NON-COMPETE CLAUSES AS ANCILLARY RESTRAINTS

Are non-compete clauses with an indefinite duration always illegal?

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Summary

The rules governing non-compete clauses in EU law are unclear, yet agreements including non-compete clauses are many times necessary to ensure that a legitimate agreement can be justified. The thesis examines the EU regulation on non-compete clauses with a particular focus on their duration. Firstly, the scope of restrictions by object in Article 101(1) is discussed to examine the legal framework in which the most restrictive agreements are assessed. The scope is defined in relation to restrictions by effect and it is concluded that the line between restrictions by object and restrictions by effect is not clear. The application of Article 101(1) therefore needs to be made cautiously, especially regarding the rules of the burden of proof. Secondly, the case law regarding objectively justifiable restrictions is examined. It is found that arguments of necessity can be used in many situations and that restrictions necessary for the implementation of an overall legitimate agreement are allowed. A similar test is used when the doctrine of ancillarity is applied. The test is comprised of three criteria: direct relation, objective necessity and proportionality to a main legitimate agreement. The doctrine of ancillarity is examined in relation to both Article 101 and merger situations and it is found that the same, broad ancillarity test is applied regardless of the nature of the case. The final part of the thesis contains a study of non-compete clauses, which is based on the findings of the previous chapters. These clauses are examined from both Article 101(1) and merger perspectives. It is found that the doctrine of ancillarity is further clarified in the Commission’s Ancillary Restraints Notice, which includes concrete provisions regarding the duration of the non-compete clauses. The main provision discussed in this part of the study is the Commission’s safe-harbour rule, which permits non-compete clauses with the duration of three years if such clauses are included in merger agreements where both goodwill and know-how is transferred. The Commission’s Notice is not legally binding on the EU Courts, however, it can provide certain guidance in cases where other EU merger rules are not applicable. Yet, if a conflict between the Notice and the general doctrine of ancillarity arises, the principles established through the doctrine of ancillarity prevail. Finally, it is concluded that the doctrine of ancillarity can justify even time-unlimited non-compete clauses, although, this may only be the case when such clauses are truly necessary and proportionate to the main legitimate agreement. The nature of the product and the conditions on the relevant market play the key role in this assessment.
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Preface

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Dagne Sabockyte
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AG</td>
<td>Advocate General</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CompLRev</td>
<td>Competition Law Review</td>
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<tr>
<td>DG GROW</td>
<td>European Commission’s Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs</td>
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<td>GC</td>
<td>General Court</td>
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<tr>
<td>EEA</td>
<td>European Economic Area</td>
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<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>E.C.L.R</td>
<td>European Competition Law Review</td>
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<tr>
<td>ERT</td>
<td>Europarättslig tidskrift</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<td>EUMR</td>
<td>European Union Merger Regulation</td>
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<td>Fordham Int’l LJ</td>
<td>Fordham International Law Journal</td>
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<td>OJ</td>
<td>Official Journal of the European Union</td>
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<td>P.Wms.</td>
<td>Peere Williams' Reports</td>
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<tr>
<td>TFEU</td>
<td>Treaty of the Functioning of the European Union</td>
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<td>VBER</td>
<td>Vertical Block Exemption Regulation</td>
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Chapter 1: Introduction

1.1 Background

“A bond or promise to restrain oneself from trading [...], if made upon a reasonable consideration, is good. Secus if it be on no reasonable consideration, or to restrain a man from trading at all.”

Cartels are prohibited by the laws of competition, because economic evidence shows that they have a detrimental effect on the price-setting mechanisms of the market. Yet, the history of the use of non-compete clauses is long and the courts have been justifying such clauses for hundreds of years. This apparent conflict was in no way solved by the laws of the European Union, even though the establishment of a well-functioning single market was the main purpose of its creation. Today, the question of what constitutes a legal non-compete clause has still not received a clear answer. At the same time, due to an excessive amount of inquiries from the companies, the Commission has been relieved from its former duty to assess such clauses in concentration cases. The question of what constitutes a lawful non-compete clause is therefore of an even higher relevance today.

Looking at the issue from the perspective of an undertaking, this creates serious practical problems. The companies cannot foresee whether the action they wish to take will later result in fines for not complying with the competition rules. The risk of fines, that can amount to 10% of the entire yearly turnover of the company in question, and possible costs for legal assistance in such cases is worrisome for most businesses. This uncertainty can therefore lead to both increased negotiation costs and, in some cases, also a reluctance to enter agreements that actually do not violate competition laws. Therefore, the lack of clear rules governing non-compete clauses does not only slow down the decision-making process for the contracting parties, but it also hampers the market. However, there are those who are willing to take the risk and many are doing so righteously. Indeed, not all non-compete clauses are detrimental to

1 Mitchel v. Reynolds, [1711] 1 P.Wms. 181, 24 Eng.Rep. 347. In this US case from 1711, a non-compete clause prohibiting the vendor of a bakery to compete with the purchaser for a period of five years was found to be reasonable and was therefore permitted.

2 Ibid.
competition. If the purpose of the non-compete clause is legitimate and the non-compete clause is necessary to achieve that purpose, no Article 101 TFEU concerns are raised.³

Non-compete clauses are common in sale and purchase agreements and cooperation agreements, in which the contracting parties normally restrict their actions through such clauses for a limited period of time. Non-compete clauses in sale and purchase agreements have the purpose to protect the value of the transferred business. In cooperation agreements, the purpose is to ensure that the cooperation can function without the parents inappropriately using the assets belonging to the cooperation. The Commission’s interpretation of what is allowed is based on, *inter alia*, fairly strict time limits regarding the duration of the clause, which highlights yet another implication connected to this issue – when caught by the prohibition in Article 101 TFEU, non-compete clauses are usually classified as cartel agreements restricting competition by object, and the requirement to prove the actual detrimental effects on competition is therefore excluded. The consequences of the classification of a non-compete clause can thus vary significantly. The European Court of Justice (CJEU hereinafter) has on several occasions explained that the object assessment needs to take into consideration legal and economic context of an alleged restriction. The Commission’s application of the relevant rules appears to be somewhat contradictory to this case law, which adds yet another element to the already complex legal frame.

Thus, the current legal status of non-compete clauses in EU competition law gives rise to several conflicts that all contribute to uncertainty. Since Article 101 TFEU and the principles connected to it are applied by the national courts in their entirety, the above-mentioned problems are also of the utmost relevance for the judicial systems and the national markets of the Member States. This thesis will therefore examine the current regulation of non-compete clauses on the EU level and, if necessary, draw de lege ferenda conclusions, with the aim to provide guidance for those affected by this regulation.

### 1.2 Purpose and research questions

The purpose of this thesis is to study the EU competition law applicable on non-compete clauses, particularly with regard to their duration. The aim is thus to make an analysis of the legal framework in which non-compete clauses are assessed, to further study their objective

and to examine the consequences that the legal framework might have for parties entering an agreement containing a non-compete clause. In particular, this paper will focus on the relationship between the ancillary restraints doctrine and restrictions by object under Article 101 TFEU on the one hand, and ancillarity related to the EU merger rules on the other. The doctrine of ancillarity therefore plays a central role. In order to achieve these aims, the thesis will be based on the following questions:

1. What is the scope of restriction by object in Article 101?
2. What is the application method of the ancillary restraints doctrine?
3. How are non-compete clauses, in particular with regard to their duration, assessed under EU competition law?

1.3 Method and materials

The legal dogmatic method is used as the basis for this study. As the aim of the thesis is to examine the regulation of non-compete clauses in EU law, the legal dogmatic method is applied in compliance with the principles of EU law and the hierarchy of its legal sources. Thus, primary legislation, comprised of the Treaties of the EU, the Charter of Fundamental Rights of the EU and the principles established by the EU Courts is placed on the highest hierarchical level. Since secondary legislation and soft law are deducted from these primary sources, all secondary sources and the relevant soft law are interpreted in conformity with the primary legislation.

The basic legal ground of this study is Article 101 TFEU. However, it is a broad and complex provision that requires further precision. Thus, guidance is primarily sought in the case law

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of the EU Courts. Judgments of the CJEU are of the highest rank, although judgments of the General Court (GC hereinafter) also play an important role, especially when there is no precedent of the CJEU, or when the GC’s rulings are cited by the CJEU.

The main interpretation method applied by the EU Courts is the teleological method, which has the predominant role in this paper.⁹ As will be seen below, the discussion regarding the necessity criterion in the ancillary restraints doctrine – one of the core discussions of this thesis – is of an effet utile nature.¹⁰ However, the teleological method, although being the main one in this analysis, is not the only method used in the study below. Both analogies and the systematic method are used as well, especially when examining the principle of ancillarity and the duration of non-compete clauses. A contrario interpretations are, however, generally not made in the reasoning of the EU Courts, which will be followed throughout this paper.¹¹ Moreover, this thesis recognises the influence of the economic theory on the competition law, even though no detailed analysis of such a theory is made here. It comes into play through several levels of EU competition law – firstly, through Article 101(1), and secondly, through the discretion of the Commission in competition cases, which somewhat limits the scope of what the EU Courts examine. Thus, when a decision of the Commission is appealed, the EU Courts adhere to the economic assessment of the Commission and only examine

“whether the evidence relied on is factually accurate, reliable and consistent [,] whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”¹²

Following the legal hierarchy mentioned above, the guidelines, notices and decisions of the Commission are consulted when sufficient answers are not provided by the primary legislation or by the case law of the EU Courts. The Commission’s Article 101(3) Guidelines¹³ and its Ancillary Restraints Notice¹⁴ are of a central importance for the study of

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⁹ Hettne & Otken Eriksson, p. 168.
¹¹ Hettne & Otken Eriksson, , p.122 and 165.
¹⁴ Commission Notice on restrictions directly related and necessary to concentrations, 2005, OJ C 56/24.
the non-compete regulation. Even though these documents are not legally binding on the EU Courts, they are of a significant practical importance as concrete examples of the application of primary legislation. Moreover, the Commission itself cannot depart from its guidelines and notices if such application disadvantages the parties relying on such published norms.15

When dealing with the Commission’s decisions, several conditions are important to bear in mind. Firstly, the Commission’s decisions are fully binding on the parties that they address, but they do not have the same legal authority as the case law of the EU Courts.16 Moreover, the Commission and the EU Courts do not have the exact same functions. The EU Courts’ task is to interpret the EU treaties, to rule in a just way and to fill out the gaps in the legislation, while preserving the general principles of the EU law and creating a sustainable legal development of the European Union at the same time.17 In addition, the Courts also aim to facilitate the creation of a functioning single market, even though this is not often explicitly expressed.18 The Commission, on the other hand, is often described as “the guardian of the Treaty”19 or “the executive arm of the EU”.20 The Commission’s primary task is not to act as the legislator, but to enforce the EU competition rules, which it does by obliging undertakings that are in breach of these rules to bring the infringement to an end and by issuing fines for such infringements.21 Thus, when studying the case law of the EU Courts and the decisions of the Commission, the differences in their roles and competences should be kept in mind, as they essentially set the frame for the primary focus of their decisions or judgments and might also influence the thoroughness of the reasoning.

Several decisions of the Commission within the field of mergers are examined below. In these cases in particular, the Commission’s main task is not to examine the compatibility of each restrictive clause with the competition rules, but to ensure that the competition in the internal

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15 Such conduct might be against the principle of equal treatment or the protection of legitimate expectations, see Case C-464/09 P, *Holland Malt BV v Commission*, EU:C:2010:733, para.46. See also Bernitz & Kjellgren, p.181.
16 Article 288.4 TFEU. See also Bernitz & Kjellgren, p.58.
18 Korling & Zamboni, p.122.
market is not distorted by large concentrations of undertakings, pursuant to the EUMR\textsuperscript{22} and the general principles of EU competition law.\textsuperscript{23} Besides, the fact that the Commission no longer examines ancillary restraints when assessing mergers, limits the study of the Commission’s decisions below to decisions issued before the introduction of the self-assessment procedure.\textsuperscript{24}

The legal doctrine is of a considerable importance for this thesis as well. It is consulted on a fairly broad scale and assists in not only the categorisation of the rules, but also in establishing \textit{de lege lata}. Moreover, since one of the aims of this thesis is to provide guidance to those affected by the regulation of non-compete clauses, practical aspects of the law are taken into consideration. Thus, apart from the writings of the legal scholars, some articles by legal professionals are used to include the practical perspective. Finally, the analysis below includes references to a few national cases and a report, which serve as examples of how the legal framework is being interpreted in practice. An attempt is thus made to give the analysis a certain depth as well as to give the conclusion a practical relevance.

1.4 Scope and delimitations

To preserve the focus on the research questions presented in section 1.2 above, this thesis does not attempt to conduct an exhaustive analysis of all the relevant aspects of EU competition law that are connected to the regulation of the ancillary restraints doctrine and the non-compete clauses. Instead, those aspects that are relevant for the understanding of the legal framework will be included to the extent they are necessary for a comprehensive analysis of the non-compete regulation. The reader is thus presumed to have some previous knowledge of EU competition law.

The border of restriction by object in Article 101(1) is one of the core aspects studied in this paper. Other aspects of the application of Article 101(1), such as the definition of the notions of undertakings or agreements, are not researched further. Restrictions by effect are only touched upon to define the object box and to highlight the consequences of classifying a

\textsuperscript{23} EUMR, Recital 2.
\textsuperscript{24} Self-assessment is examined further in section 4.2.1.1 below.
restriction as a restriction by object.25 Similarly, the burden of proof in relation to the application of Article 101(3) is studied only to clarify the application method of the ancillary restraints doctrine. Other Article 101(3) aspects are left outside of the scope of this paper. Studies of the de minimis doctrine or the effect on trade between the Member States are excluded as well. The fact that EU competition law has substantial effects on national competition laws is recognised, but these effects are not researched further. The thesis also examines certain parts of the EU merger regulation, however, only to the extent they are relevant for the study of the ancillary restraints doctrine in the merger area. Other merger-related discussions, such as e.g. those regarding the community dimension of a concentration, are left out.

Regarding the non-compete clauses, the focus is placed on the assessment of their ancillarity and their duration. The geographical and product scopes of such clauses are not examined further. They are, however, touched upon briefly in cases where they influence the ancillarity or the duration of a non-compete clause. As the focus is placed on agreements between undertakings, labour law aspects are excluded. Finally, the regulation of non-compete clauses in joint venture agreements and vertical restraints is examined as well, although this examination is strictly limited to the allowed duration of such clauses. No attempts are made to conduct a complete analysis of these clauses. Instead, the aim is to make a comparison of the allowed duration periods between non-compete clauses in joint ventures and vertical restraints on the one hand and the non-compete clauses in pure acquisition situations on the other. By studying the allowed duration of similar restrictions, an attempt is made to highlight the legal context in which the non-compete clauses exist.

1.5 Outline

Chapters 2 and 3 provide the basis for the last chapters of this thesis. Chapter 2 contains a study of the scope of restrictions by object. The focus is placed on the definition of restrictions by object. Chapter 2 also includes an examination of restrictions that are considered to be justifiable because they are necessary for pro-competitive agreements.

Chapter 3 contains a fairly broad examination of the ancillary restraints doctrine, including its developments, its application method in both merger and non-merger situations, as well as its

25 The term "object box" is used by Prof.Richard Whish to illustrate the scope of restrictions by object in Article 101(1), as opposed to restrictions by effect (the "effect box"), or conduct that is not prohibited by Article 101 at all. See Whish & Bailey, p.123 et seq. This terminology is used in the study below as well, however, no attempts are made to fully base the thesis on Prof.Whish’s other terminology and/or methodology.
systematic placement in the existing legal framework. Based on the findings of these two chapters, a study of non-compete clauses and their legitimate duration is made in Chapter 4. Even though some conclusions are drawn in each of the chapters of the thesis, the final conclusions are presented in Chapter 5.
Chapter 2: The scope of restriction by object

2.1 Introduction

According to the economic theory, certain agreements are very likely to have harmful effects on competition. This is the case with cartels, which are presumed to push the prices upwards to the detriment of the consumers.\(^\text{26}\) When assessed independently, agreements not to compete are classified as cartels, \(i.e.,\) agreements that are so likely to harm the competition that they should be prohibited regardless of whether they actually produce detrimental effects on competition or not.\(^\text{27}\) However, when such conditions are not the main purpose of the agreement, clauses obliging the parties not to compete with each other may be allowed. This will be examined in detail below, but first, to give the study of non-compete agreements a proper basis, the scope of restrictions by object in Article 101 will be defined.

2.2 Article 101 and restriction of competition

Article 101 TFEU is one of the cornerstones of EU competition law. It prohibits all agreements that have as their object or effect the prevention, restriction or distortion of competition, thus aiming to ensure a “proper functioning of normal competition” in the EU.\(^\text{28}\)

The aims of Article 101, and EU competition law in general, are to enhance consumer welfare and to ensure an efficient allocation of the resources within the EU, which is said to be achieved by the creation of an open single market.\(^\text{29}\) Apart from protecting the consumers, Article 101 also aims at protecting the structure of the market and the competition \(\textit{as such}.\)\(^\text{30}\) However, the EU Courts may consider other objectives of the EU when judging in competition cases as well.\(^\text{31}\)

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\(^\text{26}\) Hettne & Otkén Eriksson, p.123.
\(^\text{27}\) See, \(e.g.,\) Case C-209/07 \textit{Competition Authority v Beef Industry Development Society Ltd}, EU:C:2008:643.
\(^\text{28}\) \textit{Cartes Bancaires}, para.58.
\(^\text{29}\) Article 101(3) Guidelines, para.13.
\(^\text{30}\) Case C-8/08 \textit{T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit}, EU:C:2009:343, para 28; see also the Opinion of Advocate General Kokott in the same case, EU:C:2009:110, para. 58.
Article 101 is based on the principle that an economic operator must determine the policy which he or she intends to adopt on the common market independently.\textsuperscript{32} It excludes unilateral conduct, but has a wide scope of application regarding the types of coordinated behaviour of undertakings.\textsuperscript{33} Thus, 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 common market are prohibited.\textsuperscript{34} The coordination does not need to result in a change of behaviour for more than one party involved. Neither does the Article require the coordination to be in the interest of \textit{all} the coordinating undertakings.\textsuperscript{35} Similarly, the terms “undertaking” and “coordination” are defined in a wide sense.\textsuperscript{36}

Whether or not a restriction falls within the Article 101(1) prohibition is established by assessing its influence on the competition in the common market, \textit{i.e.}, its \textit{object} or \textit{effect}. The “or” in the Article provision suggests that these two notions are alternative, which has been settled case law since 1966 and the case \textit{Société Technique Minière}.\textsuperscript{37} It is therefore sufficient that the prevention, restriction or distortion of the competition is \textit{either} an object \textit{or} an effect of a given agreement. The consequence of establishing a restriction – regardless of whether it is a restriction by object or a restriction by effect – is that the agreement becomes void \textit{ex lege} and that no prior decision to that effect is needed.\textsuperscript{38}

2.3 Restrictions by object

In the \textit{BIDS} judgment, the CJEU explained that some restrictions are so injurious to the proper functioning of competition that they are considered harmful by their very nature.\textsuperscript{39} Restrictions by object are simply presumed to be anti-competitive – a presumption that is based on experience, which shows that some restrictions are so likely to produce negative effects on the market and jeopardise the objectives of the EU competition rules that they

\textsuperscript{33} Article 101(3) Guidelines, para.14.
\textsuperscript{34} The notion “restriction” will be used for “prevention, restriction or distortion of competition” in the following text.
\textsuperscript{35} Article 101(3) Guidelines, para.15.
\textsuperscript{36} The notion “undertaking” is analysed in Whish & Bailey, p.85. For an analysis of “agreements, decisions and concerted practices”, see Whish & Bailey, p.103.
\textsuperscript{38} Council Regulation 1/2003, Article 1.
\textsuperscript{39} Case C-209/07 \textit{Competition Authority v Beef Industry Development Society Ltd}, EU:C:2008:643, (\textit{BIDS}), para.17.
should be prohibited.\textsuperscript{40} No actual restrictive effects need to be shown in object cases.\textsuperscript{41} Advocate General Kokott has compared restrictions by object to the prohibition to drive a vehicle under the influence of alcohol. Even if no other person using the road is endangered in a particular case, a person driving under the influence is liable to a criminal or an administrative penalty.\textsuperscript{42} The same mind-set is applied to restrictions by object. The advantage of this approach is the cost-efficiency of the procedure and the legal certainty for the market players,\textsuperscript{43} even though the latter has arguably not yet been achieved.\textsuperscript{44}

Article 101(1)(a)-(e) provides a list of conduct that is considered to be particularly restrictive. However, the list is not exhaustive. An individual assessment of the circumstances surrounding the alleged restriction needs to be made in every case.\textsuperscript{45}

The Commission has explained that all allocations of customers or geographic or product markets that take place in the context of a pure market sharing agreement between competitors are restrictions by object, as long as there is no link between the restriction and a wider cooperation between the contracting parties.\textsuperscript{46} This is however only one definition of what a restriction by object is. Many scholars have attempted to define restriction by object and some claim that the exact scope of the notion is actually impossible to define.\textsuperscript{47} There is a great number of case law concerning restrictions by object and the most important cases will be studied below. However, before examining the concept of restrictions by object further, the general attitude of the CJEU regarding Article 101 considerations needs to be clarified. In the case \textit{Metro I}, the CJEU established that:

\begin{quote}
“the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors.”\textsuperscript{48}
\end{quote}

\begin{itemize}
\item \textsuperscript{40} Article 101(3) Guidelines, para.21.
\item \textsuperscript{41} \textit{BIDS}, para.16.
\item \textsuperscript{42} Opinion of AG Kokott in \textit{T-Mobile}, para.47.
\item \textsuperscript{43} Ibid., para.43.
\item \textsuperscript{44} See Whish \& Bailey, p.123.
\item \textsuperscript{45} \textit{BIDS}, para.23.
\item \textsuperscript{46} Commission Staff Working Document, Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final, 25.6.2014, p.7.
\item \textsuperscript{47} See \textit{e.g.} Whish \& Bailey, p.132.
\item \textsuperscript{48} Case C-26/76 \textit{Metro SB-GroßMärkte GmbH \& Co. KG v Commission}, EU:C:1977:167, (\textit{Metro I}), para.20.
\end{itemize}
This provides an explanation of the view adopted by the CJEU and should be kept in mind when putting together the case law of the CJEU, which may otherwise be difficult to reconcile.

2.3.1 How are restrictions by object established?

In a recent, but notable judgment *Cartes Bancaires*, the CJEU established that:

“the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition ‘by object’ is the finding that such coordination reveals in itself a sufficient degree of harm to competition.”

The object test is not based on the subjective wills of the parties to restrict the competition, which is why the examination of factors such as which of the parties initiated the restriction is not necessary. Instead, the focus needs to be placed on the content of the agreement and its legal and economic context. This was first established in the 1966 ruling *Consten & Grundig*, concerning a geographical market sharing agreement. Since then, this test has been used and developed in a large amount of case law, resulting in a considerable expansion of the “object box”. One of the most expansive cases was the case *T-Mobile*, where the CJEU stated that it is sufficient that an agreement to share information between competitors was capable of restricting the competition in order for it to be considered as restrictive by object. If the agreement actually restricted competition, the extent of that restriction should only be relevant for the determination of the fine or damages. This was later confirmed in *Allianz Hungária*, where the CJEU stated that if, “having regard to the economic context of the agreement, it is likely that competition on the market would be eliminated or seriously weakened after conclusion of the agreement”, the agreement should be considered as a

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49 *Cartes Bancaires*, para.57.  
50 *T-Mobile*, para.27.  
52 *BIDS*, para.16.  
54 See, e.g., Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission*, EU:C:1983:310, para.25. See also *Rheinzink*, para.26; *C-399/93 Oude Luttikhuis*, para.10; C-226/11 *Expedia*, para.21.  
55 Whish & Bailey, p.125.  
56 *T-Mobile*, para.31.
The case concerned a network of vertical agreements between car repair shops that sold car insurances and the insurance company Allianz. The repair shops received a higher compensation from Allianz for their car repair services if the Allianz car insurance made up a certain percentage of the overall insurances sold by the car repair shop. The CJEU found that this system was an infringement by object.58

In Allianz Hungária, the Court also explained what is meant by the “legal and economic context”. When establishing a restriction by object, the nature of the goods or services in question, the conditions of the functioning of the given market, and the market structure should be taken into account.59 The CJEU considered that the structure of the market, the existence of alternative distribution channels and their importance, as well as the market power of the concerned undertakings were all relevant factors for the examination of restriction by object.60

It is interesting to note that in his Opinion, the Advocate General suggested a strict interpretation of restrictions by object and did not find the restriction at issue to amount to a restriction by object.61 The Allianz Hungária judgment received criticism for expanding the object box once again – to an extent where the border between the object and effect restrictions became somewhat erased, thus creating further legal uncertainty.62 However, to meet the criticism towards the Allianz Hungária judgment at least partially, it should be mentioned that the CJEU explained that it is enough to show that an agreement is capable of restriction of competition already in 1978 in the case Miller, in which the Court dealt with exclusive selling rights and a prohibition to export.63 Thus, T-Mobile and Allianz Hungária should not merely be considered as a part of a “trend” to expand the object box.64 Their precedent should still be of relevance today, especially regarding the clarifications of the concept of the economic and legal context. The fact that the Allianz Hungária judgment needs

58 Allianz Hungária, para.51.
59 Ibid., para.36.
60 Ibid., para.48.
62 Opinion of AG Wahl in C-67/13 P Cartes Bancaires, EU:C:2014:1958, para. 52. See also Harrison, Dan, The Allianz Hungária case. The CJEU’s judgment could have ugly consequences, Competition Law Insight, 11.06.2013, p.10.
63 Case C-19/77, Miller International Schallplatten GmbH v Commission, EU:C:1978:19, p.15.
64 See Whish & Bailey, p.125.
to be taken into account when establishing restriction by object was clarified by the CJEU in its following ruling *Cartes Bancaires*.65

Apart from providing an interpretation of the *Allianz Hungária*, the *Cartes Bancaires* judgment further explained the concept of the legal and economic context, as well as the interpretation of restrictions by object. According to the CJEU, experience shows that certain collusion, such as horizontal price fixing by cartels, is so likely to leave negative effects on the market that it is unnecessary to prove that it has actual effects.66 Since no actual effects need to be shown, the object test inevitably contains an element of formalism.67 However, as pointed out by the Advocate General Wahl, a too formalistic approach to the object test could endanger the protection of the aims pursued by the TFEU.68 The notion of restriction by object should therefore be applied restrictively. Restriction by object can only be established in cases where the agreement reveals a “sufficient degree of harm to the proper functioning of the competition”.69 This sufficient degree of harm in the agreement must really be found and explained.70 According to the *Cartes Bancaires* judgment, it is revealed where the agreement intends to appreciably change the structure of the market in question through a mechanism that is intended to encourage competitors to withdraw from that market.71 In the *Cartes Bancaires* case the members of a common system for bank cards were encouraged not to exceed a certain number of cards issued to their clients. However, contrary to the case in *BIDS*,72 which concerned an agreement where several undertakings agreed to withdraw from the beef and veal production market, the aim of the measures introduced by the bank card grouping was to achieve a certain ratio between the issuing and the acquisition activities of the members, so that the system could be developed further. The CJEU did not find the required level of harm for the agreements to be considered as restrictive by object in this case.73 In did, however, find it in *BIDS*, where some parties to the agreement simply received a payment for withdrawing from the market.74

65 See *Cartes Bancaires*, para.49 et seq. The ruling includes extensive references to the *Allianz Hungária* judgment.
66 *Cartes Bancaires*, para.51.
68 Opinion of AG Wahl in *Cartes Bancaires*, para.4.
69 *Cartes Bancaires*, paras.57-58.
70 Ibid., para.69.
71 Ibid., para.85.
72 See Case C-209/07 *BIDS*.
73 *Cartes Bancaires*, para.86.
74 *BIDS*, para.40.
When it comes to the establishing of the sufficient degree of harm, the examination should be based on the legal and economic context of the agreement. This context is defined broadly:

“In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition it is necessary […] to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market.” 75

When determining such context, it is thus necessary to take into consideration the nature of the goods or services that are affected and the conditions of the market in question. Even other related markets should be considered. 76 It has become clear that the assessment of the legal and economic context is broad and flexible, however, the object box as such needs to be used restrictively, so that only those agreements that pose a serious risk to the proper functioning of the competition are prohibited as restrictions by object.

2.3.2 The border between restrictions by object and restrictions by effect

The applicability of Article 101 is seen as a whole – all agreements that fall within the prohibition are automatically void, unenforceable, and may result in fines. 77 However, there are certain procedural differences when an agreement is considered to be restrictive by object compared to when it is restrictive by effect. 78 The party alleging that an agreement is anti-competitive is required to prove such anti-competitive effects of the agreement only if it cannot be established that the object of the agreement is to restrict the competition. 79 Whether the restriction will be found or not is affected by this. Thus, in object cases, the probability that the restriction will fall within the prohibition is higher, because no proof of its actual effects is required. 80 The two tests can therefore not be mixed together. However, the line between them is not always clear. 81

75 Cartes Bancaires, para.78.
76 Ibid., paras.78-79.
77 Whish & Bailey, p.120-121.
79 BIDS, p.17.
81 See, e.g., The CJEU’s description of the object test in Case C-1/12, Orden dos Técnicos Oficiais de Contas v Autoridade da Concorrência, EU:C:2013:127, (OTO), p.70.
A restriction by effect is established by comparing the actual situation where the allegedly restrictive agreement has been implemented with a hypothetical situation where no agreement is concluded whatsoever – the so-called counterfactual scenario. Such assessment does not only include a detailed definition of the relevant market, but also a thorough assessment of the effects of the restriction on that market. It is, however, not the same as examining the agreement in its legal and economic context the way it is done under the object test, although, logically, such a context ought to be taken into account when defining the relevant product and geographical markets. Nonetheless, the counterfactual assessment cannot be made in a way resulting in that the effects of a restriction are de facto used to identify a restriction by object when such a restriction cannot be established otherwise.

The unclear line between the object and effect boxes became a question for the General Court in a recent case Lundbeck. The applicants argued that a counterfactual assessment needed to be taken into account in the object test, as it would have clearly precluded the finding of a restriction by object. In the case at issue, the counterfactual scenario consisted of a situation where no agreements were concluded between the originator of a certain medication (Lundbeck) and the generic producers to keep the latter ones from entering the market for a certain period of time (so-called pay-for-delay settlement agreements). The GC rejected these arguments and explained that the analysis of the counterfactual situation is only required when establishing restrictions by effect. The Court did find that the pay-for-delay agreements were restrictions by object, because there were “real concrete possibilities” for the generic companies to enter the market and to apply competitive pressure on the originator at the time the agreements were concluded, and that this competition was prohibited by the pay-for-delay agreements. Thus, even a potential harm to competition can be sufficient for the finding of a restriction by object. However, it is not clear how this assessment differs from the counterfactual scenario in practice. Yet, the object and effect tests cannot be intertwined by allowing the effects of an agreement to be used as proofs of the existence of restriction by

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82 Regarding the counterfactual scenario, see, e.g., Whish & Bailey, p.135.
83 Jones & Sufrin, 2016, p. 218.
84 Opinion of AG Wahl in Cartes Bancaires, para.44.
85 Case T-472/13, H. Lundbeck A/S and Lundbeck Ltd v Commission, EU:T:2016:449. The judgment was recently appealed to the CJEU, Case C-591/16 P.
86 Lundbeck, paras.473-474.
88 Further clarifications by the CJEU are awaited. The GC’s judgment was recently appealed, Case C-591/16 P.
object. Advocate General Wahl explained his view on this matter in his Opinion in a recent Article 101 case *ING Pensii*:

“[…] the need to distinguish between the identification of a restriction ‘by object’ and the identification of a restriction ‘by effect’ means that examining the context in which the agreements at issue came into existence is not the same as examining the actual effects of the agreement. While the national court must in all cases carry out an individual assessment of the agreements in the legal and economic context in which they were entered into, that assessment does not amount to a precise examination of the actual and potential effects produced by the agreements or, if applicable, the significance of those effects. [...] Taking the context into consideration when identifying the anti-competitive object can therefore only reinforce or counteract the examination of the terms themselves and the objective aims of the alleged restrictive agreement.”

These considerations were not raised in the CJEU’s reasoning and it remains to be seen whether the CJEU will build its further case law on the same view.

Lastly, a comment regarding the assessment of the relevant facts *ex post* or *ex ante* should be made. In *Lundbeck*, the GC mentioned that the object test is an *ex ante* test, meaning that it should be made in the light of factors that were known when the agreement was concluded. The examining of the counterfactual scenario, on the other hand, is made where the exact consequences of an agreement are known.

### 2.4 Legitimate and otherwise justifiable restrictions

It is established that agreements can be restrictive by object even when they intend to pursue legitimate aims. However, restrictive agreements can also fall outside of the object box if they are necessary for the implementation of a legitimate agreement. There is no controversy here, because the classification of what constitutes a restriction essentially depends on the legal and economic context discussed above. The case law of the CJEU

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90 The CJEU did, however, base its reasoning on the Opinion of the AG Wahl in some other aspects, see C-172/14 *ING Pensii v Consiliul Concurenței*, EU:C:2015:484, para.55.
91 *Lundbeck*, para.474.
92 The same approach was suggested by the Advocate General in the *ING Pensii* case, see Opinion of AG Wahl in *ING Pensii*, para.60.
93 Case C-551/03 *P General Motors BV v Commission*, EU:C:2006:229, para.64. See also *BIDS*, para.21; *Consten and Grundig*, p.342; *IAZ*, para.25.
94 Article 101(3) Guidelines, para.18(2).
contains several examples of restrictive agreements that were justified based on an objective assessment of the context of the agreement.95 The legal scholars have placed the cases discussed below in slightly different theoretical categories,96 but what unites them is that the legitimate aims of the agreements are placed against the actual anti-competitive effects of the restrictions included in such agreements.

In Metro I a selective distribution system for the distribution of electronic equipment such as radios, TVs, etc., prohibiting some distributors from taking part in the system, was justified by the CJEU. The CJEU’s main argument was that this was necessary to preserve the quality and the proper use of the product.97 The Court stated that this was permitted because objective criteria of a qualitative nature were applied to all distributors in a non-discriminatory manner and because the structure of the market of the product allowed such a system. Thus, even though the system had certain restrictive aspects, it was justified because its aim – to preserve the quality of the products – was seen as legitimate. This approach was confirmed in the AEG Telefunken case, in which the CJEU stated that when the ultimate goal of a selective distribution system is to improve the competition, restrictions are legitimate if the improvement is not related to the price.98 Yet, the CJEU came to the same conclusion in a case related to remuneration as well. Necessary restrictions put in place to safeguard the use of immaterial property rights fell outside of Article 101 in Coditel II, even though the restriction constituted a geographical market sharing.99 The same reasoning was also used in the Cartes Bancaires case discussed above.100 Thus, both economic and non-economic restrictions can be justified if the main aim of the agreement is legitimate.101

Since the assessment is highly based on the context of the agreement, the case law of the CJEU also contains examples of aims that are not capable of justifying a restriction. In Pierre

97 Case 26/76, Metro v Commission, (Metro I), para.20.
101 Bellamy & Child, p.146.
Fabre, the maintenance of a prestigious image of a brand could not justify a restriction of competition, which consisted of a prohibition to sell products online. The CJEU assigned this restriction to the object box. In Slovenská sporiteľňa, restrictive rules created by banks with the aim to combat illegal activity on the market were seen as another example of restrictions that did not have a justifiable aim because this task was outside of the responsibility of private undertakings. It is, however, reasonable to believe that the restrictions would have been accepted if they were issued by the National Competition Authority.

Objective justification arguments were also considered in Lundbeck. The Commission argued that the pay-for-delay agreements were restrictions by object because they prohibited Lundbeck’s competitors from entering the market. Lundbeck argued that those restrictions should be justified, as their aim was to protect the immaterial property rights of the company and that this was a legitimate aim. It claimed that the restrictions were both necessary and proportionate for the obtainment of that aim. The GC applied the ancillarity test and found that the pay-for-delay restrictions were not objectively necessary to protect Lundbeck’s patents, because they were already protected by the very same immaterial rights themselves. The ancillary restraints doctrine will be examined further in Chapter 3 below.

The case law discussed here shows that the objective justification assessment needs to be made by an individual examination of the content and the objective of the restriction, its legal and economic context, as well as the properties of the product. The examination of a restriction is thus highly dependent on the particularities of the market. When placing this into the general perspective of the assessment of restrictions by object under Article 101(1), it becomes clear that the overall idea behind this provision is to take into consideration all the relevant circumstances – which can vary significantly – and to only prohibit the truly naked restrictions as restrictions by object.

103 Case C-68/12 Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa, EU:C:2013:71, paras.20-21.
104 Lundbeck, paras.448-449.
105 Ibid., para.451.
106 See Pierre Fabre, para.47.
2.5 Concluding comment

It was found that Article 101 application scheme starts with the examination of the object box and the examination of restrictions by effect follows as the second step if no restrictive object is found.\textsuperscript{107} The first step requires a broad assessment of the legal and economic context of the agreement, which can include arguments of necessity as well. Thus, if a restrictive agreement has a legitimate aim, this aim can be sufficient for the restriction to escape the prohibition in Article 101(1) completely.

Moreover, the blurry line between restrictions by object and restrictions by effect discussed above is problematic when defining the scope of the object box. It raises particular concerns regarding the differences in the burden of proof, as no effects need to be shown if the restriction is anti-competitive by object, whereas a restriction by effect requires a full market analysis. However, even though the scope of the object box requires further clarification in this regard, a too formalistic approach to restrictions by object can potentially lead to the contra-productive result where pro-competitive agreements are prohibited.\textsuperscript{108}

Finally, regardless of whether the main question in a given case is a restriction by object, restriction by effect, or a question of justification due to the necessity of the restriction, the assessment made within Article 101(1) is essentially focused on the economic and legal context of the alleged restriction as well as the objectives of the agreement. Even though this is expressed slightly differently in each of the tests, the underlying idea appears to be the same.

\textsuperscript{107} Jones & Sufrin, 2016, p. 191. See also T-Mobile, para.28.

\textsuperscript{108} Opinion of AG Wahl in Cartes Bancaires, para.54.
Chapter 3: Ancillary restraints doctrine

3.1 Introduction

It was shown above that restrictive agreements might fall outside of Article 101(1) completely when the restriction is necessary for the existence of a legitimate agreement. This concept is well developed in the ancillary restraints doctrine. The Commission’s Guidelines on the application of Article 81(3) (Article 101(3) Guidelines hereinafter) provide guidance on the interpretation of the notion of ancillarity:

“In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it. […] the ancillary restraints test applies in all cases where the main transaction is not restrictive of competition.”

When the main agreement does not restrict competition, restrictive clauses that are ancillary to such an agreement are not caught by the prohibition in Article 101(1) either. The Commission recognises that this is similar to the reasoning of the overall necessity or the overall objectiveness. It appears to flow from the general idea of necessity mentioned in Chapter 1 above. However, it should be noted that the Article 101(3) Guidelines are not directly binding on the EU Courts and they should not be used mechanically. Following the legal hierarchy of the EU legal sources, the ultimate guidance on the ancillary restraints doctrine and its application will therefore primarily be sought in the case law of the EU Courts.

3.2 Development of the ancillary restraints doctrine

Three criteria must be fulfilled in order for a restriction to be considered ancillary – it needs to be directly related, necessary and proportionate to the main agreement. If one or more of these requirements are not fulfilled and the restriction is not found to be ancillary, an examination of its objects and effects is made under Article 101. The case law discussed in this section

109 Kerse & Khan, p.13.
110 See section 1.3, n.14 above.
111 Article 101(3) Guidelines, para.29.
112 Ibid. para.28.
113 Ibid. para.18(2).
114 Ibid. para.6.
shows that it is not uncommon that restrictions fall within the object box if they are not classified as ancillary restraints. Thus, the assessment of ancillarity is of a significant importance for those who are accused of restricting the competition. All three criteria have been developed in the case law of the CJEU and will be examined in the chronological order of the judgments.115

### 3.2.1 Objective necessity

The case *Société Technique Minière*116 from 1966 was already mentioned as one of the cornerstone cases for the development of the test applied under Article 101. It has the same relevance for the development of the ancillary restraints doctrine.117 The case concerned a commercial agreement in which a manufacturer of construction machines granted its distributor an exclusive right to sell the machines in France.118 A dispute between the parties arose and the CJEU was asked to interpret the prohibition in Article 101(1) in a preliminary ruling, in which the requirement of necessity was clearly mentioned for the first time. The Court stated that

“It may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking.”119

The reasoning of the Court appears to be that the penetration of a new market is a legitimate aim and that its overall effects on the competition are positive. Therefore, restrictions that are necessary to achieve this aim should not be prohibited.120 A few years later, in the judgment *Metro I* mentioned above, the CJEU allowed restrictive obligations that excluded certain distributors from a distribution network, because the restrictions were necessary for the establishment and maintenance of a distribution system.121 A similar idea can also be identified in the CJEU’s ruling in *Nungesser* from 1982, which concerned restrictions included in a licence agreement. The CJEU explained that certain restrictions could be

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115 When ancillary restraints are applied in a particular case, the criteria are examined in the following order: direct relation, necessity, proportionality. This thesis studies the notions of necessity and proportionality before the notion of direct relation to highlight the substantive development of the ancillary restraints doctrine.


119 Société Technique Minière, p.250.

120 See Whish & Bailey, p.136.

121 Metro I, para.27.
necessary for a licence agreement to be implemented. An undertaking would not risk investing in a product at all if it could not be certain that it would not face competition from its competitors immediately after the investment. This as such would have a damaging effect on the competition by itself.\textsuperscript{122}

The problem was explained in a greater detail in \textit{Remia and Nutricia}.\textsuperscript{123} The case concerned two sale and purchase agreements regarding two businesses. Both agreements included non-compete clauses to protect the purchasers from the competition from the vendor for a period of ten and five years respectively. Once again, the CJEU recognised that such clauses in fact promoted competition by enabling new undertakings to enter the market, because the agreements could not have been implemented without such restrictions. The Court stated, however, that in order to have a beneficial effect on the competition, a non-compete clause, besides being \textit{necessary} to the transfer of the concentration, must also be strictly limited to that purpose when it comes to its duration and scope.\textsuperscript{124} The Commission argued that four years were appropriate in that case. The CJEU explained that when the Commission is determining the appropriate duration for a given non-compete clause, it needs to undertake an assessment of complex economic matters and that the EU Courts’ role in these cases is to review the Commission’s steps and arguments.\textsuperscript{125} The CJEU confirmed that the Commission had not erred in law and found that the time period exceeding four years fell into the prohibition in Article 101(1).

The cases discussed above set a stable ground for the development of the notion of necessity. Since \textit{Remia and Nutricia}, the notion of necessity was used as an argument in many cases. A description of every single one cannot be included in this paper. However, the landmark cases \textit{Pronuptia}\textsuperscript{126} and \textit{Gøtrup-Klim}\textsuperscript{127} will be mentioned.\textsuperscript{128}

In \textit{Pronuptia}, the CJEU dealt with a franchise agreement. An exclusive licence was given to the franchisee to sell the franchisor’s products in three cities in Germany. In addition, the

\begin{flushleft}
\textsuperscript{122} Case 258/78 \textit{L.C. Nungesser KG and Kurt Eisele v Commission}, EU:C:1982:211, para. 57.  \\
\textsuperscript{123} See Case 42/84, \textit{Remia and Others v Commission}, EU:C:1985:327, (\textit{Remia and Nutricia}), para.19.  \\
\textsuperscript{124} \textit{Remia and Nutricia}, para.20.  \\
\textsuperscript{125} Ibid., para.34.  \\
\textsuperscript{126} Case 161/84 \textit{Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis}, EU:C:1986:41.  \\
\textsuperscript{127} Case C-250/92, \textit{Gøtrup-Klim Grovvareforening and Others v Dansk Landbrugs Grovvareselskab AmbA}, EU:C:1994:413.  \\
\textsuperscript{128} Jones & Sufin, 2016, p.225 et seq.
\end{flushleft}
agreement contained several other limitations of the franchisee with the purpose to maintain the service and the product quality as required by the franchisor. In its preliminary ruling, the CJEU recognised the need to protect the know-how in a franchise agreement. It stated if the restrictive provisions were strictly necessary to ensure that a franchisor could communicate his know-how to the franchisee without risking that this information would benefit competing third parties, such provisions did not constitute restrictions within Article 101(1). The provisions that aimed at establishing the necessary control for the maintenance of the identity and reputation of the franchiser’s brand throughout its network did not fall under Article 101(1) either. However, the Court stated that if such an agreement would result in a market sharing between the franchisor and the franchisees, or between the franchisees, the restriction could not be seen as necessary and would thus fall under Article 101(1).

In *Gøttrup-Klim*, the CJEU dealt with a slightly different situation, yet, its reasoning was similar. The Court dealt with a restriction, which prohibited the members of an agricultural purchasing cooperative to take part in any other competing association. The CJEU found that this restriction did not fall within the scope of Article 101(1) as long as it was necessary to ensure that the cooperative functions properly and that it maintains its contractual power in relation to the producers.

A certain pattern in the development of the necessity criterion can be detected when making a chronological analysis of these cases. In *Remia and Nutricia*, the CJEU made it clear that a restriction must be strictly limited to the purpose of the main agreement to be considered necessary. Then, in *Pronuptia*, it indirectly set the limit for how far such a restriction could be stretched and stated that no restrictions resulting in market sharing agreements are allowed. Finally, in *Gøttrup-Klim*, the CJEU confirmed this approach and, by applying it in a case regarding a completely different type of restriction (the internal rules of an agricultural cooperative), it marked the broad scope of the notion of necessity. In addition, these cases also clarified how the criterion of necessity relates to Article 101(1).

Although arguments of necessity can be applied on many different types of restrictions, the notion needs to be assessed objectively. It is not sufficient that the parties to an agreement

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129 *Pronuptia*, paras 16-17.
130 Ibid., paras 23-24.
131 *Gøttrup-Klim*, para.35.
132 *Pronuptia*, para.23.
consider the restriction to be necessary themselves. In a more recent case *Métropole Télévision*, the GC clarified that a restriction could not be considered necessary merely because it made the main agreement more commercially beneficial for the parties. Instead, the legal test must focus on whether the main agreement can be implemented without the clause at all.\(^\text{133}\) If it cannot, the agreement will be considered as objectively necessary.\(^\text{134}\)

The notion of necessity remains to be of a significant importance for the ancillary restraints doctrine and the businesses affected by it, which can be seen by studying the recent case law.\(^\text{135}\) Taking into consideration the overall need to take into account the legal and economic context of the agreement that is being assessed, it ought to be clear that the exact application of the notion of necessity will depend on the actual circumstances in a given case.\(^\text{136}\)

### 3.2.2 Proportionality

Apart from being objectively necessary, the restriction also needs to be proportionate to the main agreement to be considered ancillary.\(^\text{137}\) The proportionality assessment within the ancillary restraints doctrine was established in the already discussed case *Remia and Nutricia*. The CJEU expressed the principle of proportionality by stating that in order to have a beneficial effect on the competition clauses must be, firstly, necessary to the transfer of the undertaking, and, secondly, their duration and scope must be strictly limited to that purpose.\(^\text{138}\) Moreover, *Remia and Nutricia* includes a clear example of the application of the proportionality criterion – the non-compete clause assessed by the CJEU in this case was found to be necessary as such, although its duration went beyond what was proportionate. It could therefore be allowed for the time period during which it fulfilled its purpose.

Yet another case of significance for the ancillary restraints doctrine is the case *Métropole Télévision*. In this case the requirement to make a proportionality assessment was expressed once again.\(^\text{139}\) In *Métropole Télévision* the GC dealt with an agreement between several French television companies, which was concluded with the aim to jointly create a company

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\(^{134}\) This was later confirmed by the CJEU in Case C-382/12 *P MasterCard Inc. and Others v Commission*, EU:C:2014:42, para.91.

\(^{135}\) *E.g.*, the notion of necessity was once again discussed by the GC in the case *Lundbeck* described above. See *Lundbeck*, paras.462-464.

\(^{136}\) See section 2.3 above.

\(^{137}\) *Métropole Télévision*, para.106. See also Article 101(3) Guidelines, para.29.

\(^{138}\) *Remia and Nutricia*, para.20.

\(^{139}\) *Métropole Télévision*, para.106.
providing satellite television. In the agreement, the parties agreed not to engage in any activities competing with those of the created company for a period of ten years. The agreement was notified to the Commission according to the previous EU Merger Regulation, but the Commission decided to clear the non-compete clause for only a period of three years. The Commission’s decision was later appealed to the GC. The parties to the agreement argued that the non-compete clause was needed to ensure full implementation of their main agreement.

The GC analysed several of the cases discussed above and explained that if the duration and the material and geographic scope of the restriction exceeded what was necessary to the implementation of the main agreement, that restriction could not be classified as an ancillary restraint and would in such cases need to be examined under Article 101. The Métropole Télévision judgment, even though settled by the GC and not the CJEU, was the first judgment by a EU Court to give a thorough and comprehensive description of the ancillary restraints doctrine. The Métropole Télévision is one of the very few judgments that are explicitly referred to by the Commission in its Article 101(3) Guidelines regarding the interpretation of the ancillary restraints doctrine – possibly because the case includes a thorough explanation of how the ancillarity test is made. Guidance on the application of the ancillary restraints doctrine is thus often sought in this judgment.

3.2.3 Direct relation to the main agreement

A restriction can only be considered ancillary when it is necessary, proportionate and directly related to the main agreement. The main purpose of this criterion is to ensure that the restriction indeed is ancillary, meaning that the restriction cannot constitute the main element of the agreement in which it is included. Instead, as explained in Métropole Télévision, the restriction needs to be subordinate to the implementation of the main transaction and it must be inseparably linked to it. The Commission’s current Ancillary Restraints Notice explains this criterion in an even greater detail. It states that a restriction is “directly related when it is economically related to the main transaction and intended to allow a smooth transaction to the

141 Métropole Télévision, para.116.
142 Article 101(3) Guidelines, para.29.
143 Métropole Télévision, para.105. See also Commission’s first Ancillary Restraints Notice, Commission notice regarding restrictions ancillary to concentrations, 1990, OJ C 203/05 (1990 Notice), point 1.4. It is examined further in section 4.2.1.3 below.
changed company structure.” It can be understood from the wording of this provision that this definition is primarily relevant for the assessment of the ancillary restraints in merger cases. However, since the GC’s judgment in Métropole Télévision it has been established that the Ancillary Restraints Notice can provide guidance in all ancillary restraints cases. The Notice also clarifies that a restriction can be considered as directly related regardless of whether it was entered into at the same time as the main agreement or not.

3.3 Regulatory ancillarity

The CJEU examined the elements of necessity and proportionality from a slightly different perspective in the case Wouters. In this case, the Dutch Bar Association prohibited its members from establishing professional partnerships with non-lawyers in order not to “jeopardise the free and independent exercise of their profession.” The prohibition was a consequence of one of the Bar’s internal rules. A member of the Association challenged this regulation in front of a Dutch court, which in turn asked the CJEU for a clarification. In its preliminary ruling the CJEU stated that:

"not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience […] It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.” (Emphasis added.)

144 Ancillary Restraints Notice, para.12.
145 Jones and Sufrin, 2014, p.244-245. See Métropole Télévision, para.104. The relevance of the ancillary restraints doctrine in the area of mergers will be analysed in sections 3.5 and 4.2,2 below.
146 Case C-309/99 Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten, EU:C:2002:98, para.15.
147 Ibid., para.97.
Completely in line with the test of ancillarity, the CJEU stated that although an agreement has inherent anti-competitive effects, it falls outside of the scope of Article 101(1) completely when the restrictions are necessary for the obtainment of otherwise legitimate aims.\textsuperscript{148}

The \textit{Wouters} judgment was later cited in several other judgments. In \textit{Meca-Medina}, the CJEU dealt with the sporting rules of the International Olympic Committee in a case regarding a suspension of athletes for the use of dopamine. Although the circumstances in this case were different from those in \textit{Wouters}, the CJEU repeated that when the restrictions are justified by a legitimate objective (which in \textit{Meca-Medina} was to ensure a fair and healthy practice of competitive sports), and when they are necessary, they fall outside of Article 101(1).\textsuperscript{149} The CJEU reasoned in a similar way in several other cases. In the case \textit{OTOC}, it dealt with the rules of a public body for chartered accountants (OTOC) regarding a compulsory training that the accountants belonging to OTOC were required to undergo. The CJEU stated that the rules had a legitimate objective to “guarantee the quality of the services offered by chartered accountants.”\textsuperscript{150} The Court then conducted a proportionality assessment and found that the rules in question went beyond what was necessary, because there were other, less restrictive ways of achieving the objective.\textsuperscript{151} Similarly, in \textit{CNG} the CJEU made clear that a Code of Conduct of a national association of geologists needed to be “necessary for the implementation of the legitimate objective of providing guarantees to consumers” in order for it not to fall under the Article 101(1) prohibition.\textsuperscript{152}

These cases are connected by the regulatory nature of the restrictions, which Whish uses to explain the concept of regulatory ancillarity.\textsuperscript{153} However, the case \textit{Wouters} was not the first case that dealt with this type of restrictions.\textsuperscript{154} The \textit{Gottrup-Klim} ruling mentioned above showed that a prohibition for the members of a collective purchasing association to take part in competing organisations is not an infringement under to Article 101(1) as long as the prohibition is “necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.”\textsuperscript{155} Thus, the test of ancillarity is applied in a

\textsuperscript{148} Ibid., para.110.  
\textsuperscript{149} Case C-519/04 \textit{Meca-Medina and Majcen v Commission}, EU:C:2006:492, paras.45 and 47.  
\textsuperscript{150} \textit{OTOC}, paras.94-95.  
\textsuperscript{151} Ibid., paras.96-100.  
\textsuperscript{152} Case C-136/12 \textit{Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato}, EU:C:2013:489, (\textit{CNG}), para.56.  
\textsuperscript{153} Whish & Bailey, p.141.  
\textsuperscript{155} \textit{Gottrup-Klim}, para.45.
similar manner regardless of whether the aim of the main agreement concerns commercial or regulatory matters. This emphasizes the broad scope of ancillarity and the fact that the concept of ancillarity can be applied to diverse situations as long as the main agreement pursues aims that are pro-competitive. Thus, the regulatory ancillarity doctrine can provide a safe-harbour to all types of regulatory restrictions, given that the pro-competitive effects of the overall legitimate agreement outweigh the anti-competitive effects of a particular restriction.\textsuperscript{156}

### 3.4 Application methodology

The exact methodology behind the classification of the ancillary restraints doctrine in the context of Article 101 is not a completely clear matter.\textsuperscript{157} As it has been shown above, there are many different cases where ancillarity is invoked when a restriction is claimed to be anti-competitive. Article 101(3) Guidelines stipulate that if the main agreement does not restrict the competition, the ancillary restrictions included in the agreement do not change that conclusion.\textsuperscript{158} However, it should not be interpreted as meaning that the first step in the application of the ancillary restraints doctrine requires an assessment of the object or effect of the agreement.\textsuperscript{159} When a restriction is considered ancillary, it falls outside of the scope of Article 101 completely.\textsuperscript{160} Thus, if ancillarity is found, there is no need to make an analysis of the object or the effect of the restriction whatsoever, which is a time and cost-efficient approach.\textsuperscript{161} Ancillary restraints doctrine could therefore be seen as a “pre-Article 101-test”.

#### 3.4.1 Rule of reason

It was mentioned in several parts of this thesis that the overall pro-competitive agreements will not be prohibited by Article 101 even if they have certain anti-competitive effects. This should, however, not be interpreted as meaning that a direct weighing of positive and negative effects of a restriction should take place. Some scholars claim that parallels should be drawn to the US rule of reason when applying Article 101 in cases of the type described above.\textsuperscript{162}

\begin{itemize}
  \item Lanchidi, in fine.
  \item Article 101(3) Guidelines, para.28.
  \item See, e.g. the cases T-360/09 E.ON Ruhrgas and E.ON v Commission, EU:T:2012:332 and the Telefónica case, where the questions of ancillarity were examined before the court assessed restrictions according to the object and effect boxes.
  \item Carlsson, p.183.
  \item Diaz, p.996.
  \item Ibid., p.955.
\end{itemize}
However, the rule of reason cannot be applied in the same manner in EU competition law as it is applied in the US Sherman Act, because the structure of Article 101 is different; Article 101(3) allows restrictions to be exempted from the prohibition in Article 101(1), whereas the US rule of reason does not contain any exception rules at all.163 In that sense, the assessment of the overall effects of a restriction is made through the ancillary restraints.164

The debate regarding the rule of reason reached the GC in 2001 with the Métropole Télévision case. The applicants argued that a rule of reason should be applied under Article 101(1).165 The GC examined the previous case law on this matter and concluded that no weighing of pro and anti-competitive effects of the agreement could be made when assessing whether a restrictive clause is objectively necessary or not. It held that consistency with the application of Article 101(1) and effectiveness of the exemption in 101(3) needed to prevail.166 The implementation of a rule of reason under Article 101(1) in EU competition law would have serious effects. The Commission has explained that the introduction of such a rule in EU competition law would cast aside the exemption in Article 101(3), which is a part of the systematic application scheme of Article 101 and it is regulated in Treaty. The provision of the Treaty cannot be disregarded by implementing a rule of reason.167

Nonetheless, the Court admitted that there was a “trend” in the case law of the EU Courts to make “flexible interpretations” of the prohibition in Article 101(1), which showed that not all agreements that restrict the parties’ freedom of action should be considered as restrictions of competition under Article 101. This leads to the inevitable conclusion that an assessment of the restriction, the agreement in which it is included and its effects needs to be made. The GC explained that this assessment must focus on the actual conditions in the case at issue, and that “the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned” should be predominant in such an assessment.168

164 Diaz, p.954.
165 Métropole Télévision, para.68.
166 Ibid., paras.72 and 107-108.
168 Métropole Télévision, paras.75-76.
3.4.2 Ancillarity and Article 101(3) - weighing of pro- and anti-competitive effects & burden of proof

It was shown above that weighing of negative and positive effects of a restriction can only take place under Article 101(3).\textsuperscript{169} The relationship between Article 101(1) and Article 101(3) is that the former identifies restrictions that fall within the prohibition, whereas the latter one serves as a defence tool once a restriction has been established.\textsuperscript{170} The legal test under Article 101(3) includes an indispensability criterion,\textsuperscript{171} which may appear similar to the criteria of objective necessity and proportionality in the ancillary restraints doctrine. In fact, in its report \textit{Practical methods to assess efficiency gains in the context of Article 81(3) of the EC Treaty}, the Commission described the indispensability criterion as the manifestation of the EU principle of proportionality, which can be easily confused with the notion of proportionality in the ancillary restraints doctrine.\textsuperscript{172} However, in \textit{MasterCard}, the CJEU explained that these two tests should be separated:

In that regard, suffice it to note that those two provisions have different objectives and that the latter criterion relates to the issue whether coordination between undertakings that is liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services, which is therefore covered by the prohibition rule laid down in Article 81(1) EC, can none the less, in the context of Article 81(3) EC, be considered indispensable to the improvement of production or distribution or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits. By contrast, as is apparent from paragraphs 89 and 90 of the present judgment, the objective necessity test referred to in those paragraphs concerns the question whether, in the absence of a given restriction of commercial autonomy, a main operation or activity which is not caught by the prohibition laid down in Article 81(1) EC and to which that restriction is secondary, is likely not to be implemented or not to proceed.\textsuperscript{173}

Thus, no parallels between the notions of objective necessity in the ancillary restraints doctrine and the indispensability criterion in Article 101(3) should be made. This finding has a strong influence on the burden of proof. Since the ancillary restraints doctrine is a part of the

\textsuperscript{169} Article 101(3) Guidelines, para.30.
\textsuperscript{170} Jones & Sufrin, 2014, p.267.
\textsuperscript{171} Regarding the indispensability criterion, see Whish & Bailey, p.171; Jones & Sufrin, 2016, p.249.
\textsuperscript{173} \textit{MasterCard}, para.93.
Article 101(1) test, the party claiming a restriction of competition has the burden of proof of the fact that the restriction indeed falls within the prohibition in Article 101 including that the restriction cannot be covered by the ancillary restraints doctrine. Otherwise, the party that is responsible for the alleged restriction would need to prove its innocence before the restriction has been proven. Such an approach cannot be reconciled with the presumption of innocence in Article 48(1) of the Charter of Fundamental Rights of the EU (the Charter hereinafter). Recital 37 of the Regulation 1/2003 clearly states that the provisions of the Regulation should be interpreted with respect to the Charter.

The relevance of the Charter in competition cases has also been recognised by the EU Courts. Its relevance is especially important in cases involving penalties of a severe degree, such as e.g. high fines. The presumption of innocence was recently taken into account by the GC in both Telefónica and Lundbeck, as a part of the Court’s reasoning regarding this matter. Moreover, the Regulation 1/2003 also needs to be applied in compliance with Article 6(2) of the European Convention on Human Rights (ECHR hereinafter), which includes a declaration of the same presumption of innocence. This principle is thus fully applicable in EU competition cases both via the Charter and the ECHR. It is probable that Article 23(5) of the Regulation 1/2003, stating that criminal law aspects shall not be taken into consideration in decisions to impose fines in competition cases, has become obsolete.

Thus, there are strong arguments that no shifting of the burden of proof is allowed and that the Regulation 1/2003 needs to be respected. Following the application scheme of Article 101, the burden of proof shifts only when the exemption in Article 101(3) becomes relevant, i.e., when a restriction of competition has already been proven. In these cases, the party wishing to benefit from the exemption must prove that all the conditions in Article 101(3) are fulfilled.

However, as the ancillary restraints doctrine is a part of Article 101(1), the party alleging a restriction is required to provide sufficient evidence showing that the provision is restrictive

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174 See, e.g., Cartes Bancaires, para.43, where the CJEU focused on the principle of effective judicial protection.
175 Telefónica, para.127, Lundbeck, para.107. Both are currently under appeal to the CJEU.
177 Article 52(3) of the Charter of Fundamental Rights states that the freedoms listed in the Charter are the same ones as those listed in the European Convention on Human Rights. The Convention sets the minimum standard of the protection provided by the Charter.
179 See Kerse & Khan, p.111-112.
180 Council Regulation 1/2003, Article 2. See also Kerse & Khan, 2012, p.18,
and that it is not ancillary. If this is proved, the exemption can be applied as the next step, but it should not be mixed with the assessment of ancillarity.\textsuperscript{181}

### 3.5 Ancillary restraints in the merger area

The EU Courts developed the ancillary restraints doctrine together with the Article 101 assessment, however, the ancillary restraints doctrine plays a big practical role in the merger area. In fact, the only truly legislative act in EU competition law where ancillary restraints are regulated is the EUMR. It states that “a decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.”\textsuperscript{182} Such restrictions are referred to as “ancillary restraints” and are covered by the Commission’s merger clearance decisions automatically.\textsuperscript{183} The reason behind this regulation is to avoid parallel proceedings where the merger as such is examined under the EUMR, while the ancillary restriction is examined under Articles 101 and 102 at the same time.\textsuperscript{184} As the Commission is the main decision-making body in the merger cases with a community dimension, it has had a particular influence on the ancillary restraints doctrine in this area.\textsuperscript{185}

#### 3.5.1 Ancillary Restraints Notice

The Commission’s view on the ancillary restraints doctrine in merger cases can be found in its Ancillary Restraints Notice.\textsuperscript{186} The Notice is based on the EUMR and the Commission’s practice. It clarifies the Commission’s interpretation of the notions of direct relation and necessity as well as the Commission’s assessment of ancillary restrictions in different situations. The main aim of the Notice is to provide certainty to companies that are willing to merge by defining several safe-harbour rules.\textsuperscript{187} Although widely referred to by the

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\textsuperscript{181} Métropole Télévision, para.116.

\textsuperscript{182} EUMR, Articles 6(1)(b), 8(1) and 8(2). See also Recital 21.

\textsuperscript{183} Ancillary Restraints Notice, para.2.

\textsuperscript{184} 1990 Notice, point 1.1.

\textsuperscript{185} EUMR, Article 21(2). See also section 1.3 above.

\textsuperscript{186} In this thesis also referred to as “the Notice” or “the Commission’s Notice”.

\textsuperscript{187} Ancillary Restraints Notice, para.4.
Commission, and, in some cases also the EU Courts\textsuperscript{188} and national authorities,\textsuperscript{189} the Notice is not binding on the EU Courts – only the Commission is fully bound by its own notices.\textsuperscript{190}

The ancillary restraints doctrine described in the Ancillary Restraints Notice contains the same three criteria discussed above. Thus, to be considered ancillary to a merger agreement, the restriction needs to be directly related, necessary and proportionate to its implementation. These criteria need to be assessed objectively.\textsuperscript{191} When it comes to direct relation, a close link must exist between the restriction and the concentration. In particular, restrictions that are economically related to the main transaction and those that are intended to allow a smooth transition to the changed company structure are seen as directly related to the concentration.\textsuperscript{192}

The criterion of necessity is fulfilled when, in the absence of the restriction, “the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher costs, over appreciably longer periods of time or a with considerably greater difficulty.”\textsuperscript{193} In addition, to be considered necessary, the restriction must not exceed what is reasonably required for the implementation of the concentration in terms of duration, subject matter and geographical field. The Notice specifies that when there are two equally effective alternatives for achieving the same legitimate aim, the one that is objectively the least restrictive must be chosen.\textsuperscript{194} Even though it is not explicitly mentioned in the current Ancillary Restraints Notice, the requirement of proportionality in the case law regarding the application of ancillary restraints doctrine under Article 101 is also fully present in merger situations.\textsuperscript{195}

The main agreement in merger cases is more easily defined; it is the concentration agreement. However, only truly ancillary agreements can be covered by the Commission’s clearance

\textsuperscript{188} Métropole Télévision, para.104.
\textsuperscript{189} See, e.g., the decision Danish Malt of the Danish Competition Authority and the Alfa Quality Moving judgment of the Stockholm District Court, both examined in section 4.3.2.1 below.
\textsuperscript{190} Ancillary Restraints Notice, para.8. It should be reminded that the Commission can depart from its own notices only if such a departure would put the party relying on the notice in a more favourable position, see section 1.3 above.
\textsuperscript{191} Ibid., p.11.
\textsuperscript{192} Ibid., p.12.
\textsuperscript{193} Ibid., p.13. See also Commission Decision of 18 December 2000 COMP/M.1863 - Vodafone/ BT/Airtel JV, para.20.
\textsuperscript{194} Ancillary Restraints Notice, para.13.
decision. If the restriction is an integral part of the concentration, such as the sale of the shares of an undertaking, the Ancillary Restraints Notice will not be applied. Agreements aiming at protecting the value transferred by the concentration are explicitly listed as agreements that the Commission typically sees as necessary for the implementation of the concentration. The maintenance of supply after a break-up from a former entity and the enabling of the start-up of a new entity are other goals that the Commission has previously considered to be necessary.

The Commission is bound to follow its own Notice, however, if exceptional circumstances are at hand, the Commission may depart from its previous practice and the Ancillary Restraints Notice. There is no clear definition of “exceptional circumstances”, but the Commission has previously regarded a high degree of customer loyalty, long product life cycle, limited number of alternative producers and the need to protect the know-how for a longer period as factors that can trigger this exception. Since the assessment of ancillarity is individual in each case, factors allowing exceptions ought to vary depending on the specific features of the product and the market conditions.

Lastly, it should be noted that even though the criteria of the ancillary restraints doctrine in Article 101 cases are the same as those in mergers, the general principles behind the EUMR must be taken into account when interpreting the Commission’s merger decisions that are based on the Ancillary Restraints Notice. The main aim of the EUMR is to provide the necessary control of concentrations with a community dimension, so that the dynamic competition in the internal market can be safeguarded. It should be kept in mind that this aim does not have the same predominant position in Article 101(1) cases, where the focus is rather placed on the more general aim to ensure that the competition in the internal market is not distorted.

196 Ancillary Restraints Notice, para.10.
197 Ibid., p.13.
198 Ibid., p.13.
199 Only cases that have not been covered by any previous decision of the Commission can be specifically examined in regard to their ancillarity to the concentration, see Recital 21, EUMR and Ancillary Restraints Notice, paras.3 and 5.
200 Ibid., p.5, n.3.
201 EUMR, Recital 6. See also Recital 4.
202 Ibid., Recitals 2 and 6.
3.6 Concluding comment

This chapter shows that the ancillary restraints doctrine is broad and that it is not dependent on the type of restriction. Many different restrictions can thus fall outside of the scope of Article 101 completely if they are directly related, objectively necessary and proportionate to a main non-restrictive agreement. It was suggested above that the test of ancillarity could be seen as a “pre-Article 101 test”. It should not in any case be mixed with the exemption in Article 101(3) due to the structure of Article 101 and the burden of proof connected to the application of the provision.

The findings of this chapter should be seen in the light of the study of justifiable restrictions made in Chapter 2 above. There is no clear and unified opinion among the scholars on how the case law on “other legitimate objectives”\(^{203}\) should be classified. However, it is apparent that the same type of reasoning is applied in both tests, as they both require that, firstly, the main agreement is pro-competitive, and, secondly, that the restriction related to this agreement is necessary and proportionate to the implementation of that agreement. This chapter also established that the ancillary restraints doctrine is not a pure Article 101 matter. The content of the doctrine remains the same when it is applied in merger cases. These circumstances suggest that the ancillary restraints doctrine is universal and that the findings above show signs of a higher principle of necessity in EU competition law. At the very least, this view cannot be disregarded, as the notion of necessity is in fact applicable in all areas of EU law through the general principle of proportionality in Article 5(4) TFEU.\(^{204}\)

\(^{203}\) See *Lundbeck*, para.447.

\(^{204}\) Bernitz & Kjellgren, p.175 *et seq.*
Chapter 4: Non-compete clauses and their duration

4.1 Introduction

There are several different types of non-compete clauses. Agreements in which non-compete clauses can be found are of many types as well. They may concern a merger or simply a situation in which parties regulate their cooperation without any plans to merge. A non-compete clause can be related to a certain product, a particular customer group or a geographical area. Non-compete clauses are also common in employment contracts, where their aim is to protect the employer’s trade secrets and client connections in situations where an employee is leaving the employment.\textsuperscript{205} All non-competes have the same things in common; they restrict one or more parties’ freedom on the market by prohibiting them from taking actions.\textsuperscript{206}

The problem with non-compete restrictions arises when they are assessed under Article 101(1) TFEU, which prohibits all agreements that have as their object or effect the restriction of competition within the common market. It was shown above that agreements prohibiting companies to operate in a given market do not only fall into the scope of Article 101(1), but they are also often categorised as “hard-core” market sharing agreements prohibited as restrictions by object.\textsuperscript{207} The requirement to prove the actual detrimental effects on competition is excluded in such cases. It was however already shown that there are situations where certain restrictive clauses do not infringe EU competition law.

Situations where agreements are considered restrictive by object and where they fall outside of the scope of Article 101 completely were discussed in the previous chapters.\textsuperscript{208} The following chapter will examine the assessment of non-compete clauses, with a particular emphasis on their duration, in the legal framework defined above.

\textsuperscript{205} As mentioned in section 1.3 above, labour law aspects are left outside of the scope of this paper. For a further study, see Bhandari, Ruchi, Enforceability of non-competition clause in sale of business in joint venture: conundrum, E.C.L.R., 2014, 35(9), 445-452, at p.446. See also Adlercreutz, Axel & Flodgren.
\textsuperscript{206} Adlercreutz, Axel & Flodgren, Boel, Om konkurrensklausuler i anställningsavtal och vid företagsöverlåtelse, 1992, Institutionen för handelsrätt, Lund, p.13.
\textsuperscript{207} A clear example was the BIDS, para.40. See also O’Regan, Metthew, The Competition Appeal Tribunal – a new venue for challenging restrictive covenants?, E.C.L.R. 2016, 37(10), 393-396, at p. 394.
\textsuperscript{208} Whish makes a distinction between restrictive agreements and restrictive clauses, see Whish & Bailey, p.137-139. Such distinction will not be upheld in this paper, as the rules discussed here apply in the same way regardless of whether the restrictions is constituted of a simple clause or an entire agreement.
4.2 Non-compete clauses in mergers

One of the most common examples of a non-compete clause is the prohibition for the vendor of a company to compete with the purchaser for a certain period of time after the transfer.\(^{209}\) Non-compete clauses are found in both pure acquisition situations and in those of joint ventures.\(^{210}\) The reason behind such clauses is to ensure that the main concentration agreement between the parties can be implemented. The value of the purchased concentration or a part of it needs to be protected after the purchase.\(^{211}\) As the CJEU explained in *Remia and Nutricia*, the vendor of a company is already familiar with the market and has a particularly detailed knowledge of the transferred concentration. It is therefore relatively easy for the vendor to win back their previous clients and to re-enter the same market. If the purchase agreement does not guarantee that the purchaser can obtain full control of the purchased company, including, *inter alia*, all its immaterial property, there is little incitement for the purchaser to conclude the agreement in the first place. Therefore, a non-compete clause restricting certain actions of the vendor is often desirable.\(^{212}\) For the vendor, a non-compete clause means that the selling price can be increased.\(^{213}\) As long as such a clause is necessary for the full implementation of the concentration, and as long as it fulfils the criteria of direct relation and proportionality set up by the ancillary restraints doctrine and further specified in the Commission’s Ancillary Restraints Notice, the non-compete clause can be cleared together with the Commission’s merger clearance decision.\(^{214}\)

In line with the legal framework set out in the chapters above, whether or not a restrictive clause can be considered necessary and proportionate depends on the type and objective of the agreement that the non-compete clause is a part of. The purchaser is generally granted a wider protection against competition from the vendor than the other way around. It is unlikely that the Commission would accept a non-compete clause protecting the vendor.\(^{215}\) In addition, the Commission is of the view that non-compete clauses are not motivated at all when only

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\(^{210}\) See Ancillary Restraints Notice, paras.18, 26 and 36-41.

\(^{211}\) Karlsson & Östman, p.938.

\(^{212}\) *Remia and Nutricia*, para.19.


\(^{214}\) Ancillary Restraints Notice, paras.10-13.

physical assets are transferred or when the concentration includes exclusive property rights. When only physical assets are transferred, the transfer is completed as soon as the property is properly conceded. No assets remain in the possession of the vendor after that point. Similarly, in the case where a concentration concerns exclusive property rights, the holder of the exclusive right is able to take immediate legal action against infringements based on the right itself.\footnote{Ancillary Restraints Notice, para.21.} In such cases there is no need for any special contractual arrangements to ensure the transfer. Therefore, the following text will focus on those acquisition cases where special protection is required.

### 4.2.1 Non-compete duration

Non-compete clauses must be strictly limited to what is necessary for the implementation of the concentration agreement. The assessment of necessity is made in terms of the scope and duration of a given non-compete clause.\footnote{Remia and Nutricia, para.20. See also Métropole Télévision, paras.106 and 113.} As in all ancillarity tests, the criterion of proportionality has a high relevance also when assessing the duration of non-compete clauses. The need to make a proportionality test in merger cases was first acknowledged by the Commission in its decision \textit{Reuter/BASF},\footnote{Commission Decision of 26 July 1976, IV/28.996 - \textit{Reuter/BASF}. See also Diaz, p.960.} which, some argue, was the actual beginning of the ancillary restraints doctrine.\footnote{Ritter, Lennart & Braun, W. David, \textit{European Competition Law: A Practitioner’s Guide}, 3rd edition, 2004, Kluwer Law International, the Hague, p.635}

In \textit{Reuter/BASF}, Dr. Reuter transferred a controlling part of his shares in a company to BASF. In a separate agreement concluded the next day, he transferred his know-how and the relating technology to a subsidiary of BASF. In these agreements, Dr. Reuter agreed not to engage in any activity competing with BASF for a period of eight years. Only certain R&D activities were allowed, but they needed to be conducted with respect to the interests of BASF as well.\footnote{\textit{Reuter/BASF}, p.42-43.} The Commission recognised that the transfer included both know-how and goodwill and stated that a full transfer of these assets required special protection. The Commission examined the clauses in regard to their duration, geographical scope and subject matter and found that eight years exceeded what was necessary for the transfer of the undertaking.\footnote{Ibid., p.46.} The Commission was of the opinion that both goodwill and know-how required some time to be
fully transferred. However, this time period needed to be limited. Concerning the goodwill, the Commission stated the following:

“This does not imply that the purchaser may benefit from protection without limit as to time, since the goodwill of an undertaking enjoys no absolute right of protection. It consists rather in a purely factual state of affairs which is constantly exposed to attacks by competing firms. The protection claimed by a purchaser against the competitive activity of the vendor is justified only on the ground that the vendor, as the former owner of the undertaking, may enjoy an advantage over outsiders in possessing special information about the undertaking's production and sales situation; this makes him more dangerous than other competitors. However, this protection must be limited to the period required by an active competitive purchaser for him to take over undiminished the undertaking's market position such as it was at the time of transfer. Account must be taken of such organizational problems as may arise until the newly acquired firm has been integrated into the purchaser's undertaking or group.”\textsuperscript{222}

Thus, in determining the allowed duration, the purchaser is considered to be a fairly active competitor on the market. The market position of the transferred company at the time of the transfer sets the limit for the duration of the non-compete clause. Regarding the additional time required for the transfer of know-how, the Commission listed the following factors that should be taken into consideration:

“In determining the duration of the non-competition clause, the factors particularly to be taken into account are the nature of the transferred know-how, the opportunities for its use and the knowledge possessed by the purchaser. It is also reasonable to assume that the transferee will actively exploit the assets transferred. A distinction must be made between know-how existing at the date of transfer and new or further developments by the transferrer based on or in connection with the transferred know-how. A non-competition clause extending to new or further developments can be of shorter duration.”\textsuperscript{223}

In this case, the Commission found that a non-compete clause lasting for a period of five years could be considered necessary. When arriving to this conclusion, it considered a wide range of factors. Reorganizational aspects necessary due to the transfer of the company, termination period of the contracts with customers, the size and scope of the activities of the

\textsuperscript{222} Ibid., p.46-47.
\textsuperscript{223} Ibid.
undertaking (50 firms in 11 countries in this case), the financial strength as well as the previous knowledge and experience of the purchaser were some of the factors were relevant for the assessment. The Commission also mentioned the need for further research and the development of the market in which the sold undertaking operated.\textsuperscript{224} The CJEU reasoned in the same way in the case \textit{Remia and Nutricia}, even though no explicit reference to the \textit{Reuter/BASF} decision was made.\textsuperscript{225} The Ancillary Restraints Notice expresses this type of proportionality assessment as “the need to take account of the duration, subject matter and geographical field of the restriction”.\textsuperscript{226}

Since the assessment of necessity is broad and dependant on the specifics of the product and the market in question, other aspects may be highlighted in cases concerning other products or markets. In \textit{Siemens/Areva}, the Commission dealt with a joint venture (Areva NP) between Siemens and Areva. The joint venture operated in the field of construction and maintenance of nuclear power plants. The concentration agreement included a non-compete clause prohibiting Siemens to engage in any activities competing with Areva NP for the lifetime of the joint venture and 8-11 years after Areva’s obtainment of full control of Areva NP.\textsuperscript{227} As required by the 1990 Ancillary Restraints Notice, the non-compete clause had been notified to the Commission and cleared – with an absolute limit for 30 years – at the time of the creation of the joint venture. The Commission’s assessment in the case at issue concentrated on the ancillarity of the non-compete clause after Siemens’ sale of its shares in the joint venture to Areva, which had not been notified to the Commission prior the creation of the joint venture. The Commission concluded that the clause was directly related and objectively necessary for the implementation of the concentration agreement. However, the duration of the clause was not proportionate. The Commission found a three-year non-compete clause after the termination of the joint venture to be appropriate instead.\textsuperscript{228} In its assessment, the Commission considered that Areva had already assimilated the know-how before the termination of the joint venture and that no substantial transfer of goodwill was made to Areva firstly because the clients were not likely to switch back to Siemens, and, secondly,

\textsuperscript{224} \textit{Reuter/BASF}, p.48.

\textsuperscript{225} Díaz, p.964.

\textsuperscript{226} Ancillary Restraints Notice, para.13. The geographical scope of non-compete clauses cannot exceed the area in which the vendor operates prior the purchase, see Ancillary Restraints Notice, para.22. Similarly, the product scope cannot exceed to those products or services that do not form the economic activity of the transferred undertaking, see Ancillary Restraints Notice, para.23.

\textsuperscript{227} Commission Decision of 18 June 2012, COMP/39736 \textit{Siemens/Areva}, para.2.

\textsuperscript{228} \textit{Siemens/Areva}, para.76.
because Siemens no longer had its own nuclear business. When discussing the duration, the Commission also considered the objectives that the clause was supposed to protect and the likelihood that they would change in the future. Finally, the Commission found that the same result could have been achieved by a non-use and non-disclosure clauses. After a thorough assessment of all these factors, the Commission concluded its reasoning by finding that a non-compete clause with the duration of three-years could be lawful. However, the geographical and the products scopes were defined broadly – the non-compete clause was allowed to have a worldwide effect and include all the products resulting from the economic activity of the joint venture.

These decisions show that the assessment of necessity and proportionality of non-compete clauses is wide and that many different factors can be taken into account when making such an assessment. Moreover, the cases serve as good examples of the broad application of the ancillary restraints doctrine, which was discussed in Chapter 3 above.

4.2.1.1 Self-assessment and its implications

Siemens/Areva shows that the assessment of ancillarity of non-compete clauses can be complicated and highly dependent on the product and the market in question. Complex economic considerations must be made every time the ancillarity of a non-compete clause is examined. From the perspective of the legal certainty, this approach is particularly problematic. What makes this matter quite complex is the fact that the Commission stopped assessing the ancillarity of non-compete clauses in mergers with the issuing of its second Ancillary Restraints Notice in 2001 (2001 Notice hereinafter). Today, the Commission is only required to specifically assess non-compete clauses within the framework of ancillarity if a case presents “novel or unresolved questions giving rise to genuine uncertainty.” There is, however, no known case law where the Commission has assessed a clause under this provision.

The general rule is that the merging parties are required to assess whether the non-compete clauses they wish to include in their agreements are compatible with EU competition law

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229 Siemens/Areva, para.66.
230 Remia and Nutricia, para.34.
231 Commission Notice on restrictions directly related and necessary to concentrations, 2001, OJ C 188/05. This is discussed in section 4.2.1.3 below.
232 EUMR, Recital 21.
233 See Claydon & O’Regan.
themselves. The reason behind this change was the aim to ease the burden of the Commission to make ex ante assessments and to increase the focus on combating serious infringements ex post instead. However, this means that the companies are required to make the complex assessment of ancillarity themselves. Moreover, if they do not find that the clause is ancillary to their merger agreement, they also need to self-assess the legality of the restriction under Article 101. Undoubtedly, it is difficult for the parties to conduct such assessments on the same level as the Commission would, as they do not have the same resources. Furthermore, the Commission is entitled to a certain degree of discretion when it makes economic analyses, which means that it is unlikely that the self-assessment made by an undertaking would result in the very same findings as if the Commission had made such an assessment.

4.2.1.2 Legal certainty through Ancillary Restraints Notice

To make it easier for the parties to navigate in this complex legal framework, the Commission has created several safe-harbour rules in its Ancillary Restraints Notice. The duration of non-compete clauses is one of the questions covered by the Notice. It stipulates that when a concentration includes goodwill, non-compete clauses lasting for a period of two years will always be accepted. When both goodwill and know-how is included, the safe-harbour period is three years. These safe-harbour rules should make it easier for the companies to come to correct conclusions when they are self-assessing the clauses in their agreements.

The Commission is has been fairly consistent in its application of the Ancillary Restraints Notice. In Kingfisher/Grosslabor, the Commission found that only goodwill was transferred in the agreement through which Kingfisher acquired Grosslabor. A non-compete clause with the duration period of two years was therefore found to be necessary to secure the

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234 Ancillary Restraints Notice, para.2.
237 See Claydon & O’Regan.
238 Jones & Sufrin, p.244.
240 Ancillary Restraints Notice, para.4.
241 Provided that the other criteria of ancillary restraints doctrine are fulfilled.
242 Ancillary Restraints Notice, para.20.
243 Cook & Kerse, p.72. As mentioned in section 1.3 above, the Commission is generally required to follow its own notices.
transfer. Similarly, in KNBT/Bunzl/Wilhelm Seiler, the Commission explained that a non-compete clause including goodwill could be accepted for a period of two years. When both goodwill and know-how is included, non-compete clauses with a duration of three years have often been accepted. E.g., a three-year non-compete clause was accepted as an ancillary restraint to Nestlé’s acquisition of Dalgety’s subsidiary in Nestlé/Dalgety. The concentration included both goodwill and know-how. However, as in the two previous cases, the Commission did not explicitly describe the factors that it took into account when making the assessment. It simply mentioned that the non-compete clause imposed on Dalgety included both goodwill and know-how and that it meant that the clause was allowed for a period of three years. The same conclusion, following similar reasoning, was reached in a number of other merger cases where the transfer included both goodwill and know-how. The case Siemens/Areva discussed above is yet another example of a situation where a non-compete clause lasting for a period of three years was considered to be ancillary to a merger. Compared to the other decisions of the Commission, the detailed reasoning in this case seems to be quite uncommon. This shows that further guidance on the application of the safe-harbour rules in the Ancillary Restraints Notice cannot always be found in the Commission’s decisions.

Finally, a few decisions in which the Commission allowed non-compete clauses with duration periods exceeding three years should be mentioned as well. These cases provide some further guidance on the Commission’s view on the circumstances that can lead to an exception from the safe-harbour rules. Thus, in Volvo/Renault, a non-compete clause lasting for a period of five years was accepted with the reasoning that a high degree of customer loyalty existed on the market and that the products had long life cycles. In Kodak/Imation the Commission allowed a non-compete clause for a period of five years regarding the digital technology that was transferred with the merger. Here, the explicit reasons were that the merger included certain know-how and that the life cycles of the technology were long. However, the rest of

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244 Commission Decision of 2 April 1999, IV/M.1482 – Kingfisher/Grosslabor, para 26
248 Siemens/Areva, para. 43 et seq.
the transferred business, which did not involve any know-how, could only be covered by a non-compete clause lasting for three years.\textsuperscript{250}

As mentioned above, the safe-harbour rules set out in the Ancillary Restraints Notice can be disregarded if exceptional circumstances are present.\textsuperscript{251} Thus, the Commission has considered a high customer loyalty, long product life cycles, the need to protect the know-how for a longer period of time due to its specific nature and a limited number of alternative producers as factors that could justify longer duration periods than those prescribed in the safe-harbour rules.\textsuperscript{252}

\textbf{4.2.1.3 Historical perspective on non-compete regulation in Ancillary Restraints Notices}

The Commission issued its first Ancillary Restraints Notice in 1990 – shortly after the Council Regulation 4064/89 on the control of concentrations between undertakings had entered into force.\textsuperscript{253} The 1990 Notice was very similar to the current one both in terms of structure and the Commission’s interpretation of the notions of direct relation and necessity. However, it stipulated different safe-harbour rules for the concentration agreements that included both goodwill and know-how. In these cases, the allowed duration was set at five years. If the transfer only included goodwill, the allowed time period was two years, like in the current Ancillary Restraints Notice.\textsuperscript{254} In addition, the 1990 Notice also mentioned the need to apply the principle of proportionality.\textsuperscript{255} Moreover, it explicitly explained the Commission’s aim to “take the greatest account of business practice” when making the assessments of ancillarity.\textsuperscript{256}

The 1990 Notice was replaced by a new Ancillary Restraints Notice in 2001.\textsuperscript{257} The main novelty in the 2001 Notice was the introduction of the self-assessment procedure on the ancillary restraints. In a press release issued shortly before the 2001 Notice was published the Commission explained that the new approach was a part of the ongoing modernisation of the

\textsuperscript{251} Ancillary Restraints Notice, para.5.
\textsuperscript{253} Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1989, OJ L 395/1, Article 8(2) and Recital on p.3.
\textsuperscript{254} 1990 Notice, point III.A.2.
\textsuperscript{255} Ibid., point II.6.
\textsuperscript{256} Ibid., point I.2.
\textsuperscript{257} Commission Notice on restrictions directly related and necessary to concentrations, 2001, OJ C 188/05.
EU competition policy. In addition, the Commission stated that it had never been under a legal obligation to assess ancillary restraints, that all its statements in the previous merger decisions were merely of a declaratory nature and that these statements had no legally binding effects. At the same time, the Commission stated that the 2001 Notice was based on its previous practice. Thus, no change of the Commission’s economic assessment was intended. Most of the substantial rules and even the systematic order of the provisions in the 2001 Notice followed those of the 1990 Notice.

One of the very few concrete changes in the 2001 Notice was the safe-harbour rule on non-compete clauses. According to this Notice, non-compete clauses in mergers containing both goodwill and know-how were allowed for a period of three years instead of five. In this regard, the Commission provided no reasoning. Neither the current EUMR itself, nor its preparatory documents give any answers to this change either. The regulation of non-compete clauses in those mergers where only goodwill is included did not change. As there are no indications that any changes regarding the Commission’s economic assessment were made. It is therefore reasonable to believe that the shortening of the duration of the safe-harbour rule was a consequence of the new self-assessment, aimed at ensuring that merging parties do not enter non-compete clauses with a longer duration than actually necessary merely because the Notice allows it.

The Ancillary Restraints Notice was updated one last time in 2005, shortly after the current EUMR entered into force. The safe-harbour rules regarding the duration of non-compete clauses in mergers are practically identical to those of the 2001 Notice. Thus, the principles developed under the previous Notices ought to still be capable of providing guidance for the application of the ancillary restraints doctrine in merger cases. However, the changes of the Commission’s policy regarding the safe-harbour rules have no effects on the application of Article 101 and the general doctrine of ancillarity. The relationship between them is examined in the next section.

259 Ibid.
260 2001 Notice, para.15.
4.2.2 Legal nature of Ancillary Restraints Notice compared to the general doctrine of ancillarity

The doctrine of ancillarity roots in the case law related to Article 101. The EU Courts have applied the doctrine on a variety of different agreements. Studies of this case law show that the doctrine of ancillarity has a wide application scope. Moreover, the previous sections of Chapter 4 show that the doctrine of ancillarity has a significant importance in the merger area as well. The fact that it is applicable in both Article 101 and merger cases show that the doctrine cannot be strictly related to either of the areas. The doctrine of ancillarity appears to be of a universal relevance, which leads to the conclusion that ancillarity is of a higher rank in the legal hierarchy.262

In merger cases, the ancillary restraints doctrine is specified in the Ancillary Restraints Notice. Thus, the Notice provides guidance on the interpretation of ancillarity in the concentration cases that have a EU dimension.263 The Ancillary Restraints Notice has no direct binding power and it is therefore classified as soft law.264 Following the legal hierarchy described in section 1.3 above, soft law is placed on the lowest level of the legal hierarchy.265 Thus, the Ancillary Restraints Notice can never be placed above the general doctrine of ancillarity.266 The Métropole Télévision case shows that the Notice can provide certain guidance for the general doctrine of ancillarity,267 however, its exact influence is not clear.268

In practice, this means that when the provisions of the Ancillary Restraints Notice are not directly applicable, or in case of conflict between these two sources, a particular non-compete clause will be assessed under the general ancillarity doctrine. Consequently, the safe-harbour rules in the Ancillary Restraints Notice will not be considered in such an assessment of ancillarity directly.269 The Commission’s margin of appreciation regarding the economic assessment has already been discussed above and will therefore not be examined here.270

262 See section 3.6 above.
263 Regarding the applicability of the Ancillary Restraints Notice in non-merger cases, see section 4.3.2.1 below.
264 Ancillary Restraints Notice, paras. 4 and 8, and Hettne & Otken Eriksson, p.46 et seq. above.
267 Métropole Télévision, para.104. See also Jones and Sufrin, 2014, p.244-245.
269 They can not be taken into consideration indirectly, see Métropole Télévision, para.104. See also Jones & Sufrin, 2014, p.244.
270 Cartes Bancaires, paras.45-46. See section 1.3.
4.2.3 Other comparable clauses

It has been established that a variety of different restrictions can be allowed under certain circumstances. This section will examine two types of clauses in merger agreements that are similar to non-compete clauses. The similarity between the non-compete clauses in merger agreements and the clauses discussed in this section lies in the fact that they all restrict competition; yet, they are allowed when considered ancillary to the merger. The duration of such clauses remains to be the main focus in the following sections. Thus, the aim is not to make an exhaustive analysis of the clauses, but rather to set the non-compete regulation in a larger legal context by bringing the regulation of related clauses in similar situations to attention.

4.2.3.1 Non-competes in joint ventures

Non-compete clauses between a joint venture and its parent companies are probably the most similar clauses to the non-compete clauses in pure acquisition agreements. In joint venture cases, the aim of the non-compete clauses is to protect the full value of the transfer as well. However, the Commission allows such clauses for the entire lifetime of the joint venture, which is a significant difference compared to the safe-harbour rules of the non-compete clauses in mergers, where the safe-harbour duration is only three years.271 The reason behind this extensive approach in joint venture cases was explained in the Siemens/Areva decision:

“Non-compete obligations applicable during the lifetime of the joint venture aim at protecting the individual parent companies' investments, which are "locked in" the joint venture during its lifetime. If the parent companies started to compete against their own joint venture, this could effectively eliminate the existence of the joint venture as such. Only one parent company starting to compete against the own joint venture would increase that parent company's share of profits to the detriment of the other joint venture partner.272

Due to the specific nature of the joint venture, the aim of the non-compete clauses is slightly different in joint venture situations, compared to the aim of such clauses in pure acquisition situations. The Commission has explained that non-compete clauses in joint ventures are legitimate when they aim to ensure the following objectives: good faith during the negotiations of the parents, full utilisation of the joint venture’s assets, the joint venture’s

271 Ancillary Restraints Notice, para.36.
272 Siemens/Areva, p.45.
assimilation of the know-how and goodwill of its parents, and the prohibition of competition that arises from the parents’ privileged access to the know-how and goodwill of the joint venture.  

As soon as the joint venture is terminated, e.g., because of one parent’s acquisition of sole control of the joint venture, the non-compete clause no longer fulfils the legitimate purpose of ensuring the full implementation of the joint venture agreement. Non-compete clauses between third parties – e.g., a non-compete clause among the parents – are not allowed either. Similarly, if the clause concerns a non-controlling parent, it will not be included in the Commission’s safe-harbour described in the Ancillary Restraints Notice.

The application method of the ancillary restraints doctrine in joint venture situations is the same as in pure acquisition cases. Thus, the Commission first examines whether the agreement to establish the joint venture falls within the scope of Article 101(1), which is followed by the assessment of necessity of the restrictive clause.

Indeed, looking into the Commission’s practice, a number of non-compete clauses with the duration for the entire lifetime of the joint venture were considered ancillary. In *Eastman Kodak/Sun Chemical*, the joint venture was going to function for at least ten years. After this initial period, it was going to be renewed automatically for periods of five years. The Commission found that the non-compete clauses between the joint venture and its parents, matching the duration of the joint venture, expressed “the reality of the withdrawal of the parents from the market assigned to the joint venture” and found the clauses to be integral parts of the concentration.

In *Messer Griesheim/Hydrogas* the Commission found that a non-compete clause lasting for the entire lifetime of the joint venture and a year after its termination was directly related to the establishment and operation and necessary for the protection of the interests of both the

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273 Ancillary Restraints Notice, para.36.
274 Díaz, p.977.
parents and the joint venture. The joint venture concerned the market for production and sale of industrial gases in Sweden. The following factors were considered by the Commission in its decision: the parents supplied the joint venture with different types of know-how, the parent companies were not going to be present on the same geographical market as the joint venture and the fact that the joint venture would increase the competition on the Swedish market for industrial gases. However, the Commission did not specify to what extent they were relevant for its decision regarding the duration of the non-compete clause.

There are also examples of decisions where non-compete clauses lasting for the lifetime of the joint venture were considered to be too long. Such was the case in NEC/Toshiba concerning the creation of a joint venture on the global space product market, active in developing, manufacturing, and maintaining, satellites, space stations, rocket components, etc. The parties argued that a non-compete clause was necessary for the lifetime of the joint venture, because the concentration involved advanced technologies, large expenditure of resources on research and development, the duration of the programmes was long and because the transfer included significant know-how. Despite the arguments of the parties, the Commission only saw the need for a non-compete clause for a period of five years. No specific explanation for the Commission’s decision regarding the duration of the non-compete clause was provided – the Commission simply referred to the particularities of the markets. Similarly, in Stora Enso/AssiDomän, which concerned a joint venture producing kraft paper, active in Sweden and the EEA, a non-compete clause was accepted for a period of five years with even less motivation. The Commission only mentioned that this corresponded to what was necessary for the proper market entrance and that the clause was not justified beyond this period.

The Commission’s limited reasoning in these joint venture cases is similar to its decisions in the acquisition cases described above. It is not clear what factors lead the Commission to the conclusions it made. Generally, it is interesting to note that the Commission’s attitude regarding non-compete clauses in joint venture cases has been subject to change more times than its approach towards non-compete clauses in acquisition situations. Moreover, the changes are not in line with each other. The Commission’s 1990 Notice did not provide any specific safe-harbour period for non-compete clauses. It only stated that non-compete clauses are allowed as long as they aim “at expressing the reality of the lasting withdrawal of the

parents from the market assigned to the joint venture. The decisions described here show that this provision did not exclude non-compete clauses lasting for the entire lifetime of the company. The 2001 Notice, however, set a limit for the safe-harbour rule to five years. In addition, if the period was longer than three years, a requirement to duly explain the particular circumstances that made the clause ancillary for the exceeding years was added. If the joint venture lasted for a shorter period than five years, the lifetime of the joint venture was set as the absolute limit. Four years later, with the issuing of the current Ancillary Restraints Notice, the Commission changed its view regarding such clauses once again, possibly to the mildest approach it has had so far. As mentioned, the current Notice explicitly states that non-compete clauses between the joint venture and its parents are allowed for the entire lifetime of the joint venture. Yet, similarly to the change of the Commission’s view regarding non-compete clauses in acquisition situations, the changes regarding the allowed duration in joint venture cases were not motivated further.

It appears to be difficult to foresee what the allowed duration of a particular non-compete clause in a joint venture situation will be in the future. At the same time, the decisions discussed in this section, allowing non-competes for the lifetime of the joint venture as well as those assessed in a stricter manner, are in line with the Commission’s 1990 and 2001 Notices respectively. The current Ancillary Restraints Notice views the non-compete clauses in joint ventures quite permissively. The question remains, though, why the Commission applies a lenient approach on non-compete clauses in joint ventures, although its view on non-compete clauses in acquisition situations is quite the opposite. Essentially both clauses aim at protecting the full transfer of a concentration. Diaz suggests that the extensive regulation of non-compete clauses in the 1990 Notice was based on the view that only joint ventures where the parents left the market of the joint venture could be considered as concentrations. Thus, no anti-competitive results would be found in such cases, meaning that non-compete clauses had a limited practical importance. This is, however, not always the case. It is fully possible that the parents remain active on neighbouring markets after the creation of the joint venture. In such cases, they can still enjoy a part of the goodwill that has been taken over by the joint venture. By staying active on a neighbouring market, they also retain the possibility to become active on the market of the joint venture again. Yet, the Notice allows unlimited non-

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280 1990 Notice, point V.A.
281 2001 Notice, para.36.
282 See Commission’s press release IP/01/908.
283 See Diaz, p.980.
compete cases in joint ventures. The Commission’s approach in joint venture cases does not appear to be in line with its restrictive approach regarding the safe-harbour rules in merger cases.

4.2.3.2 Vertical restraints

The general view is that vertical agreements normally raise fewer competition concerns than horizontal agreements, however, Article 101(1) certainly does not exclude this type of agreements from the scope of its application.\(^{284}\) Restrictions of competition in vertical agreements that fall within Article 101(1) are defined as vertical restraints.\(^{285}\) This definition is wide – consequently, there are many different types of vertical restraints and a number of regulations and guidelines clarifying their legal status. However, a detailed assessment of this category of restrictions is beyond the scope of this thesis.\(^{286}\) The following text examines the regulation of the so-called purchase and supply obligations. These types of clauses are common in practice; thus, the Commission is not unfamiliar with them. The Commission’s practice regarding the assessment of purchase and supply obligations in merger cases is summarised in the Ancillary Restraints Notice, which will be the main focus for the following analysis. The emphasis of this section will be kept on the allowed duration of these obligations.

In concentration cases, apart from the need to protect the transferred value, as the case is with non-compete clauses, the Commission also recognises the need to protect lines of purchase and supply that exist within an economic unity. When a sale of an undertaking takes place, these traditional lines might be broken off. To ensure the continuity in such supply lines, the Commission allows purchase and supply obligations in concentrations when they are necessary for carrying out the activities kept by the vendor or taken over by the purchaser. Provided that all other criteria of ancillary restraints are met, such clauses are justified by the Commission as long as their duration does not exceed five years.\(^{287}\) However, they may not in any case be completely exclusive.\(^{288}\)

\(^{284}\) Commission Guidelines on Vertical Restraints, 2010, OJ C 130/1, para. 6 (VBER Guidelines).
\(^{286}\) For an in-depth analysis of vertical agreements, see Jones & Sufrin, 2016, p.751. See also Karlsson & Östman, p.427.
\(^{287}\) Ancillary Restraints Notice, para.33.
\(^{288}\) Ibid., para.34.
Although the Ancillary Restraints Notice does not specify this, exclusive purchase and supply obligations are also a type of non-compete obligations.\textsuperscript{289} In practice, the effect on the market of such purchase and supply obligation is that the possibility for the purchaser or the supplier to choose among other suppliers or purchasers respectively becomes almost non-existent. Pursuant to the Vertical Block Exemption Regulation (VBER), such non-compete obligations exist when more than 80\% of the buyer’s total purchases on the relevant market are made from one supplier.\textsuperscript{290} They can thus be either completely exclusive or close to exclusive, as they prohibit the buyer from purchasing competing goods or services from other suppliers to more than 20 \% of the buyer’s total purchases.\textsuperscript{291} Yet, in these cases, even completely exclusive purchase and supply obligations are allowed for a period of five years when the market shares of the contracting parties do not exceed 30\% on their respective markets.\textsuperscript{292}

It should be acknowledged that the provisions of the VBER are mainly related to Article 101(3),\textsuperscript{293} which, as shown above, has a different application method than that of Article 101(1) and the ancillary restraints doctrine.\textsuperscript{294} However, this does not prohibit a comparison of the substantial safe-harbour rules in the VBER with the safe-harbour rules of purchase and supply obligations in concentration cases.

Thus, the safe-harbour rule for non-compete clauses is limited to three years pursuant to the Ancillary Restraints Notice, while the VBER allows purchase and supply obligations with a duration of five years. The objectives of these clauses are not the same, which should not be disregarded in this discussion; yet, the clauses are similar to each other in that they both have clear restrictive effects on the freedom of action of the parties and on competition in general. Moreover, as it was stated above, the VBER allows exclusive non-compete obligations for a period of five years, while the Ancillary Restraints Notice does not allow such clauses to be ancillary to concentrations at all. The complexity of the regulation of non-compete obligations is apparent. The border between the two regulations was touched upon in the \textit{Bright Service}\textsuperscript{295}

\textsuperscript{289} VBER, Article 1(1)(d). See also Moldén, Robert, \textit{Public procurement and competition law from a Swedish perspective – some proposals for better interaction}, ERT, 2012, 557, at p.607.
\textsuperscript{290} Article 1(1)(d), VBER.
\textsuperscript{291} VBER Guidelines, para.66.
\textsuperscript{292} VBER, Article 5(1).
\textsuperscript{293} Ibid., Article 2(1). For a further analysis, see Whish & Bailey, p.691.
\textsuperscript{294} See section 3.4.2.
In its reasoning, the CJEU stated that the assessment of whether the allowed duration of a non-compete obligation can be regarded as a block exemption or not cannot only take into consideration the block exemption criteria. If not all the criteria of the block exemption are fulfilled, an assessment of whether the agreement actually has the object or effect to harm the competition in the internal market should be made to determine its final classification.

Lastly, a comment should be made regarding the fact that VBER takes into account the market shares of the companies. As mentioned above, exclusive non-compete obligations are permitted for a period of five years only if the market shares of both the purchaser and the supplier do not exceed 30%. Thus, VBER recognises that companies of a smaller scale do not have the same effects on competition as the large companies. The market shares of merging undertakings are, however, not taken into consideration when assessing the ancillarity of non-compete clauses in mergers.

As mentioned above, the scope of this section is not to fully analyse the complex legal framework of other types of restrictive clauses, but rather to compare the practical aspects of the application of their regulation. The findings of this section show that different safe-harbour rules apply on very similar clauses depending on whether such clauses are included in a merger agreement or not. Thus, a certain divergence exists in the legal framework. Once again, the Commission’s view on non-compete clauses in merger cases appears to be the most restrictive.

### 4.3 Non-compete clauses when merger rules do not apply

Non-compete clauses are not only entered into in merger situations, even though it is the most common situation. To give a complete overview of the regulation of non-compete clauses in EU competition law, it is therefore not sufficient to only examine them in relation to the rules and principles relating to mergers. The following section will focus on the assessment of non-compete clauses when there is no merger aspect or when the clause does not qualify for the EUMR and the direct application of the Ancillary Restraints Notice.

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296 *Bright Service*, para.68.
4.3.1 Agreements between competitors

The most clear example of a non-compete clause where the element of concentration is not fulfilled is an agreement between competitors in which they agree not to compete with each other, as was seen in the ruling BIDS. It could also be a market sharing agreement, prohibiting parties to operate in a certain geographical market. Yet another example of non-compete situations where no merger aspect is present is an agreement not to compete on a certain product market, or a limitation on the quantity that a party to the agreement can produce or sell. Such clauses often constitute “hard core” restrictions that fall within the object box of Article 101, which was already examined in Chapter 2. As explained there, a broad assessment of the legal and economic context of the agreement should be made in every assessment of a restriction by object. This assessment should take into consideration all relevant circumstances in a given case. The general doctrine of ancillarity can be applied on these cases. If a non-compete clause is directly related to a main legitimate agreement and if it is necessary and proportionate to the full implementation of such an agreement, the clause falls outside of Article 101(1) due to its ancillarity. However, if the ancillarity criteria are not fulfilled, such non-compete clauses do fall within the prohibition in Article 101(1). Only if the restriction is proven is the possibility to defend it under the exemption in Article 101(3) available.

4.3.2 Agreements in merger situations

Another example of a non-compete situation where merger rules do not apply is a situation where such a clause is included in a merger agreement, but where the scale of the merger is not large enough for it to have a community dimension. Apart from ensuring that any applicable national merger rules are respected, the natural step is in these cases is to go back to Article 101, as it is applicable on all agreements, decisions and concerted practices that have as their object or effect the restriction of competition. Naturally, the general principles arising from the case law of the EU Courts accompanying Article 101 are fully applicable in these cases as well. The fact that the ancillary restraints doctrine is universal and thus also

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297 It was discussed in section 2.3.
298 As seen in e.g. Telefónica and E.ON Ruhrgas.
300 Such restrictions were explicitly listed in Commission’s previous Notice on agreements of minor importance which do not appreciably restrict competition (de minimis), 2001, OJ C 368/13, para.11.
301 See section 3.4 above.
applicable in such cases has already been established above. The question that still needs to be examined is to what level the Ancillary Restraints Notice can influence the assessment in merger cases without a community dimension.

### 4.3.2.1 Applicability of the Ancillary Restraints Notice

The Ancillary Restraints Notice is directly applicable to concentration situations with a community dimension. The question whether it has any influence in cases with no community dimension is, in fact, not merely hypothetical. The Commission’s Ancillary Restraints Notice formed the base for decisions in two recent national cases. Although national cases are without prejudice to EU law, in this context they serve as illustrative examples of the relevance of the Commission’s Ancillary Restraints Notice outside of its regular application area.

Thus, in *Viking Malt*, the Danish Competition and Consumer Authority dealt with Viking Malt’s purchase of Danish Malting Group (DMG) from Carlsberg Breweries. In the purchase agreement the parties included a purchase and supply obligation, obliging the DMG to continue providing Carlsberg with malt for a time period exceeding five years. The Competition Authority stated that such a clause could be seen as ancillary to the purchase if it was directly related and necessary for the maintenance of the supply of malt to the vendor, and if it did not last for a longer period of time than what was necessary for Carlsberg to establish an independent position of the market after the sale of its malt supplier. The Competition Authority referred to the current Ancillary Restraints Notice and found that since the duration of the clause exceeded five years, the clause could not be regarded as ancillary to the merger. Thus, it cleared the merger in general but the purchase and supply obligation was not included in the clearance decision.

The Stockholm District Court dealt with a similar situation in a recent case, in which the question raised above was defined very clearly. The case concerned the assessment of two non-compete clauses with a duration of five years each, included in two acquisition agreements between companies active on the removal sector. The purchaser, Alfa Quality Moving (AQM), acquired the international household removal business of NFB Transport

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303 See sections 3.6 and 4.2.2.
304 See EUMR Art.6(1)(b), Art.8(1), Art.8(2) and Ancillary Restraints Notice, para.1.
Systems (NFB) in 2006. In 2011, AQM made an acquisition of ICM Kungsholms (ICM). Both purchase agreements included non-compete clauses aimed at the vendors. None of the mergers required prior notification to the authorities.

The Swedish Competition Authority started proceedings against all three companies and claimed that such conduct was anti-competitive by object. It asked the court to issue fines amounting to 42 million SEK (around 4 million EUR), which were on the same level as fines for cartel infringements.\textsuperscript{306} The main argument of the Swedish Competition Authority was that the non-compete clauses were not proportionate to the purchase agreements because their durations exceeded the safe-harbour periods in the Commission’s Ancillary Restraints Notice.\textsuperscript{307} The Competition Authority recognised that goodwill was transferred and argued that only two-year non-compete clauses could be accepted. The Stockholm District Court found that the Ancillary Restraints Notice, even though not binding, should serve as guidance in the case.\textsuperscript{308} It agreed with the Swedish Competition Authority regarding the lack of know-how. However, it found the non-compete clauses to be necessary and proportionate for a period of three years after the purchase due to high customer loyalty and the long duration of agreements with customers. It also took into consideration that important knowledge, reputation and network of contacts remained with the vendors and that they continued to operate on the neighbouring market of domestic removal services.\textsuperscript{309} Finally, the court did not find the remaining two years to constitute a restriction of competition pursuant to the Swedish and EU competition laws because of certain other Article 101(1) considerations. The Competition Authority was of the opinion that the Notice should be followed strictly and announced that it would appeal the judgment on the very same day the district court’s judgment was published.\textsuperscript{310} The case is now pending at the Swedish Patent and Market Court of Appeal.

The Swedish Competition Authority acknowledged that the non-compete clauses would have been objectively necessary and in line with the Swedish and EU competition law if their

\begin{footnotes}
\item[308] Ibid., p.67.
\item[309] Ibid., p.79-80.
\item[310] See McKelvey.
\end{footnotes}
duration had been limited to two years. Thus, the case is unique in the sense that it solely rests on the applicability of the safe-harbour rules in the Ancillary Restraints Notice.

The findings of the previous chapters of this paper show that the principle of ancillarity is applicable on all types of restrictions and that the Ancillary Restraints Notice is an expression of this doctrine in the specific cases of mergers with a EU dimension. Since the GC’s judgment in Métropole Télévision, it has also been clear that the certain guidance can be sought in the Notice in all ancillarity cases. Therefore, it can be expected that the general principles set out in the Ancillary Restraints Notice would apply on restrictions that do not have the required community dimension. This view is supported by Article 16 of the Council Regulation 1/2003, which states that the application of EU competition law by national courts should be uniform.

However, the hierarchical level of the Ancillary Restraints Notice must be kept in mind in such application. The fact that the Notice essentially constitutes a special type of non-binding lex specialis for mergers with a EU dimension cannot be superseded by the analogical relevance of the Notice. Thus, guidance can be sought in the Ancillary Restraints Notice in merger cases even where EU dimension is not present, but the fact that the Notice does not have mergers without EU dimension as its main target should be taken into consideration.

4.3.2.2 Implications regarding the burden of proof

It was already established that the burden of proof rests on the party alleging the restriction in all Article 101 cases, including those cases that concern ancillary restrictions. Ancillarity is thus not used as a defence, as the case is when the exemption in Article 101(3) is applied, but rather as a test to determine whether a restriction falls within Article 101(1) in the first place.

What is particularly important to mention in this aspect is that the safe-harbour provisions in the Ancillary Restraints Notice regarding the duration of non-compete clauses cannot in any case be applied in a way so that the burden of proof shifts to the allegedly infringing party simply because the non-compete clause exceeds the Commission’s safe-harbour rules

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311 See Métropole Télévision, para.104. See also Article 101(3) Guidelines, paras.18(2) and 29, examined in Chapter 3 above.
312 Díaz, p.970
313 See section 3.4.2 above.
included in the Notice. The presumption of innocence in Article 48(1) of the Charter of Fundamental Rights and Article 6 ECHR must be respected.\textsuperscript{314} Moreover, this is especially relevant when considering penalties. Severe penalties can trigger the application of criminal law principles in EU competition law, meaning that analogies are not allowed in these aspects.\textsuperscript{315} The rules regarding the burden of proof prescribed in the Regulation 1/2003 should therefore prevail.

\textsuperscript{314} See section 3.4.2. See also Bernitz, p.19.
\textsuperscript{315} For an analysis of the relevant case law of the EU Courts and the European Court of Human Rights, see Kerse & Khan, p.108 \textit{et seq}. 
Chapter 5: Conclusions

The main aim of EU competition law is to safeguard the conditions that enable a well-functioning competition on a free internal market. Agreements having a sufficient degree of harm to the proper functioning of competition are therefore righteously prohibited. However, the wish to clarify the legal framework in order for it to be easily and effectively applied, thus also creating clarity for the companies on the market, can lead to a formalistic system, which may disregard important factors in a particular case. In the worst case, the formalistic application may prohibit agreements that do not restrict competition.

As it was shown in chapter 2, the EU Courts have been clearly advocating for a dynamic assessment of restrictions of competition by highlighting the need to take all relevant circumstances into account, or, using the terminology of the CJEU, by examining the alleged restrictions together with their legal and economic context. Restrictions by object need to be assessed in this background. Moreover, the Wouters doctrine clearly shows that the purpose of the restriction needs to be taken into consideration as well. If the main objective of an agreement is legitimate – regardless of whether its nature is commercial or not – clauses that are necessary for the implementation of the agreement will not be prohibited. There are thus two questions that need to be answered when arguments of this type are made; is the agreement legitimate and, if so, are restrictions attached to it really necessary for the implementation of the contract?

The ancillary restraints doctrine further specifies the steps that should be taken in such cases. Restrictions that are directly related, objectively necessary and proportionate to the aim they attempt to pursue are not prohibited. In practice, the ancillarity test is used to exclude non-compete clauses from the scope of Article 101 before any concrete restriction is established. Ancillarity is not a defence that the parties can use in the same way as the exemption in Article 101(3) is used, as shown in Chapter 3 above. Instead, the ancillarity test, although only applicable on restrictions that indeed are ancillary and thus not on the main agreement, is a “pre-Article 101” test. Therefore, at least in theory, the effects of ancillary restrictions on the market do not even need to be assessed. In practice, however, the courts will look into factors that make these clauses necessary and proportionate, and a certain assessment of the effects of such ancillary clauses will be made. The CJEU has repeatedly clarified that this is
not an expression of the rule of reason where positive and negative effects of the clause are weighed against each other, however, it cannot be disregarded that a certain assessment of the actual effects of ancillary clauses is made nevertheless.

The scope of the ancillary restraints doctrine appears to be broad. It was shown that it can be applied universally in both Article 101 and merger cases. Dogmatically, the doctrine of ancillarity shows clear similarities to the Wouters doctrine of justification, as both require an examination of the main purpose of the agreement. If the purpose of the agreement is found to be legitimate, the assessment of the necessity of the restriction is made as the next step. It is also observed that this test resembles the reasoning applied under the general principle of proportionality in EU law, especially regarding the necessity criterion, which ought to be the source from which the need to assess the necessity of a restriction is deducted in the first place.

The legal framework established in Chapters 2 and 3 shows that a variety of restrictions can be deemed necessary to a legitimate objective, which also includes non-compete clauses. In principle, the findings of these chapters support the hypothesis raised in the legal doctrine that even a time-unlimited agreement not to compete can be deemed necessary. De facto, this is the case in the Commission’s assessment of joint ventures. Non-compete clauses that fulfil the requirements of the ancillary restraints doctrine are allowed for the entire lifetime of the joint venture according to the Commission’s latest Ancillary Restraints Notice. The Commission is reluctant to admit that this could also be the case in pure merger cases. In fact, as shown in Chapter 4 of this paper, the Commission’s view of non-compete clauses in merger situations is fairly strict compared to its approach towards other similar restrictions. No explanation to why this is the case is given.

Coming back to the title of the thesis, there may therefore be grounds for arguing that in cases where the vendor remains active in a neighbouring market, the treatment of non-compete clauses in the general doctrine of ancillarity should be similar to the treatment of non-compete clauses in joint venture agreements as prescribed in the Ancillary Restraints Notice. It may be possible to argue that non-compete clauses indefinite as to the number of years may be legal under the ancillary restraints doctrine, if the non-compete clause is valid as long as the vendor

316 See Jones and Sufrin, p.244. See also section 4.2.1 above.
remains active on a neighbouring market. An indefinite period of time may indeed be necessary to ensure that the purchaser can obtain the full value of the assets purchased. This is in line with one of the CJEU’s landmark cases Remia and Nutricia. In this case, the Court clearly stated that if the vendor and the purchaser remain competitors after the transfer of the undertaking, the sale and purchase agreement cannot be given effect because the vendor continues to enjoy competitive advantages related to the goodwill and the know-how of the undertaking sold to the purchaser. The doctrine of ancillary restraints prohibits such situations and ensures that legitimate agreements can be implemented. Since it is applied universally, an individual assessment needs to be made in every case. Thus, it is fully possible that even indefinite non-compete clauses may be necessary for the implementation of the main legitimate agreement.

Considering the aspect of legal clarity, the Commission’s Ancillary Restraints Notice does provide such clarity regarding the most common restrictive clauses. However, as shown above, the Commission seems to apply the Notice in a formalistic way fairly often. Due to the authority of the Commission in the area of competition law, this application method may also be passed on to the national courts of the Member States. Although the Ancillary Restraints Notice is of a high relevance for the every-day application of the ancillary restraints doctrine in merger situations, the safe-harbour rules included in the Notice are not of a legally binding nature. In any case, the Notice cannot be applied in a formalistic way, as this interferes with the established case law regarding the application of Article 101. Furthermore, when the provisions of the Notice are applied without any proper reasoning, the utmost consequence of such application is that their legality becomes questionable. Finally, the presumption of innocence in the EU Charter of Fundamental Rights and the ECHR needs to be respected when severe penalties, such as e.g. high fines, are involved.

The final concluding remark, somewhat inspired by the CJEU’s approach, concerns the legal and economic context of the Ancillary Restraints Notice and the Commission’s practice connected to it. The aim of the Notice is to provide legal certainty and to make it easier for the businesses to operate on the internal market of the EU. The Notice is based on the EUMR and

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317 To my knowledge, there is no EU case law regarding the validity of indefinite non-compete clauses in cases where the vendor remains active on a neighbouring market for an indefinite period of time. The only case where such conditions are present that I am aware of is the ongoing Swedish case Afla Quality Moving discussed in section 4.3.2.1.

318 Remia and Nutricia, para.19.

319 See Karlsson & Östman, p.942.
is thus primarily made for concentrations of a scale large enough to have a community dimension. However, the rules created for big merging companies cannot be applied identically on non-compete clauses that are included in agreements of a smaller scale. When making an assessment of whether a given restriction is necessary to its main legitimate agreement, all relevant factors need to be taken into consideration. Identical application of the ancillary restraints doctrine on all types of agreements, without fully considering the context of the agreement is contradictory to the case law of the EU Courts and it may, at the utmost, prohibit harmless agreements. 320 Such application of the ancillary restraints doctrine is, in fact, by itself restrictive to the proper functioning of competition on the internal market of the EU.

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