly unlikely that obvious object restrictions caught with the textual approach actually will be exempted.

4.3 The rule of reason in the US system

If the per se prohibition can be seen as some kind of equivalent to the object assessment the US rule of reason corresponds better with the more detailed effect assessment. The US Supreme Court has held that the rule of reason can be defined as a case-by-case assessment in which “the factfinder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition". The rule of reason should hence be interpreted, as to establish if an agreement is in line with Section 1 of the Sherman Act, so that the pro- and anti-competitive effects are weighed against each other.

While both the effect assessment and the rule of reason contains a case-by-case assessment it should be held in mind that the effect assessment in Article 101(1) TFEU

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229 For example, RPM is treated under rule of reason in the US and as an object restriction in the EU. See Case US Supreme Court Leegin Creative Leather Products Inc v PSKS, Inc (2007) 551 U.S. 877


does not include a balancing of pro- and anti-competitive effects; within the EU system the balancing is left to be performed under Article 101(3) TFEU. Setting aside circumstantial matters, such as the burden of proof, the rule of reason can thereby be suggested to correspond to the collected assessment of the effect criterion in Article 101(1) TFEU together with the exceptions in Article 101(3) TFEU.

4.4 The truncated rule of reason in the US system

In 1999, through California Dental Association v. Federal Trade Commission, the US antitrust system, in somewhat, opened up for a new type of assessment under Section 1 of the Sherman Act. This assessment falls in between the per se prohibitions and the rule of reason by constituting a truncated rule of reason. Through this type of examination it is possible to find a breach of Section 1 of the Sherman Act without making a full-scale rule of reason assessment establishing all the elements normally required. If a plaintiff is capable to show that “a particular restraint is ‘inherently suspect’ because it is of a type that always or almost always tends to harm competition”, it is sufficient for, at least at a preliminary stage, catching an agreement as restrictive since the plaintiff’s initial burden of proof has been satisfied. In this way, the burden of proof is fulfilled even if the plaintiff has neither shown that the agreement caused harm nor that it was likely to cause harm. To rebut its position, the defendant then has to show a “plausible procompetitive justification” to escape breaching Section 1 of the Sherman Act. If the defendant manages to do so, a full-sized rule of reason analysis is required.

238 Geoffrey Oliver ‘Of tenors, real estate brokers and golf clubs: a quick look at truncated rule of reason analysis’ [2010] Antitrust 24(2):40, page 40. It is unclear whether it is sufficient for the defendant to only present evidence showing that the agreement is not harmful to competition for rebutting the claim of the plaintiff and thereby avoid an assessment of the effects of the agreement. Geoffrey Oliver ‘Of tenors, real estate brokers and golf clubs: a quick look at truncated rule of reason analysis’ [2010] Antitrust 24(2):40, page 40.
The truncated rule of reason can be compared with object restrictions in the EU. The truncated rule of reason is however, unlike the per se prohibition, more similar to the contextual approach of the object box than to the textual approach.\textsuperscript{239} The reason for this is partly that an agreement that simply by its content would be found to include some type of obvious restriction of competition still will be caught with the per se rule, and partly because the truncated rule of reason includes the element of "looking [at] the circumstances, details, and logic of a restraint" to reach "a confident conclusion about the principal tendency of a restriction"\textsuperscript{240} and thereby also concerns less obvious restrictions of competition. Like agreements caught with the contextual approach in the EU, the agreements can, with the truncated rule of reason, be excused from sanctions if pro-competitive justifications can be found. Hence, it is not unreasonable to say that the assessments in the US and EU systems were becoming more similar with the changes in 1999. It is however not exactly clear how wide the scope of application really is for the truncated rule of reason in the US system.

4.5 Disparities between the EU and US system

The interpretation of anti-competitive collusions is alive and can vary over time in the EU and the US. It is therefore self-evident that the courts from time to time are required to define and redefine the categories of restrictions.\textsuperscript{241} The changes affect whether a restriction should be interpreted under the per se prohibition or the rule of reason, alternatively within the object or effect box. The differences in interpretation also result in larger and smaller variations between the EU and US systems. For instance, resale price fixing (RPF) is after 2007 examined under the rule of reason in the US\textsuperscript{242}, while it remains to be seen as an obvious restriction by object in the EU.\textsuperscript{243} The difference in this specific case can be interesting to examine to shed light on some of the essential disparities between the EU and US standpoints.

\textsuperscript{239} It can also be noted that while the truncated rule of reason have been seen as somewhat of a quick-look of the rule of reason (the US equivalent to an effect assessment), the contextual approach has been referred to as a quick-look of the effects of an agreement (see section 3.3.2.3).
\textsuperscript{241} Richard Whish and David Bailey, \textit{Competition Law} (7th edn, Oxford University Press 2012) 124
\textsuperscript{243} See section 3.1.
In EU law an agreement containing RPF is first examined under Article 101(1) TFEU. The conduct has generally been considered a restriction by object due to its anti-competitive nature and the object restriction can hence already be found through using a textual approach in the object assessment. This means that the agreement has to be exempted under Article 101(3) TFEU to escape invalidity and sanctions. At a first glance this combination of a per se prohibition with the possibility to be exempted may seem to fall close to the rule of reason used in the US for the same behavior. The similarities between the systems are however not as extensive as it first seems.

In EU law the burden of proof lies on the plaintiff to find a restriction by object under Article 101(1) TFEU. By quickly establishing that the agreement is restrictive, only by looking at the content (or context) of the agreement, the burden of proof changes almost instantly. It is then the defendant that has to show pro-competitive effects under the examination of Article 101(3) TFEU.

The burden of proof changes under the use of the US rule of reason as well. However, under the rule of reason the burden of proof does not shift to the defendant until the plaintiff has brought forward a “prima facie” case demonstrating the anti-competitive effects of the agreement. If the defendant after that can provide a “substantiated justification” the court normally rules in favor of the defendant. Moreover, it should also be noted that restrictions by object do not tend to have a “realistic chance” under Article 101(3) TFEU. It can therefore be established that a defendant of an agreement containing RPF stands in front of a heavier challenge under EU law than under US law.

244 Csongor Nagy, EU and US Competition Law, Divided in Unity? The Rule on Restrictive Agreements and Vertical Intra-Brand Restraints (Ashgate 2013) 3.
245 Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 152. Nagy has stated that this structure of Article 101 TFEU “minimizes the risk of false positives and false negatives, because it allocates the burden of proof according to the agreement’s probable effects on consumer welfare”. He does however continue by saying that the application of the article, in practice, is inconsistent and blurs the line between the two sub-paragraphs - Csongor Nagy, EU and US Competition Law, Divided in Unity? The Rule on Restrictive Agreements and Vertical Intra-Brand Restraints (Ashgate 2013) 3.
246 Csongor Nagy, EU and US Competition Law, Divided in Unity? The Rule on Restrictive Agreements and Vertical Intra-Brand Restraints (Ashgate 2013) 3.
247 Csongor Nagy, EU and US Competition Law, Divided in Unity? The Rule on Restrictive Agreements and Vertical Intra-Brand Restraints (Ashgate 2013) 3.
249 Csongor Nagy, EU and US Competition Law, Divided in Unity? The Rule on Restrictive Agreements and Vertical Intra-Brand Restraints (Ashgate 2013) 3.
truncated rule of reason, the similarities to the EU system would, however, be a lot greater. 250

To summarize; this exposition has shown that RPF, functioning as an example, is regulated differently under US and EU law. The US courts changed their views on RPF rather recently (2007) and thereby departed from the requirements, still applicable in the EU, of a high burden of proof by the plaintiff together with lengthy and expensive processes. It is henceforth interesting to consider the reasoning behind the differences in regulation between the two systems. A large part of the answer is the variations in how much significance that is given to competition economics in the two systems, and also which doctrine of competition economics that is the prevailing. It has been argued that the EU system regarding RPF is not “in accord with sound economics” since RPF “may have both pro- and anti-competitive effects”. 251 What is meant by this last statement will be examined in the following chapter. Chapter 5 will provide an account of how economic reasoning is applied in competition law and also give an overview of the most eminent doctrines of competition law in the EU. The chapter will thereafter continue to a more general argumentation regarding different considerations when determining the scope of the object box.

250 Compare with section 4.4.
5 Competition economics and the object box

5.1 Introduction

This Chapter will begin with an introduction into competition economics (5.2). An examination of economic considerations is needed to provide a full analysis of how the object box (is and) should be interpreted.

The Chapter will continue with an examination of advantages and disadvantages of the different approaches to the object box (5.3.1-5.3.3). This examination will include aspects such as legal certainty and enforcement costs, but also connect to the presentation of competition economics. The chapter will end with some overall remarks regarding the scope of the object box (5.3.4).

5.2 Economics and competition law

Chapter 4 ended with an assessment of how RPF is treated in the US and EU systems respectively. By RPF being regulated differently in EU and the US, it is apparent that the cohesion with competition economics varies. In Chapter 4 it was stated that the US approach probably was more in line with competition economics than the EU approach. This section (5.2) will show what competition economics actually is, and hence provide an explanation to the, here mentioned, statement from Chapter 4.

The discussion will start with answering the question “what is competition economics?” (5.2.1) before continuing to a brief account of the economic doctrines (5.2.2), explanations of two schools of competition economics (5.2.3-5.2.4) and finally conclude with an example, illustrating the reasoning of the two schools (5.2.5).

5.2.1 What is competition economics?

Competition law has its foundation in economics; some even argue that competition law “should be interpreted solely according to what economic theory dictates”.252 When

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252 Damian Chalmers, Gareth Davies and Giorgio Monti, European Union Law (2nd edn, Cambridge University Press 2010) 910. It can, of course, be argued that competition law also should focus on other
interpreting competition law in the light of economics, commercial practices harming the market should be prohibited and activities benefitting economics should be promoted.\textsuperscript{253} Competition law should strive to achieve a perfect competition which, at least according to Chalmers et al., is found “when an industry is made up of many firms producing homogeneous products, where new firms can enter and existing firms exit with ease and where consumers are fully informed: /and/ consumers dissatisfied with one firm’s prices or quality will switch to others”.\textsuperscript{254} The obvious question is then how this, at least in an economic sense, perfect competition can be achieved.

In the matter, Jacobs suggests that competition law cannot be determined purely by a single economic rule, since there is no certain knowledge of how the market reacts and functions in all specific situations. He rather means that economic efficiency can be argued to be achieved through different assumptions about how market participants operate. These different assumptions can be divided into categories of economic theories that support the different lines of argumentations.\textsuperscript{255} Different antitrust doctrines are then in turn supporting the competing economic theories.\textsuperscript{256}

Today there are three predominant economics doctrines; the conservative and liberal neoclassical doctrines and the neo-Keynesian doctrine.\textsuperscript{257} Since, as will be seen below, the EU system of antitrust rules is mainly based on the neoclassical doctrines an account will only be made of these.

5.2.2 The economic doctrines

Both the conservative and liberal neoclassical doctrines focus on maximization of allocative efficiency. In short terms this means that resources should be allocated in aspects and interests than purely economics. Such considerations will however be left outside the scope of this section.

\textsuperscript{257} Robert Atkinson and David Autretesch \textit{Economic Doctrines and Approaches to Antitrust} [2011] ITIF, January, page 4. There is potentially also a fourth doctrine called “innovation economics”. This theory will, however, be left outside the scope of this thesis.
such a way that they “maximize the net benefit attained through their use”.\textsuperscript{258} According to neoclassical economics the participants of competitive markets are to set their prices, and interventions on these prices should be omitted for maximization of economic welfare. If no intervention is made the market should adapt so the amounts of goods that are sold on the market corresponds to the buyers demand.\textsuperscript{259} The main task for economic policy should therefore be to “reduce artificial barriers and impediments to market equilibrium, particularly by ensuring that prices are aligned with costs”.\textsuperscript{260} The neoclassical doctrine also assumes that consumers act rationally and in such ways as to maximize their own interests. Through individual rationality the public interest will then also be maximized as a natural consequence.\textsuperscript{261}

The conservative and liberal neoclassicists do, however, not agree on everything. The conservatives “are less concerned with fairness, generally view markets as not prone to failure, and are less willing to assign roles to government to intervene” while the liberals generally are “more concerned with fairness, see market failures as more common, and are more willing to support government intervention, even though they often think intervention harms growth”.\textsuperscript{262}

The conservative and liberal neoclassical economic doctrines have equivalents in antitrust law. There are four main schools of antitrust; the Chicago school, the post-Chicago school, the populist school and the more recent innovation school. The Chicago school has its origin in the conservative neoclassical doctrine while the post-Chicago school corresponds to the liberal neoclassical doctrine.\textsuperscript{263} The further examination will focus on these two latter antitrust schools, due to their influence on EU competition law.

5.2.3 The Chicago School

The Chicago school emerged in the 1970s as an alternative to the, by then, prevailing Harvard school.\textsuperscript{264} The Chicago School is, according to Chalmers et al, “the most influential school of thought in competition law” but does now have the post-Chicago School as a good competitor.\textsuperscript{265} Both the Chicago School and the post-Chicago School find economics to be “the essence of antitrust” and the main goal of competition law to be protection of consumers through allocative efficiency.\textsuperscript{266} It has been stated in EU case law that also conduct harming “the structure of the market and, in so doing, competition as such”\textsuperscript{267} should be prohibited. Such conduct can also indirectly be harmful to consumers\textsuperscript{268} and the EU case law is hence not contradicting the neoclassical economics in this regard.

The Chicagoans believe that the market is able, to a very great extent, to heal itself from anti-competitive behavior. If, for instance, an undertaking with great market power raises its prices excessively, new undertakings will enter the market and consumers will buy products from these new companies instead. In other words, Chicagoans believe that “if economic performance [lead] to unmet consumer demand, this [will] cause the entry of other firms”. In this way competition can only be harmed where there are barriers to enter a new market and, according to the Chicago School, the major cause to such barriers is national legislation setting up limitations, and not anti-competitive behavior of other undertakings.\textsuperscript{269}

Since the focus is on allocative efficiency Chicagoans accept concentrated market due to the advantage of economies of scale.\textsuperscript{270} They also mean that market power is a sign

\begin{footnotesize}
\begin{enumerate}
\item[268] Case C-95/04 P British Airways / Commission [2007 ] ECR I-2331, Opinion by AG Kokott, para 86. The case concerned Article 102 TFEU, but the same reasoning can be applied for Article 101 TFEU.
\end{enumerate}
\end{footnotesize}
of “superior performance” and that it should not be considered pernicious. Undertakings with large market power should not be penalized for their efficiency.\footnote{271}

Chicagoans believe that law enforcers do not have the necessary knowledge of how the market functions\footnote{272} and that interventions “cause more harm than good”.\footnote{273} Due to this lack of insight in neoclassical economics, judges should proceed with caution in regulating the area of competition law\footnote{274} and it is important that law enforcers do not, to any greater extent, intervene with competition.\footnote{275}

Even though Chicagoans may prefer that law enforcers do not intervene with competition, they accept and prefer the rule of reason more than per se prohibitions. A case-by-case analysis is to give a more accurate result than stating that certain types of agreements per se are restrictive. Sometimes agreements that at a first glance may seem anti-competitive are in fact not harmful to the market. To prohibit such agreements would not be in line with the Chicagoan view.\footnote{276} In EU law the Chicagoans must thereby be seen as preferring effect assessments over object assessments.

The Chicagoans strive to not prohibit agreements that are actually not harming competition does not fall well with the reasoning about risk offences mentioned in section 3.2.2. A general prohibition of certain types of agreements excludes the possibility of a specific agreement actually not having a negative impact on competition. The exclusion of that possibility does, according to the Chicagoans, result in unnecessary market interventions that may even harm competition.\footnote{277}

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\begin{itemize}
\item \footnote{271}Robert Atkinson and David Autretesh \textit{Economic Doctrines and Approaches to Antitrust} [2011] ITIF, January, page 12.
\item \footnote{273}Robert Atkinson and David Autretesh \textit{Economic Doctrines and Approaches to Antitrust} [2011] ITIF, January, page 11.
\item \footnote{276}Robert Atkinson and David Autretesh \textit{Economic Doctrines and Approaches to Antitrust} [2011] ITIF, January, page 22.
\item \footnote{277}Robert Atkinson and David Autretesh \textit{Economic Doctrines and Approaches to Antitrust} [2011] ITIF, January, page 22.
\end{itemize}
5.2.4 The post-Chicago School

In the 1980’s and 1990’s a new, more liberal, doctrine emerged. Like the Chicago School the post-Chicago School has its origin in the neoclassical economic doctrine and thereby agrees that consumer welfare achieved by allocative efficiency is a rudimentary part of competition law.\textsuperscript{278} The post-Chicago doctrine does, however, differ from the Chicago School in aspects such as the “views of human nature, firm behavior, and judicial competence”.\textsuperscript{279} While the Chicagoans argue that markets are well-functioning and that the judiciary is not, the post-Chicagoans are inclined to argue a touch more of the opposite.\textsuperscript{280} The post-Chicago School does hence not have an equally blind faith in the markets own abilities as the Chicagoans do.

Followers of the post-Chicago School admit that there are market failures that do not necessarily heal themselves and that “distortions to competition made possible by market imperfections should prompt enforcement authorities to scrutinize a wider variety of conduct than Chicagoans would examine”.\textsuperscript{281} Post-Chicagoans also acknowledge the fact that market power can be a result of undertaking’s anti-competitive conduct.\textsuperscript{282} This is connected to post-Chicagoans believing that undertakings actually can “create or perpetuate market imperfections that indeed can seriously hamper competitive balance”.\textsuperscript{283} This means that the post-Chicago School includes a broader scope of conduct that can be considered as anti-competitive.

Unlike the Chicagoans almost complete lack of faith in judges’ ability to apply economic reasoning to antitrust\textsuperscript{284}, followers of the post-Chicago School have more

trust in the judiciary to “distinguish between competitive and anti-competitive behavior”. 285

In line with the reasoning above it hardly comes as a surprise that the post-Chicagoans acknowledge both per se prohibitions and the rule of reason as acceptable means for catching anti-competitive behavior. 286 The post-Chicago School, however, still derives from the neoclassical economics doctrine and restrictiveness with market interventions should thereby be held.

The liberal view of the post-Chicagoans is reflected in their position towards EU competition law. Based on what has been stated above it can be assumed that post-Chicagoans both approve of assessments under the object and effect box. Due to the fact that post-Chicagoans still are followers of the neoclassical school they can hardly approve of a too contextual approach to object restrictions; since a more contextual approach resembles somewhat of a truncated effect assessment (and thereby also a truncated rule of reason) it is unlikely that the post-Chicagoans would prefer such an approach before the more accurate full-blown effect assessment. However, EU competition policy today seems to assent more to the post-Chicago School – allowing both assessments of the object and effects of agreements - rather than to the Chicago School only permitting assessments under the effect box. 287

5.2.5 An example – GlaxoSmithKline

Before the discussion continues to a more general analysis of the object criterion an example will be provided to clarify the discussion about the schools of competition economics and also to clarify the connection to the objectives of EU competition law. To use an actual situation the case GlaxoSmithKline 288 will once again be of assistance. The case concerned agreements restricting parallel trade. Traditionally restrictions on parallel trade have been seen as falling within the object box. Restrictions on parallel trade are, for instance, in the Commission Regulation 330/2010 of 20 April 2010 on the

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application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices\textsuperscript{289} established to be a hardcore restriction.\textsuperscript{290} To treat restrictions on parallel trade as unequivocally obvious to restrict competition, to borrow the wordings from van Cleynenbreugel, is, however, maybe not in line with competition economics. The Chicagoans would probably argue that such a restriction should fall within the effect box, due to the fact that parallel trade still, under specific circumstances, can improve allocative efficiency. The post-Chicagoans would however not be as quick to judge, but after realizing that restrictions on parallel trade potentially can be beneficial to competition they would probably agree with the Chicagoans. If, for instance, different prices are set in different countries undertakings may be provided “the ability to locally react to the specific competitive conditions prevailing in different geographic regions” and the market would hence be positively affected by the restriction.\textsuperscript{291} To prohibit parallel trade by only looking at the type of the agreement would plainly be wrong according to the Chicagoans and probably also according to the post-Chicagoans.

In \textit{GlaxoSmithKline} the GC stated that restrictions on parallel trade should only fall within the object box “insofar as the agreement may be presumed to deprive final consumers of /…/advantages”.\textsuperscript{292} The CJEU on the other hand stated that “for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers [are] deprived of the advantages…”.\textsuperscript{293} Even if the ruling of the GC was deficient in other ways it was still more in line with competition economics than the ruling of the CJEU. Followers of the Chicago School and probably also followers of the post-Chicago School would agree that a more thorough assessment is needed where it is not obvious that competition will be harmed - even if the post-Chicagoans have a more relaxed standpoint in the question. The GC requiring “proof of the likely economic impact of the agreement” opposed by the CJEU thinking that “predicting the future in

\begin{footnotesize}
\begin{enumerate}
\item Commission Regulation 330/2010 of 20 April 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, Article 4b
\item Hans Zenger and Mike Walker, \textit{Theories of Harm in European Competition Law: A Progress Report} in Bourgeois, Waelbroeck (eds.), \textit{Ten Years of Effects-Based Approach in EU Competition Law} (1\textsuperscript{st} edn, Editions Juridiques Bruylant 2012) 197.
\item Case T-168/01 \textit{GlaxoSmithKline Services / Commission} [2006] ECR II-2969, para 121.
\item Joined Cases C-501/06, C-513/06 P, C-515/06 P, C-519/06 P \textit{GlaxoSmithKline Services and others / Commission and others} [2009] ECR I-9291, para 63.
\end{enumerate}
\end{footnotesize}
such a deterministic way is risky” implies that the GC advocated a more narrow scope of the object box and thereby fulfilled the wishes, at least, of the Chicagoans. The ruling of the CJEU has, however, been upheld in case law after GlaxoSmithKline and strengthens the fact that EU competition law lies closer to the post-Chicago School than to the Chicago School.

To suggest that the ruling of the CJEU in GlaxoSmithKline was purely based on economic considerations and hence consumer welfare is, however, maybe not the whole story. As noted in the beginning of the thesis (section 2.2.2) one of the most important objectives of EU competition law is single market integration. As Whish and Bailey observed; “nothing could be more obviously inimical to the goal of market integration than restrictions [on parallel trade]”. It can hence be assumed that the CJEU, in changing the verdict of the GC, based its decision partly on the objective of single market integration and not purely on economic factors.

However, the objective of consumer welfare is not excluded by a larger focus on single market integration. Barnard has stated that market integration and free trade opens up for undertakings specializing in fields were they can work most efficiently. The specialization leads to greater productivity and hence also to cheaper products and better choices. If supply and demand then can fall into balance with each other the allocative efficiency will be maximized and hence will also consumer welfare be maximized. In this way it can be argued that the objective of single market integration results in consumer welfare. According to this line of reasoning the judgment of CJEU was not at all contrary to competition economics, but only to the Chicagoans views on competition economics. This can be connected to the above mentioned statement made by Jacobs (section 5.2.1); that competition law cannot be determined purely by a single economic rule. The fact that the EU Courts also are putting focus on other objectives of competition law than just purely economic ones strengthens the fact that EU competition law today falls closer to the post-Chicago School than the Chicago School,

296 Richard Whish and David Bailey, Competition Law (7th edn, Oxford University Press 2012) 123.
even if, at least in the case of *GlaxoSmithKline*, it can be argued that allocative efficiency still was achieved through the judgment.²⁹⁸

5.3 The scope of the object box

An interesting question connected to the discussion regarding different schools of competition economics is how they correlate with the use of the object and effect boxes, and especially how different approaches within the object box are cohesive with the economic doctrines. In the following, an examination will therefore be made of how the different object approaches correlates with competition economics. The sections (5.3.1-5.3.3) will also show other advantages and disadvantages that should be taken into account when determining which approach that is the best option in the EU. The discussion will be concluded with a more general discussion regarding the scope of the object box and also some personal opinions in the matter (5.3.4).

5.3.1 Advantages and disadvantages with the textual approach

The textual approach is the narrowest interpretation of the object box and thereby the approach that probably rhymes best with competition economics. The post-Chicago School agrees with some intervention by the judiciary, even if the interventions should be made restrictively. The post-Chicagoans, therefore, most likely agree that agreements, which are extremely likely to have restrictive effects on competition, can be allowed to take the short-cut in Article 101(1) TFEU and thereby directly fall into the object box.

An example of restrictions that, also according to competition economics, should be allowed an object assessment, preferably by using the textual approach, are price cartels. Price cartels are extremely likely to produce anti-competitive effects by foreclosing new market entrants and thereby reducing the allocative efficiency in the markets. Price cartels can, however, also be argued to have their place in the object box

²⁹⁸ If the objective sought to attain instead would be the protection of competitors it is harder to argue that consumer welfare is upheld. On the contrary, such an objective may have more focus on equity than on economic efficiency. The Chicago School is more focused on dismantling barriers to entry a market than to protect the competitors within the market. A decision based purely on the objective to protect competitors would hence probably fall far from the Chicago School and thereby fall closer to the more liberal post-Chicago School. It should also be noted that it is unclear how much weight that has, and will be, given to the objective to protect competitors in EU today. See Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 21-23.
due to them being so hard to detect. The element of deterrence, discussed in section 3.2.2 concerning risk offences, becomes of a lot greater significance with types of agreements that are easily hidden from the law enforcers. It is more likely that undertakings will restrain from anti-competitive behavior if it is certain that sanctions will be enforced if the undertakings are caught. The textual approach, with its more shallow and formalistic assessment, hence includes an element of deterrence that can be of use in these kinds of situations. Bailey confirms this line of reasoning and states that “[t]he deterrent effect of competition law is /…/ increased by the existence of predictable object-based infringements attracting severe sanctions”.

The element of deterrence is thereby also connected to legal certainty, which is one of the major advantages with using the textual approach (see below).

The narrow scope of the object box should, according to the textual approach, not include agreements which can be efficiency enhancing if competition economics are taken into consideration. For example, restrictions on parallel trade, as mentioned above (5.2.5), should thereby generally be left to an effect assessment, according to competition economics. Regarding the element of deterrence, it can here be mentioned that restrictions on parallel trade often are contractual and hence not as hard to detect as price cartels. The element of deterrence in the object assessment is therefore not needed to the same extent in similar cases and it is therefore not as important that the clear textual approach is used in those kinds of situations.

Since certain types of agreements, potentially falling within the object box, may have efficiency enhancing effects, determining which restrictions that should be falling within the object box should be made with caution. If the textual approach is used agreements restrictive by their content will almost instantly fall within the object box, with minor possibilities to be justified under Article 101(3) TFEU. It is thereby important to keep a narrow scope of the object box if the textual approach is the prevailing method of assessment.

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301 Even if competition economics does not require restrictions on parallel trade to fall within a clearly defined object box with certainty, there are other objectives that might require this.
Apart from the advantage of, at least to a rather far extent, correlating with competition economics there are also some other, more practical, advantages (and disadvantages) with the textual approach. The textual approach is simple and clear and provides predictability of legal consequences for different types of conduct.\textsuperscript{302} As already established, this is specifically important in cases where deterrence is necessary for effective enforcement. Even if the list of obvious restrictions cannot be precisely determined they are still specific enough to create legal certainty for several types of agreements. Advocate General Kokott has confirmed this and stated that obvious restrictions “creates legal certainty and allows all market participants to adapt their conduct accordingly”.\textsuperscript{303} A higher degree of legal certainty also leaves room for more private enforcement. Another advantage with the textual approach is that it simplifies the work of the enforcers and thereby reduces procedural costs.\textsuperscript{304} However, while narrowing down the object box the effect box grows. The effect assessments are long and expensive and the textual approach can thereby be argued to, indirectly, lead to consequences that are not cost-efficient.

5.3.2 Advantages and disadvantages with the contextual approach

The contextual approach widens the scope of the object box and thereby moves away from the wishes of the Chicagoans, who advocate that the object box should be small if not non-existing. The contextual approach allows the judiciary to make some form of a truncated effect assessment. It is hard to see how this can be in line with competition economics; if an analysis of the effects of an agreement is required the analysis should be full blown and not stop at any arbitrary place. Even if the post-Chicagoans are slightly more liberal in their views towards the competence of the judiciary it is hard to see how the contextual approach can be in line with the school. It is, however, possible that the post-Chicagoans are more lenient to accept the contextual approach when argued that the contextual approach is providing more accurate results than the textual approach and that it has the potential to exclude sanctions for agreements that, through the textual approach, would have been falling under the object box.

\textsuperscript{302} Case C-373/14 P, Toshiba Corporation v European Commission, Opinion by AG Wathelet, para 58.
\textsuperscript{303} Case C-8/08 T-Mobile Netherlands and others [2009] ECR I-4529, Opinion by AG Kokott, para 43.
According to competition economics it is important that the law enforcer only intervene where actually necessary to avoid anti-competitive practices. This means that it is better that an efficiency enhancing agreement that, by a look of its content seems to fall straight into the object box, instead is assessed with the contextual approach and hence get the possibility to fall outside the scope of Article 101(1) TFEU. However, the problem still remains; it might be outside the competence of the judiciary to decide which and how the context of an agreement should be taken into consideration in assessments under Article 101(1) TFEU. Since the contextual approach does not include an analysis of the actual effects of agreements it is thereby hardly in line with the Chicago School. Even if the post-Chicagoans have slightly more faith in the authorities to make correct assumptions of the likelihood of an agreement harming competition it is still hard to tell how far of a contextual approach they accept.

There are also some other disadvantages with the contextual approach than that it might not be in line with competition economics. It is obvious that the contextual approach, being more of a case-by-case assessment, provides less legal certainty than the textual approach. Another disadvantage with the more in-depth contextual approach is that it also is more expensive and time-consuming than the textual approach.

However, the contextual approach is the one most used in case law and it thereby has to have at least some advantages. The largest advantage with the contextual approach is that it widens the scope of the object box and thereby reduces the amount of effect assessments. The enforcement costs can therefore be assumed to decrease by using the contextual approach, allowing more agreements to be assessed under the object box instead of under the effect box. The contextual approach also has the advantage of delivering more accurate results than the textual approach in certain cases. Unlike the textual approach, the contextual approach can, through looking at the context of an agreement, even find agreements to fall outside the scope of the object box. Competition economics are probably supporting the fact that agreements get the possibility to completely be excluded from application of Article 101(1) TFEU and people that are less skeptic towards the judiciary probably also support the fact that the context is examined for more accurate results in individual cases.

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305 Some guidance of which external circumstances that can be taken into consideration exists, though, and within certain limits there is hence at least some legal certainty.

5.3.3 Advantages and disadvantages with the extended contextual approach

It is hard to find the extended contextual approach to be in line with competition economics. Even if the post-Chicago School allows for some intervention of authorities the post-Chicagoans will probably not agree with the enforcers doing a far-reaching truncated effect assessment, taking as much external circumstances into consideration as they please.

The extended contextual approach reduces legal certainty even more than the contextual approach. Enforcement costs for assessing an agreement with the extended contextual approach, taking more details into consideration, are higher than the assessment costs for the contextual approach. The extended contextual approach has the ability to transfer agreements, which would normally be examined within the effect box, to the object box. This means that undertakings are deprived of the more in-depth and accurate effect assessment.

Since the lines between the object and effect boxes are blurred when using the extended contextual approach, the enforcer also gets the possibility to avoid the criterion of appreciability in the effect assessment by simply doing an object assessment instead. While it is sufficient for an agreement to not have anti-competitive effects for falling outside the effect box there is a need to show pro-competitive effects if the agreement should be justified through Article 101(3) TFEU after it has been caught within the object box. The extended contextual approach does hence not only contradict competition economics but may also amount to over-enforcement and incorrect rulings.

5.3.4 A collected assessment

This section will include a collected assessment of the discussions above (2.1-5.3.4). The section will also function as somewhat of a summary. It will weigh the different aspects against each other to highlight the difficulties, not only to determine the current scope of the object box, but even more to decide the best possible interpretation of the object box in EU law. Some personal thoughts in the matter will also be provided.

To establish whether the current interpretation of Article 101(1) TFEU is in line with competition economics is hard. At the same time as different schools of economics

307 Compare with Case C-32/11 Allianz Hungária Biztosító and others [2013] ECLI:EU:C:2013:160.
advocates different lines of interpretations the different approaches to the object box also vary in result; legal, economic and political facts are variously affected. Without knowing which specific approach that is to be compared and to which school of competition economics the comparison is to be made, no definite conclusions can be held. What can be concluded from above is, however, that the contextual approach is prevailing in case law and that there are indications that the approach is expanding, and so also the object box. A larger object box will result in less agreements falling within the effect box and more, potentially also efficiency enhancing, agreements falling within the object box. Such a development of Article 101(1) TFEU is not in line with the Chicago School and hardly in line with the post-Chicago School either.

To solve the problems and unclarities of the scope of the object box, guidance may be found in the US system, with its per se prohibition and rule of reason. For the EU system to correspond to the US structure it would, as seen in Chapter 4, be constituted of a narrow object box assessed under the textual approach and an expanded effect box. Advocate General Wahl would probably approve of such a division, having stated that “[o]nly conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should /…/ be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition”. A US influenced EU system would be better in line with competition economics and, as stated in the beginning of this chapter, there are those who believe that competition law only should be ruled by economics. An attempt to copy the US system to the EU would, however, probably not be the best solution in the EU. Article 101(3) TFEU remains as a possibility to exempt agreements, and to say that the object box should be treated in the exact same way as the per se prohibitions would thereby probably be unnecessary. It should also be noted that to compare the schools of competition economics with the EU system is not as simple as it first seems. Even if the Chicago School does not accept per se prohibitions it might be easier on the object box due to the possibility to justify agreements under Article 101(3) TFEU.

There is also another dimension separating the EU and US systems that should be held in mind. While the objectives of the US rules are allowed to have a larger focus on competition economics, the structure of the EU as an institution requires other interests to be considered. In other words, European competition policy has as its “primary aim /.../ that of closer integration” while “free enterprise and a competitive business ethos lay at the heart of the US policy”.\(^{309}\) The fact that the EU has a vast focus on single market integration means that “decisions have sometimes been taken prohibiting behavior which a competition authority elsewhere, un Concerned with single market considerations, would not have reached”.\(^{310}\) It would hence be remarkable if the EU copied the US system, not giving single market integration any significance.

There are, however, many advantages with having a clearly distinguishable narrow object box, assessed with the textual approach, supplementing a wider effect box. An unclear division between the object and effect boxes results in reduced legal certainty. Such uncertainties lead to private enforcement being a less popular option. Legal certainty grows, not only with the line between the object and effect criteria being clarified, but also with the reduction of the object box. A clear and narrow set of obvious restrictions that can be caught through the textual approach raises legal certainty, raises the interest in private enforcement, and falls more in line with competition economics. More private enforcement would also reasonably reduce the amount of public enforcement.

However, to only catch agreements within the object box through the textual approach raises the costs of the increased amount of effect assessments that will appear as consequence of the smaller object box. By only looking at the content of the agreement there is also a possibility that agreements that, by an examination of their context, easily would fall outside of the object box or even outside the entire Article 101 TFEU.

The advantages of reducing the amount of lengthy and costly effect assessments increase with the level of circumstantial matters that are allowed to consider under a contextual approach. In the same manner the legal certainty is, however, reduced with a far-reaching contextual approach. This means that to combine an extended contextual approach with the effect box cannot be an option. A too far-reaching extended


contextual approach also blurs the line between the object and effect box. It should then be remembered that the actual wording in Article 101(1) TFEU requires a distinction between the object and effect criteria.\textsuperscript{311}

Due to all the three approaches to the object box, that have been mentioned above, have both positive and negative effects it is hard to determine how the scope of the object box best should be determined. A balancing of different interests, becoming more of a political than a purely legal question, has to be made to come to any conclusion. Since any clear answers cannot be given based on the various sources of law that have been discussed in this thesis, a personal view on the matter will be made in the following.

To begin with it only a short note will be made regarding the recently used extended contextual approach. The range of negative effects arising from the use of the approach, such as it contradicting competition economics and drastically reducing legal certainty, has already been established. To widen the scope of the object box and blurring the line between the object and effect boxes through opening up for a highly inconsistent and fluctuant assessment of agreements should not be seen as an option.

As established above there are instead more apparent advantages with both the textual and the contextual approach. It can thereby be questioned whether scholars such as van Cleynenbreugel and Advocate General Wathelet might have a point when advocating some form of two-staged assessment within the object box. A two-staged object assessment has already been presented in Chapter 3. In line with what van Cleynenbreugel argued, an examination of the content should then first be made to see if the agreement includes an obvious object restriction immediately placing the agreement within the object box. If no obvious object restrictions are found the assessment should continue to examine some basic circumstances around the agreement. In this second stage the agreement can then be found to fall either within the object box, fall completely outside Article 101(1) TFEU, or be found to move on the an examination of its effects. In this way the advantages with both the textual approach and the contextual approach are received; a quite high level of legal certainty is kept in most cases, and the enforcement costs are acceptable due to the object box not being narrowed down all too much. To return to the discussion regarding the US system, the

\textsuperscript{311} This means that the Chicagoans wishes to only have an effect box in Article 101(1) TFEU cannot be fulfilled through the current EU system.
two-staged method added to the effect assessment would also make the EU have three possible methods of assessment. Since the US courts seemed to believe that a third approach to Section 1 of the Sherman Act, in form of the truncated rule of reason, was needed, it is not impossible to argue that similar reasoning is required in the EU (even if Article 101(3) TFEU still remains in the EU). It is possible that a third option is needed in the EU for situations that are not as black and white as the object and effect criteria sometimes seem to be.

To clearly state that a two-stage division is the best method of assessment is, however, not as easy as it first seems. To understand the practical consequences of such a division is not only difficult, but also outside the scope of this thesis. Another element that should be held in mind regarding the two-folded division is that not only the advantages, but also the disadvantages with both approaches, will appear with their application. It can also be questioned whether a three-stage division of the object and effect boxes would be used as an excuse to transfer agreements previously requiring an effect assessment into the object box. To say the least, the scope of the object box is a confusing and difficult matter.

6 Conclusion

A comparison of three different approaches to the object box has now been described. The approaches have been explained and discussions regarding their current status in the EU have also been made. The object and effect boxes seem to be “identified on the basis of a ‘sliding scale’ assessment of the content, context and effects of [an] agreement”. It has been stated that while the textual approach perhaps is the most reasonable approach it has been established that the contextual approach is the one most used in case law and the extended contextual approach is the most recently used. To further analyze which approach that, despite its current status, should be the prevailing method of choice some different aspects has been presented. A presentation and comparison has not only been made with the US system, but also with competition

312 It can also be argued that this three-stage division is already used in case law, but that it is just not expressed in an as apparent way as the two scholars have explained it.
314 Especially when complemented by the contextual approach.
economics in general and with specific objectives of competition law. In addition has also aspects such as legal certainty, enforcement costs, the possibility of public and private enforcement and similar been discussed.

In determining which approach that is most appropriate to use in the EU some personal views were shed on the matter. After considering of all the gathered information on the subject it seemed as if the textual approach complemented by a defined contextual approach would be the best solution in the EU. A clear standpoint was, however, not taken due to the difficulties in defining all the possible practical effects of such an interpretation of the object box. It was instead concluded that establishing the scope of the object box comes down to a balance of differently important interests and that the balancing turns into somewhat of a political question and not only a legal or economic consideration. When setting the scope of the object box it should therefore be held in mind that “there is an inherent political dimension to competition law, even when analysed through an economic perspective”. 315 Even if it is difficult to take a standpoint in the confused area of the object box there is, however, one thing that is clear. Uncertainties are never favorable in law and, as stated in Chapter 1, clarification of the distinction between the object and effect box is much needed. 316

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