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The Notion of Ancillary Restraints Under EC Competition Law

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F. Enrique González Díaz

Abstract

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ARTICLES

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*F. Enrique González Díaz**

INTRODUCTION

This Article examines the scope of the so-called ancillary restraints doctrine under European Community ("EC") competition law and the legal consequences of its implementation in light of the administrative practice of the European Commission and the case-law of the European Court of Justice ("Court of Justice" or "Court").

Article 85(1) of the EC Treaty¹ prohibits, as incompatible with the common market, all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States that have as their object or effect the prevention, restriction, or distortion of competition within the common market.² Article 85(3), however, may declare Article 85(1) inapplicable to agreements or concerted practices that contribute to improving the production or distribution of goods or promote technical or economic progress provided that the agreements or practices allow consumers a fair share of the resulting benefit, do not impose restrictions on the undertakings that are not indispensable to the attainment of these objectives, and do not afford such undertakings the possibility of eliminating competition with respect to a substantial

* Member of the Legal Service, European Commission. A version of this Article will appear in 1995 *FORDHAM CORP. L. INST.* (Barry Hawk ed., 1996). Copyright © Transnational Juris Publications, Inc., 1996. The author wishes to thank Mr. Daniël Jowell.

1. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No.1 (Cmd. 5179-II) [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* [EC Off'1 Pub. Off. 1987].

2. *Id.* art. 85(1), [1992] 1 C.M.L.R. at 626.

part of the products in question.³ The power to apply Article 85(1) is shared between the Commission, national courts, and national authorities entrusted with the task of applying the competition rules of the Treaty at the national level.⁴ Only the Commission, however, is empowered to grant an exemption under Article 85(3).⁵

The Commission's exclusive right to grant exemptions under Article 85(3), coupled with the obligation placed on undertakings to file a notification with the Commission as a legal condition for obtaining an exemption,⁶ prompted an important debate in EC competition law shortly after the EC Treaty entered into force. What was and still is at issue is whether all restraints on the freedom of action of undertakings that have an appreciable effect on market conditions should be regarded as a violation of Article 85(1) or whether an examination of the overall impact of the restriction on competition should be made before finding a violation of Article 85(1). Under the first approach, the assessment of the overall competitive impact of restricting the freedom of action of undertakings to determine their commercial behavior, and/or their possible merits in furthering other Treaty objectives, must only be assessed in the context of Article 85(3). The second approach advocates that the competitive impact of a restriction should be appraised according to the first paragraph of Article 85(1), and views the third paragraph as a provision essentially designed to exempt restrictions having an overall anti-competitive impact on the market.⁷

Generally, the Commission has followed the first approach, while the Court of Justice has not adhered to either approach. At the risk of oversimplification, however, it may be said that the Court has distinguished between vertical and horizontal re-

3. *Id.* art. 85(3), [1992] 1 C.M.L.R. at 627.

4. *See* BRT v. SABAM, Case 127/73, [1974] E.C.R. 51, [1974] 2 C.M.L.R. 238. With regard to national authorities, however, Article 9(3) states that as long as the Commission has not initiated any procedure under Article 2 or Article 3 the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty. Council Regulation No. 17 J.O. 204/62, at 64 (1962), O.J. Eng. Spec. Ed. at 87 (1959-62) [hereinafter Regulation 17].

5. Regulation 17, *supra* note 4, art. 9(1).

6. *See id.* art. 4(1). Article 4(2) of Regulation 17 provides for a limited exception to this notification obligation. *Id.* art. 4(2).

7. For an excellent analysis of this debate see RENÉ JOLIET, *THE RULE OF REASON IN ANTITRUST LAW* (1967).

straints, hard-core and non-hard-core restraints, and, like the Commission, ancillary and non-ancillary restraints. With respect to judicial review of vertical and horizontal restraints under Article 85(1), the Court has been more willing to accept a more detailed analysis of the overall competitive impact of vertical restraints than it has been with horizontal restraints.⁸ When reviewing cases involving vertical restraints under Article 85(1), however, the Court has been stricter with respect to hard-core restrictions, such as absolute territorial protection,⁹ resale price maintenance,¹⁰ and concerted refusals to deal than with milder restrictions of intra-brand competition.¹¹ Finally, in Article 85(1) proceedings, both the Court and the Commission have permitted a significant number of milder restrictions on both intra-brand and inter-brand competition, as well as some hard-core vertical and horizontal restrictions, such as non-competition clauses¹² and/or concerted refusals to deal,¹³ by resorting explicitly or implicitly to the doctrine of ancillary restraints.

I. THE NOTION OF ANCILLARY RESTRAINTS IN EC COMPETITION LAW

The first formulation of the doctrine of ancillary restraints in modern antitrust law can be traced back to Judge William

8. See *Delimitis v. Henninger Brau*, Case 234/89, [1991] E.C.R. I-935, [1992] 5 C.M.L.R. 210 (ruling on exclusive purchasing); *Erauw Jacquery v. La Hesbignonne*, Case 27/87, [1988] E.C.R. 1919, [1988] 4 C.M.L.R. 576 (concerning exclusive licensing of intellectual property rights); *Nungesser v. Commission*, Case 258/78, [1982] E.C.R. 2015, [1983] 1 C.M.L.R. 278 (involving exclusive right to produce and distribute); *Braserie de Haecht v. Wilkin*, Case 48/72, [1973] E.C.R. 77, [1973] C.M.L.R. 287 (discussing exclusive purchase obligation); *Société Technique Minière v. Ulm*, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357 (discussing exclusive dealing).

9. See *Nungesser*, [1982] E.C.R. 2015, [1982] 1 C.M.L.R. 278; *Consten & Grunding v. Commission*, Case 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418.

10. See *Distillers v. Commission*, Case 30/78, [1980] E.C.R. 2229, [1980] 3 C.M.L.R. 121.

11. See *supra* note 8 and accompanying text (discussing cases involving vertical and horizontal restraints).

12. See *Remia v. Commission*, Case 42/84, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1; Commission Decision No. 75/95/EEC, O.J. L 38/14 (1975), [1975] 1 C.M.L.R. D68 [hereinafter SHV/Chevron]; Commission Decision No. 64/502/EEC, J.O. 2287/64 (1964), [1964] C.M.L.R. 505 [hereinafter Nicholas/Vitrapo].

13. In the context of selective distribution and franchising see *Metro II v. Commission*, Case 75/84, [1986] E.C.R. 3021, [1987] 1 C.M.L.R. 118; *Pronuptia v. Schigalis*, Case 161/84, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414; *Metro I v. Commission*, Case 26/76, [1977] E.C.R. 1875, [1978] 2 C.M.L.R. 1.

Taft's decision in *United States v. Addyston Pipe & Steel Co.*¹⁴ According to Judge Taft:

No conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.¹⁵

In current U.S. antitrust practice, the notion of ancillary restraints is used essentially as an instrument allowing the application of the rule of reason to restrictions, namely horizontal restrictions, otherwise falling within the scope of the *per se* rule.¹⁶

With respect to EC competition law, there are essentially two schools of thought regarding ancillary restraints.¹⁷ According to the first school, the term refers to any clause or restriction in an agreement that is appreciable and is considered to fall outside of Article 85(1).¹⁸ The second school, however, contends that the term ancillary restraints should be used in a more

14. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

15. *Id.* at 282. Taft offered the following examples of ancillary restraints:

- (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold;
- (2) by a retiring partner not to compete with the firm;
- (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm;
- (4) by the buyer of property not to use the same in competition with the business retained by the seller; and
- (5) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service.

Id.

16. On the notion of ancillary restraints in U.S. antitrust law see Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965); Martin B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?*, 66 VA. L. REV. 879 (1980); Robert H. Bork, *Ancillary Restraints Under the Sherman Act In Sale-of-Business Cases and Know-How Licenses*, AMERICAN PATENT LAW ASSOCIATION BULLETIN 293 (1960). For an example of the current use of the ancillary restraints doctrine by U.S. courts see *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

17. In this Article, unless otherwise indicated, the second, more restrictive approach to the use of the term ancillary restraints will be employed. Ancillary restraints will be regarded as simply one category among several categories of restrictive agreements not falling within Article 85(1).

18. See VALENTINE KORAH, *EC COMPETITION LAW* 148-49 (5th ed. 1994).

limited set of circumstances.¹⁹ According to this view, agreements that do not fall within Article 85(1) can be sub-divided into several different categories.²⁰ Ancillary restraints are simply one category of such agreements or restrictions. Other notable categories are those relating to commercial risk and to selective distribution systems.²¹

Commercial risk cases involve agreements conferring exclusivity on a downstream commercial operator such as a licensee, franchisee, or distributor. These agreements are considered necessary in view of the risks undertaken by those downstream operators who create the market or undertake the investment. With respect to this category of restrictions, the Court tends to be more liberal than the Commission and has established a truncated rule of reason to assess the legality of commercial risk provisions under Article 85(1).²²

Some scholars who adhere to the stricter definition of ancillary restraints regard them as merely an *ad hoc* collection of terms considered "objectively necessary" for the performance of certain contracts that do not fall within the "commercial risk" reasoning.²³ There is, however, another way of analyzing them. There is a common thread that binds most of these various restrictions referred to as ancillary restraints. More specifically, the ancillary restraints doctrine is essential to justify restrictions that are necessary for the full preservation or transfer of value in certain types of transactions.

The theory that ancillary restraints are restrictions necessary to preserve or transfer value in a particular transaction is supported by the following examples. In a know-how licensing agreement,²⁴ the licensor wishes to be able to transfer the full value of his know-how to his licensee while preserving its value for himself or future licensees after the expiry of the licensing

19. See RICHARD WHISH, *COMPETITION LAW* 210-15 (1993) (categorizing agreements falling outside Article 85(1)).

20. *Id.* at 210-11.

21. *Id.* at 214.

22. See *supra* note 8 and accompanying text (discussing cases involving vertical and horizontal restraints).

23. WHISH, *supra* note 19, at 210-11.

24. These are agreements whereby one undertaking, the licensor, agrees to communicate know-how (technical information that is secret, substantial, and identified in appropriate form) to another undertaking, the licensee, for exploitation in a given territory.

agreement. In order to do so, the licensor will need to ensure the secrecy of the know-how. This will necessitate the addition of provisions in the licensing agreement that impose obligations on the licensee to keep the know-how secret, not to sub-license, not to use the know-how post term, and possibly, to restrict the use of the know-how to certain designated fields. Similarly, in a contract involving the sale of an undertaking, in order to transfer the full value of the business including the goodwill associated with it and its reputation to customers, it will almost certainly be necessary for the seller to covenant not to compete with the buyer of the undertaking for a certain period. Once again, such a clause is essential for transferring and/or preserving value in the transaction.

This Article conducts a non-exhaustive investigation into the veracity of the theory that ancillary restraints aim to preserve value in various types of transactions.

II. *REASONS FOR THE RESTRICTIVE APPROACH TO ANCILLARY RESTRAINTS*

Irrespective of the merits of the restrictive approach, some object to the sub-division of clauses falling outside of Article 85(1), arguing that these categories are artificial. According to this view, there is little value in maintaining a distinction between clauses necessary for the preservation or transfer of value such as ancillary restraints, and those clauses necessary in view of the commercial risk undertaken by the downstream operator. Critics further assert that these distinctions have no utility since both types of restrictions may be equally necessary for the transaction to occur.

While there is some validity to this objection, there are, nevertheless, several grounds for attributing some value to the distinction between ancillary restraints and commercial risk cases, and, perhaps, additional types of clauses falling outside Article 85(1). First, as a purely descriptive matter, the distinction has explanatory force in understanding the varied treatment of different clauses in both the case law of the Court and of the Commission. The restrictive approach to ancillary restraints gives a more precise delineation in viewing the jurisprudence relating to clauses falling outside Article 85(1), irrespective of whether one may object to such a delineation on commercial and/or

competition grounds. Second, the restrictive approach to ancillary restraints is also justified by the type of legal analysis applied in determining their legality under Article 85. Indeed, while commercial risk clauses usually necessitate an economic analysis of the market to determine whether they are permissible, ancillary restraints do not require, at least in EC competition law, a full economic analysis of the market. It is true that even ancillary restraints must satisfy the proportionality test; they must not go beyond what is necessary for the transaction to occur. The proportionality test in this context, however, is applied with a fairly wide margin of appreciation, an approach similar to the requirement in the common law doctrine of restraint of trade, which requires that the clauses must be "reasonable."²⁵ This proportionality test, however, does not require a full economic analysis of the market, unlike that required by the Court in cases such as *Société Technique Minière*²⁶ and *Delimitis*.²⁷ As a result of the absence of a full-blown market analysis, ancillary restraints are often regarded as *per se* legal. This, in turn, has the beneficial consequence of granting legal certainty regarding their use in commercial transactions. This certainty does not exist with respect to those clauses falling within the commercial risk category. Such terms are subject to the vagaries of an economic analysis of the market either under Article 85(1) or under Article 85(3).

III. ANCILLARY RESTRAINTS AND THE RULE OF REASON

Before proceeding to an in-depth analysis of the ancillary restraints doctrine, it is important to note that there is no necessary connection between whether one takes a narrow or broad view of ancillary restraints and whether one is in favor of a less restrictive approach with regard to what constitutes a restriction on competition under Article 85(1). It is true that some who subscribe to a broader view of the term ancillary restraints also lament the fact that under EC competition law there is no restrictive approach to the application of Article 85(1).²⁸ Conversely, some scholars who take a narrower view of ancillary re-

25. See MICHAEL J. TREBLIČOCK, *THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS* (1986).

26. *Société Technique Minière*, [1966] E.C.R. 235, [1966] C.M.L.R. 357.

27. *Delimitis*, [1991] E.C.R. 935, [1992] 5 C.M.L.R. 210.

28. See KORAH, *supra* note 18, at 56-60.

straints also look with some hesitancy at commercial risk restraints and the more liberal jurisprudence of the Court.²⁹ They regard such cases as damaging to legal certainty.³⁰ It is entirely consistent, however, to take the restrictive view of ancillary restraints as a distinct and separate category of restraints and to approve the liberal jurisprudence of the Court in the commercial risk cases as a desirable, but nonetheless distinct, supplement to the doctrine of ancillary restraints.

Whether there would still be a role for ancillary restraints if the Court and the Commission were to go as far as instituting a full-blown rule of reason is an open question. It is at least arguable that, even under such a scenario, it would be useful to have a class of restrictions with respect to the legality of which commercial operators could be certain, even in the absence of an economic analysis of the market. The extent to which the doctrine of ancillary restraints can be expanded to include further types of restrictions is an issue that will have to wait until a full examination of the theory of the transfer of value with respect to various categories of transaction is presented.

IV. *TRANSFER OF UNDERTAKINGS*

Both the Court and the Commission hold that Article 85(1) does not apply to non-competition clauses and other restrictions on the commercial freedom of undertakings when these restrictions are imposed in the context of the sale of a business.

One of the first decisions where the Commission developed its position with regard to ancillary restraints, *Reuter/BASF*,³¹ related precisely to the sale of a business. This case concerned the non-competition clauses imposed on Dr. Reuter by BASF upon the transfer of assets from Dr. Reuter to BASF. First, under an agreement dated June 25, 1971, Dr. Reuter transferred his con-

29. See *supra* note 8 (discussing cases concerning vertical and horizontal restraints).

30. See WHISH, *supra* note 19, at 210-11. On the importance of certainty in legal systems see FRIEDREICH A. VON HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973).

31. Commission Decision No. 76/743/EEC, O.J. L 254/40 (1976), [1976] 2 C.M.L.R. D44 [hereinafter *Reuter/BASF*]. For an early application of the doctrine of ancillary restraints see Nicholas/Vitrapo, J.O. L 2287/64 (1964), [1964] C.M.L.R. at 505. Nicholas/Vitrapo involved a five-year non-competition clause and an unlimited time restriction on the use of certain brands following the partial sale of the seller's business outside the European Community. *Id.*

trolling stake in Elastomer AG to BASF.³² Pursuant to a second agreement concluded on the same date between Dr. Reuter and Glasurit, a subsidiary of BASF, Dr. Reuter transferred all of his know-how and technology in the relevant field to Glasurit, including a detailed series of documents containing most of the scientific and technical data and know-how possessed by Elastomer AG.³³

These agreements imposed several restraints on Dr. Reuter's future activities. First, Dr. Reuter was prevented from engaging directly or indirectly in any activity in Germany or elsewhere in the relevant field for eight years, except for some limited activities related to the continuation of research and development on manufacturing processes for related products, the manufacture of finished parts,³⁴ and the right to perform some contracts with the former German Democratic Republic.³⁵ Second, for eight years, Dr. Reuter could not divulge any protected or unprotected know-how and experience in the relevant field or any events, circumstances, or facts relating to technical, commercial, financial, or staffing matters in the companies of the Elastomer group that arose before the contract was made, unless they were already well-known or related to the permitted activities.³⁶ Finally, Dr. Reuter was prevented from carrying out research in the relevant field.³⁷

32. Reuter/BASF, O.J. L 254/40, at 42, [1976] 2 C.M.L.R. at D49. Elastomer AG comprised a group of undertakings involved in the research, development, manufacture, use, and distribution of chemical products for the production of polyurethanes. Each undertaking derived semi-manufactured finished products, insofar as they formed part of the production program of the same, of the group's companies at the time of the agreement and of all technology, equipment, and apparatus for the processing of the chemical products for the production of polyurethanes and related products. *Id.* at 40-41, [1976] 2 C.M.L.R. at D46-D48.

33. *Id.* at 42-43, [1976] 2 C.M.L.R. at D49-D50.

34. *Id.* at 43, [1976] 2 C.M.L.R. at D50-D51. Dr. Reuter, however, was obliged, with respect to factories in which he held shares, to give the Elastomer group priority with regard to the supply of raw materials, plants, and machinery in the relevant field, provided that the prices and quality of such items were competitive. BASF was obliged to accord Dr. Reuter "most-favored-firm" treatment until December 31, 1974. *Id.*, [1976] 2 C.M.L.R. at D51. In exchange for suitable remuneration, Dr. Reuter was also obliged to notify the BASF group of all relevant business that became known to him in the course of his business activity. *Id.*

35. *Id.* When exercising these limited rights, Dr. Reuter was required to respect the legitimate interests of the Elastomer group along with its relevant subsidiaries and affiliates. *Id.*

36. *Id.*

37. *Id.*

The Commission found that the non-competition clauses eliminated Dr. Reuter as BASF's competitor in the relevant field, reasoning that, but for the clauses, Dr. Reuter's personal and technical knowledge and experience would have enabled him to engage in activity in all the relevant fields covered by the non-competition clauses.³⁸ He could have developed and exploited new application processes, even after the transfer of Elastomer AG to BASF.³⁹

In deciding whether these restrictions on Dr. Reuter's commercial freedom violated Article 85(1), and given the fact that the assets transferred to BASF included both goodwill and know-how, the Commission considered it necessary to examine the extent to which the clauses were essential to preserve the transferred worth of the undertaking and whether the clauses exceeded what was necessary for such preservation. Since *Reuter/BASF* represents the first significant occasion on which the Commission had the opportunity to decide on this issue, it is worth quoting from the Commission's opinion:

(a) It is recognized that it may be necessary in certain cases to provide safeguards to ensure the effective performance of an agreement. These may take the form of a contractual non-competition clause in cases where not only the material assets of an undertaking but also its commercial goodwill, including relations with customers, are to be transferred to the purchaser. In such cases it is essential to prevent a seller from re-acquiring his old customers either directly or indirectly through cooperation with the purchaser's competitors in the period immediately following the transfer. Compliance by the seller with such a non-competition clause means no more than that he must respect his obligation under the agreement to transfer the full value of the undertaking. Application of Article 85(1) to such a non-competition clause in an agreement can be excluded in such cases, since it would make more difficult or even impossible transactions which are generally recognized as legitimate.

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

38. *Id.* at 46, [1976] 2 C.M.L.R. at D55.

39. *Id.*

exposed to attacks by competing firms. The protection claimed by a purchaser against the competitive activity of the seller is justified only on the ground that the seller, 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.

(b) It is further recognized that it may be necessary in certain cases to provide additional safeguards to ensure the effective performance of an agreement in cases where technical knowledge, constituting an important part of the value of a transferred undertaking, is placed at the disposal of the transferee. As in the case of goodwill, it must be possible to prevent the transferrer for a certain time from using such knowledge in a manner which would prevent the transferee from acquiring the undertaking with its market position undiminished.

Here too, the protection afforded to the transferrer should be limited in time, since the transfer of legally unprotected know-how confers no exclusive rights on the purchaser

[T]he transfer of technical know-how in connection with the sale of an undertaking does not automatically preclude any further activity on the part of the seller based on such know-how. The opportunity of using know-how which is unknown to competitors is, like goodwill, a competitive advantage. This advantage can be diminished by the development by third party competitors of their own know-how in the particular field of research. Unlike third parties the transferrer of an undertaking remains aware of the contents of any transferred know-how, since he cannot divest himself of his own knowledge. For this reason it appears legitimate to protect the transferee in order for a certain time to enable him to acquire the undertaking with its competitive position undiminished. This need to protect the competitive position of the undertaking provides the justification for and prescribes the time limits to any non-competition clause involved.⁴⁰

40. *Id.* at 46-47, [1976] 2 C.M.L.R. at D56-D57. The factors to be taken into account in determining the duration of the non-competition clauses are: the nature of the transferred know-how, the opportunities for its use, and the knowledge possessed by

. . . In respect of geographical extent and subject matter the non-competition clause must in normal circumstances be confined to those markets in which the undertaking was active before its sale, or in which it may be regarded as a potential competitor on the basis of its relevant and demonstrable activity.⁴¹

In applying the aforementioned tests, the Commission found that the following clauses exceeded what was necessary to secure the legitimate object of the agreement: (1) the non-competition clause in so far as it covered non-commercialized research and development;⁴² and (2) the non-competition clause restricting the commercial exploitation of technical knowledge in the areas covered by the agreement in so far as it exceeded a period of five years.⁴³

The Commission, however, also held that the five-year non-competition clause, imposed on the vendor of a business coupled with a know-how exclusive license of the same duration, did

the purchaser. It is also reasonable to assume that the transferee will actively exploit the assets transferred. Furthermore, a distinction must be made between know-how existing at the date of transfer and new or further developments in connection with the transferred know-how. For example, non-competition clauses extending to new or further developments can be for a shorter duration. *Id.* at 47, [1976] 2 C.M.L.R. at D57.

41. *Id.*, [1976] 2 C.M.L.R. at D57.

42. *Id.* The Commission held as such because the development by the transferee of the results of his research, even to the stage of industrial use, does not breach the obligation of secrecy or jeopardize achieving the legitimate purpose of the agreement. The Commission stated:

As long as the transferee does not exploit the results of his research and development activity in such a way as to compete directly or indirectly with the purchaser of the undertaking, there is no adverse effect either on the undertakings' market position or on the value of the acquisition, and likewise there is no risk of customers being taken away.

Id. The Commission also considered that Dr. Reuter would lose touch with scientific and technical progress if he did not continue his polyurethanes research, where there is constant innovation. *Id.*, [1976] 2 C.M.L.R. at D58.

The Commission added that his continuance in research is consistent with the interests of the Community to maintain genuine competition within the common market. *Id.* If the prohibition on research and development were upheld, there would be a danger that Dr. Reuter would be entirely eliminated as a potential competitor. *Id.* This prohibition was thus regarded as a clause that was unjustified as a safeguard for the takeover and which has as its object and effect an appreciable restriction of competition. *Id.*

43. *Id.* The Commission rejected the justifications for the eight-year period originally foreseen in the agreement including: the need to protect the secrecy of the know-how; the high costs incurred by BASF in taking over the undertaking; and, the loss of raw material know-how which Dr. Reuter had formerly received from a third party and which he refused to continue to supply to BASF. *Id.* at 48-49, [1976] 2 C.M.L.R. at D59.

not fall under Article 85(1), provided that the sale included the transfer of goodwill and technical know-how, and that the subject matter, duration, and geographical scope of the restrictions did not exceed what is necessary to guarantee the effective transfer of these assets.⁴⁴ In effect, this ruling enables a purchaser to fully replace the seller on its market position prior to the acquisition.

It is important to note that the Commission reached this conclusion without examining the impact on competition of Dr. Reuter's elimination as a competitive force. Thus, the legality of the non-competition clauses in *Reuter/BASF* did not rest on their impact on market conditions but rather on their ability to bring about the transfer of value in terms of goodwill and know-how. Moreover, as the acquisition of control by BASF did not fall as such under the scope of application of Article 85(1), the logical consequence of the Commission's approach was a narrower application of Article 85(1) to restrictions on the commercial freedom of the seller, which made the transaction possible. In narrowing the application of Article 85(1), the Commission articulated a version of the ancillary restraints doctrine, according to which, the legality of some restrictions depended exclusively on their connection to the main transaction and not on their independent impact on competition.

In the *Nutricia*⁴⁵ decision of December 12, 1983, the Commission again had the opportunity to apply its ancillary restraints doctrine to restrictions imposed in the context of the sale of a business. This case concerned non-competition clauses contained in agreements for the sale by NVVB Nutricia of its subsidiary, Remia BV, to De Rooij, and the sale of Luycks Producten BV ("Luycks") to Zuid-Hollandse Conservenfabriek BV ("Zuid"). Remia was involved in the production of sauces while Luycks essentially produced pickles. According to the agreement concerning the sale of Remia ("Sauce Agreement"), Nutricia would transfer its shares in Remia to De Rooij, together with the exclusive right to sell consumer products manufactured by or on behalf of Remia, and the exclusive right to sell in the Netherlands sauces manufactured by or on behalf of Luycks, whose compli-

44. *Id.* at 49, [1976] 2 C.M.L.R. at D60.

45. Commission Decision No. 83/670/EEC, O.J. L 376/22 (1983), [1984] 2 C.M.L.R. 165 [hereinafter *Nutricia*].

ance Nutricia guaranteed.⁴⁶ Against this backdrop, Nutricia undertook not to engage, directly or indirectly, in the production or sale of sauces on the Dutch market for a period of ten years and ensured that Luycks would comply with this restriction.⁴⁷ De Rooij was also given a non-exclusive right to use the trademark "Luycks" for some sauces for two years with respect to sales to the hotel and catering trade.⁴⁸ Pursuant to the agreement relating to the sale of Luycks ("Pickles Agreement"), Nutricia allowed Zuid to use Nutricia's sale force on a non-exclusive basis in the Dutch market and in the Belgian and German export markets for a period of one year.⁴⁹ As in the Sauce Agreement, the Pickles Agreement required Nutricia not to engage, directly or indirectly, for five years, in any production or sale of pickles or condiments in European countries.⁵⁰ Failure to comply with this provision could trigger penalties, which were quantified in the Pickles Agreement.⁵¹ The Pickles Agreement also extended the non-competition clause contained in the Sauce Agreement to Luycks-Zuid, concerning Luycks' future activities in the sauce market.⁵²

In its legal assessment, the Commission essentially followed the approach developed in *Reuter/BASF*. Accordingly, it stated that when the sale of a business involves the transfer not only of material assets but also of goodwill and clientele it may be necessary to impose on the seller contractual restrictions on competition.⁵³ The Commission also stressed that the level of protection accorded to the purchaser must be limited to what is objectively necessary for the purchaser to assume, by active competitive behavior, the place in the market previously occupied by the

46. *Id.* at 25, [1984] 2 C.M.L.R. at 171.

47. *Id.*

48. *Id.*

49. *Id.*, [1984] 2 C.M.L.R. at 171-72.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 26, [1984] 2 C.M.L.R. at 172-73. The Commission provided a number of criteria to be used in determining the necessary duration of the restrictions. *Id.* These criteria include: internal documentation of the parties at the time of the sale, the time it will take the purchaser to build up a clientele, the degree of brand loyalty, the time lapse required to enter the market or to have a new trade mark accepted by the consumer, and the time required by the seller to make a successful comeback such as the degree of technological sophistication of the products and the degree of financial strength of the purchaser. *Id.*, [1984] 2 C.M.L.R. at 173.

seller.⁵⁴ With regard to the geographical scope of the non-competition clause, the Commission appeared to depart from its previous approach in *Reuter/BASF* by deciding that, as a rule, the provision should only cover the geographical markets where the products concerned were manufactured or sold at the time of the agreements.⁵⁵

The most relevant innovation introduced by the Commission in *Nutricia*, however, was the extension of the ancillary restraints doctrine to the imposition of non-competition clauses on third parties. Indeed, the Commission implied that the imposition of a four-year non-competition clause on Zuid upon the sale of Luycks would not violate Article 85(1) in so far as the restriction would simply reflect that imposed in relation with *Nutricia*.⁵⁶ The legal test articulated by the Commission requires that a non-competition clause imposed on the buyer in the second transaction does no more than reflect the non-competition clause imposed upon the seller in the first transaction, and where the first non-competition clause is deemed ancillary, then the second must also be regarded as ancillary.

On appeal, the Court affirmed the Commission's approach.⁵⁷ Regarding the applicability of Article 85(1) to non-competition clauses in the context of the sale of a business, the Court stated that in order to determine whether or not such clauses fall within the prohibition in Article 85(1) it is necessary to examine the competitive environment as if those clauses did not exist.⁵⁸ If, in the absence of such clauses, the vendor and the purchaser would have remained competitors after the transfer, the agreement for the transfer of the undertaking could not have been given effect. The vendor, with his particularly de-

54. *Id.* The Commission also stated that the period of protection will not be extended even if the objective minimum appears insufficient as a result of an earlier management decision on the part of the purchaser. *Id.* In regard to the Sauce Agreement, the Commission decided that the non-competition clause provided could only be considered as ancillary for a period of four years. *Id.* at 27, [1984] 2 C.M.L.R. at 174. As to the Pickles Agreement, the Commission only accepted a two-year non-competition clause limited to the Dutch, Belgian, and German markets. *Id.* The applications for exemption under Article 85(3) were refused. *Id.* at 28, [1984] 2 C.M.L.R. at 175-76.

55. *Id.* at 26, [1984] 2 C.M.L.R. at 173-74. The application of this general rule in this case, however, does seem justified since *Nutricia* had no reputation in markets outside the Netherlands. *Id.* at 27, [1984] 2 C.M.L.R. at 174.

56. *See id.* at 27, [1984] 2 C.M.L.R. at 174.

57. *Remia*, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1.

58. *Id.* at 2571, ¶ 18, [1987] 1 C.M.L.R. at 28.

tailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business.⁵⁹ As a result, non-competition clauses incorporated in an agreement for the transfer of an undertaking, in principle, have the merit of ensuring that the transfer has the effect intended. These clauses, by virtue of that fact, contribute to the promotion of competition because they lead to an increase in the number of undertakings in the market in question.⁶⁰ Nevertheless, in order to have a beneficial effect on competition, such clauses must be necessary to the transfer of the undertaking concerned, and their duration and scope must be strictly limited to that purpose.⁶¹

While the Court initially seemed to base the non-applicability of Article 85(1) to non-competition clauses on the sale of a business on a pro-competitive merits analysis, it essentially endorsed the Commission's test based on the necessity of the clause to make the transfer of assets fully effective. Indeed, the Court did not require, that in implementing the "necessity test," the Commission take into account the degree of actual and potential competition on the relevant market at the time of the sale. Nor did the Court require the Commission to undertake a detailed examination of the competitive situation in the relevant market before and after the transaction in order to decide whether the need to guarantee the full transfer of the assets took precedence over the need to preserve and/or develop effective competition.

The Commission further developed its approach in *Mecaniver/PPG*.⁶² In this decision, the Commission considered not only the possible applicability of Article 85(1) to the sale of the business and ancillary agreements, but also the potential applicability of Article 86.⁶³ With respect to Article 86, the Commission held that given the conditions of effective competition prevailing

59. *Id.* at 2571, ¶ 19, [1987] 1 C.M.L.R. at 28.

60. *Id.* at 2571, ¶ 20, [1987] 1 C.M.L.R. at 28.

61. *Id.*

62. Commission Decision No. 85/78/EEC, O.J. L 35/54 (1985), [1985] 3 C.M.L.R. 359 [hereinafter *Mecaniver/PPG*].

63. EC Treaty, *supra* note 1, art. 86, [1992] 1 C.M.L.R. at 627-28. "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade." *Id.*

in the market, the application of that Article was not justified.⁶⁴ In holding as such the Commission implied that its approach to the non-competition clause contained in the sale agreement could have been different had the transaction given rise to a strengthening of a dominant position.⁶⁵

In *BPCL/ICI*⁶⁶ and *ENI/Montedison*,⁶⁷ two subsequent decisions reviewing agreements concerning the restructuring of the European petrochemical industry, the Commission adopted a more cautious approach with respect to non-competition and related clauses applied in transactions involving the transfer of undertakings. Both decisions concerned asset swap arrangements coupled with the concurrent closure of some production capacity and transitional cooperation agreements for the operation of the newly acquired assets between BPCL and ICI and between ICI and ENI, respectively.⁶⁸ Each individual transaction could have been viewed simply as a sale of a business accompanied by transitional arrangements designed to ensure the effectiveness of the transfers, but the Commission held that the agreements in question constituted agreements and concerted practices within the meaning of Article 85(1).⁶⁹

64. *Mecaniver/PPG*, O.J. L 35/54, at 57 (1985), [1985] 3 C.M.L.R. at 364-65.

65. *Id.*

66. Commission Decision No. 84/387/EEC, O.J. L 212/1 (1984), [1985] 2 C.M.L.R. 330 [hereinafter *BPCL/ICI*].

67. Commission Decision No. 87/3/EEC, O.J. L 5/13 (1987), [1988] 4 C.M.L.R. 444 [hereinafter *ENI/Montedison*].

68. *BPCL/ICI*, O.J. L 212/1 (1984), [1985] 2 C.M.L.R. 330; *ENI/Montedison*, O.J. L 5/13 (1987), [1988] 4 C.M.L.R. 444. More particularly, *BPCL/ICI* concerned the agreements between BPCL and ICI for the mutual sale of certain production units, technical know-how, goodwill for polyvinyl chloride ("PVC") and low-density polyethylene ("LDPE"), and related agreements concerning the operation and further sale of the plant by the new owners. *BPCL/ICI*, O.J. L 212/1, at 1 (1984), [1985] 2 C.M.L.R. at 333. The opinion also concerned the decision of BPCL to close down its PVC and chlorine wedge production units not involved in the agreements, the decision of ICI to close down certain of its LDPE and ethylene production units not involved in the agreements, the agreements to change the capacity rights in a jointly owned ethylene cracker, and supply agreements between BPCL and ICI for polyethylene and ethylene. *Id.*

69. EC Treaty, *supra* note 1, art. 85(1), [1992] 1 C.M.L.R. at 626. Article 85(1) prohibits "all agreements between undertakings . . . and concerted practices which may affect trade between member-States and which has as their object of effect the prevention, restriction or distortion of competition within the common market." *Id.* The agreements in question include the sale both of the most modern plants and of all of the parties' goodwill on the respective markets with the implied obligation not to compete and the subsequent closures of the plants not specifically included in the same

According to the Commission, the result of the agreements and subsequent plant closures was a specialization of production and an agreement to limit capacity in the United Kingdom in that ICI abandoned the production of low-density polyethylene ("LDPE") in the United Kingdom, specializing instead in polyvinyl chloride ("PVC"), and BPCL totally abandoned the production of PVC, specializing instead in LDPE.⁷⁰ Consequently, competition was restricted appreciably for both products because each party was an important and active competitor before the agreements and remained so after their implementation.⁷¹

With regard to the non-competition clause, the Commission decided that both BPCL and ICI's sales of their most-modern PVC and LDPE plants, respectively, and all the U.K. goodwill, which prohibited the seller from canvassing his former customers for a reasonable period, effectively precluded the seller from competing with the purchaser, thus, implicitly forcing the former to close all their remaining plants not involved in the deal.⁷² The Commission concluded that the sale of all the parties' goodwill on the respective markets amounted implicitly to an obligation not to compete and was not simply ancillary to the transfer of the assets because the goodwill was being transferred without the plant to which it belonged and because of the reciprocal nature of these transfers.⁷³

The Commission also adhered to this position in *ENI/Montedison*.⁷⁴ The Commission held that the non-competition

agreements. BPCL/ICI, O.J. L 212/1, at 5 (1984), [1985] 2 C.M.L.R. at 339; see *ENI/Montedison*, O.J. L 5/13, at 16 (1987), [1988] 4 C.M.L.R. at 450-51.

70. BPCL/ICI, O.J. L 212/1, at 5-6 (1984), [1985] 2 C.M.L.R. at 339-40.

71. See *id.* at 6, [1985] 2 C.M.L.R. at 340.

72. This analysis essentially applied to BPCL since ICI retained some plants on the Continent.

73. BPCL/ICI, O.J. L 212/1, at 8 (1984), [1985] 2 C.M.L.R. at 345-46.

74. *ENI/Montedison*, O.J. L 5/13, at 17 (1987), [1988] 4 C.M.L.R. at 452. The decision stated:

In the circumstances of the present case, the economic effects of the reciprocal asset swaps must be seen as a whole: the result is a *de facto* specialization accompanied by concerted action to reduce capacity. In addition . . . both parties still remain actual and potential competitors, even though they are forbidden for a time from competing. Furthermore, the parties have not withdrawn completely from the sector and they are dependent on each others' cooperation for the continued effective operation of certain of their newly acquired assets. Therefore it cannot be argued that the agreements constitute simple assets transfers outside the scope of Article 85(1)

Id.

clauses and related arrangements, while ensuring the effectiveness of the transfer of assets, were also part of a wider scheme designed to restrict competition by way, in particular, of a specialization agreement.⁷⁵

Although these two cases should not be seen as a departure from the Commission's previous approach to ancillary restraints, they illustrate how the Commission's perception of the main objective of the transaction determines the fate of restrictions that, on their face, should normally fall under the ancillary restraints category.

Following the entry into force of the Merger Regulation⁷⁶ ("Merger Regulation"), the Commission issued a Notice⁷⁷ ("Ancillary Notice"), stating the interpretation it would thereafter give to the notion of "restrictions directly related and necessary to the implementation of the concentration" both in general terms and to specific clauses, including: non-competition covenants, licenses of industrial and commercial property rights and know-how, and purchase and supply agreements usually included in the different types of transactions covered by the Regulation, such as transfers of undertakings, joint ventures, and joint acquisitions.⁷⁸ Although these guidelines only apply to

75. *Id.* at 16-18, [1988] 4 C.M.L.R. at 450-53. It is worth noting that in applying Article 85(3) to the obligation not to canvass each other's customers the Commission applied, in the BPCL/ICI decision, the traditional test of ancillarity developed in its previous administrative practice. BPCL/ICI, O.J. L 212/1, at 10 (1984), [1985] 2 C.M.L.R. at 346-47. This approach, however, was not followed in the subsequent ENI/Montedison decision where the five-year non-competition clause was exempted without any elaborate analysis regarding its indispensability. ENI/Montedison, O.J. L 5/13, at 19 (1987), [1988] 4 C.M.L.R. at 456.

76. Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990). Recital 25 of the this Regulation ("Merger Regulation") states that "this Regulation should still apply where the undertakings concerned accept restrictions directly related and necessary to implementation of the concentration." *Id.*, O.J. L 257/13, at 16 (1990). The Merger Regulation also provides that "[t]he decision declaring the concentration compatible [with the common market] shall also cover restrictions directly related and necessary to the implementation of the concentration." *Id.* art. 8(2), O.J. L 257/13, at 19 (1990).

77. Commission Notice, O.J. C 203/05 (1990) [hereinafter Ancillary Notice].

78. For an early analysis of the 1990 Notice see Donald L. Holley, *Ancillary Restrictions in Mergers and Joint Ventures*, 1990 FORDHAM CORP. L. INST. 423 (B. Hawk ed. 1990). For a detailed analysis of the Commission's application of the 1990 Notice up to 1992 see JONES & GONZÁLEZ, *THE EEC MERGER REGULATION* (1992). For a more recent analysis of the Commission's implementation of the 1990 Notice with particular regard to non-competition clauses see James R. Modrall, *Ancillary Restrictions in the Commission's Decisions under the Merger Regulation: Non-competition Clauses*, [1995] 1 E.C.L.R. 40.

Community dimension operations⁷⁹ as defined by Article 1 of the Regulation,⁸⁰ it can be safely anticipated that the Commission will apply these principles to ancillary restraints imposed in the context of concentrations falling below the thresholds.

The Ancillary Notice sets out the following principles of evaluation:

3. The 'restrictions' meant are those agreed on between the parties to the concentration which limit their own freedom of action in the market. They do not include restrictions to the detriment of third parties. If such restrictions are the inevitable consequence of the concentration itself, they must be assessed together with it under the provisions of Article 2 of the Regulation. If, on the contrary, such restrictive effects on third parties are separable from the concentration they may, if appropriate, be the subject of an assessment of compatibility with Articles 85 and 86 of the EEC Treaty.

4. For restrictions to be considered 'directly related' they must be ancillary to the implementation of the concentration, that is to say subordinate in importance to the main object of the concentration. They cannot be substantial restrictions wholly different in nature from those which result from the concentration itself. Neither are they contractual arrangements which are among the elements constituting the concentration, such as those establishing economic unity between previously independent parties, or organizing joint control by two undertakings of another undertaking. As integral parts of the concentration, the latter arrangements constitute the very subject matter of the evaluation to be carried out under the Regulation.

Also excluded, for concentrations which are carried out in stages, are the contractual arrangements relating to the stages before the establishment of control within the meaning of Article 3, paragraphs 1 and 3 of the Regulation. For these, Articles 85 and 86 remain applicable as long as the conditions set out in Article 3 are not fulfilled.

The notion of directly related restrictions likewise excludes from the application of the Regulation additional restrictions agreed at the same time which have no direct link with the concentration. It is not enough that the additional restrictions exist in the same context as the concentration.

79. Council Regulation No. 4064/89, *supra* note 76, art. 1, O.J. L 257/13, at 16 (1990).

80. *Id.*

5. The restrictions must likewise be 'necessary to the implementation of the concentration', which means that in the absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success. This must be judged as an objective basis.

6. The question of whether a restriction meets those conditions cannot be answered in general terms. In particular as concerns the necessity of the restriction, it is proper not only to take account of its nature, but equally to ensure, in applying the rule of proportionality, that its duration and subject matter, and geographic field of application, do not exceed what the implementation of the concentration reasonably requires. If alternatives are available for the attainment of the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition.⁸¹

With regard to non-competition clauses, the Commission essentially codified its former administrative practice.⁸² According to the Commission, ancillary restrictions that meet the criteria set out in the Regulation are contractual prohibitions on competition imposed on the vendor in the context of a concentration achieved by the transfer of an undertaking or part of an undertaking.⁸³ Such prohibitions guarantee that the acquirer receives the full value of the assets transferred, which, in general, include both physical assets and intangible assets such as the goodwill that the vendor has accumulated or the know-how he has developed. These restrictions are not only directly related to the concentration, but are also necessary for its implementation because, in their absence, there would be reasonable grounds to expect that the sale of the undertaking or part of an undertaking could not be accomplished satisfactorily. In order to assume full control over the value of the assets transferred, the acquirer must be able to protect itself against the competitive acts of the vendor in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such protection is not generally considered necessary when the transfer is *de facto* limited to physical assets such as land, buildings, machinery, or to exclusive indus-

81. Ancillary Notice, O.J. C 203/05, at 5-6 (1990).

82. *Id.* at 6-7.

83. *Id.* at 7.

trial and commercial property rights where the holders could immediately take action against infringements by the transferor of such rights.

Such a restriction on competition, however, is justified only where the concentration in terms of its duration, its geographical field of application, its subject matter, and the persons subject to it, do not exceed what is reasonably necessary to that end.⁸⁴

Protection of the vendor is not normally an ancillary restriction and is, therefore, examined under Articles 85 and 86 of the EC Treaty.⁸⁵ The vendor may bind himself, and his subsidiaries

84. *Id.* at 6. With regard to the acceptable duration of a prohibition on competition, the Commission has deemed five years as an appropriate period of time when the transfer of the undertaking includes the goodwill and know-how, and a period of two years when it includes only the goodwill. *Id.* These, however, are not absolute rules; they do not preclude a prohibition of longer duration in particular circumstances. For example, the parties can demonstrate that customer loyalty will persist for a period longer than two years or that the economic life cycle of the products concerned is longer than five years and should, therefore, be taken into account. *Id.*

Similarly, the geographic scope of the non-competition clause must be limited to the area where the vendor had established its products or services before the transfer. *Id.* It does not appear objectively necessary that the acquirer be protected from competition by the vendor in territories which the vendor had not previously penetrated. *Id.*

In the same manner, the competition clause must be limited to products and services which form the economic activity of the undertaking transferred. *Id.* In particular, in the case of a partial transfer of assets, it does not appear that the acquirer needs to be protected from the competition of the vendor in the products or services which constitute the activities which the vendor retains after the transfer. *Id.*

85. The Commission has applied the above-mentioned principles in a substantial number of the following unreported cases. *See, e.g.*, Mitsubishi/UCAR, Decision of 04.01.91, Fiat Geotech/Ford New Holland, Decision of 08.02.91, ASKO/Omni, Decision of 21.02.91, Digital/Kienzle, Decision of 22.02.91, ASKO/Jacobs/ADIA, Decision of 16.05.91, Conagra/Idea, Decision of 30.05.91, RVI/VBC/Heuliez, Decision of 03.06.91, RVI/VBC/Heuliez, Decision of 03.06.91, VIAG/Continental Can, Decision of 06.06.91, Sanofi/Sterling Drug, Decision of 10.06.91, Péchiney/Usinor-Sacilor, Decision of 24.06.91, Dräger/IBM/HMP, Decision of 28.06.91, ICL/Nokia Data, Decision of 17.07.91, Digital/Philips, Decision of 02.09.91, ABC/Générale des Eaux/Canal /W.H. Smith TV, Decision of 10.09.91, Thomson/Pilkington, Decision of 23.10.91, Lucas/Eaton, Decision of 09.12.91, Ingersoll Rand/Dresser, Decision of 18.12.91, Courtaulds/SNIA, Decision of 19.12.91, VIAG/Brühl, Decision of 19.12.91, Volvo/Atlas, Decision of 14.01.92, Inchcape/IEP, Decision of 21.02.92, Ericsson/Kolbe, Decision of 22.01.92, Tarmac Steetley, Decision of 12.02.92, Thorn EMI/Virgin Music, Decision of 27.04.92, Eureko, Decision of 27.04.92, Herba/IRR, Decision of 28.04.92, Solvay/Laporte, Decision of 30.04.92, Mondy/Frantschach, Decision of 12.05.92, Ericsson/Ascom, Decision of 08.07.92, GECC/Avis, Decision of 15.07.92, Elf Atochem/Rohm & Haas, Decision of 28.07.92, Pepsi Co/General Mills, Decision of 05.08.92, Pechiney/VIAG, Decision of 10.08.92, Rhône-Poulenc/SNIA, Decision of 10.08.92, Northern Telecom/Matra Communication, Decision of 10.08.92, BTR/Pirelli, Decision of 17.08.92, Avesta/British

and commercial agents. An obligation to impose similar restrictions on others, however, would not qualify as an ancillary restriction. This applies in particular to clauses that would restrict the scope for resellers or users to import or export.⁸⁶

As to licenses of industrial and commercial property rights and know-how, the Commission's position is the following: the transfer of an undertaking or part of an undertaking generally includes the transfer to the acquirer, with a view to the full exploitation of the assets transferred, of rights to industrial or commercial property or know-how.⁸⁷ The vendor may, however, remain the owner of the rights in order to exploit them for activities other than those transferred.⁸⁸ In these cases, the usual means for ensuring that the acquirer will have the full use of the assets transferred is to conclude licensing agreements in his favor.

Simple or exclusive licenses of patents, similar rights, or existing know-how can be accepted as necessary for the completion of the transaction, as well as agreements to grant such licenses. License agreements may restrict certain fields of use to the extent that they correspond to the activities of the undertakings transferred. Normally, it will not be necessary for such licenses to include territorial limitations on manufacturing, which reflect the territory of the activity transferred. Licenses may be granted for the whole duration of the patent or similar rights, or the duration of the normal economic life of the know-how. As such licenses are the economic equivalent to a partial transfer of

Steel/NCC, Decision of 04.09.92, Linde/Fiat, Decision of 28.09.92, Rhône-Poulenc Chimie/SITA, Decision of 26.11.92, British Airways/TAT, Decision of 27.11.92, Waste Management/SAE, Decision of 21.12.92, Tesco/Catteau, Decision of 04.02.93, Sara Lee/BP Food Division, Decision of 08.02.93, Matra/Cap Gemini Sogeti, Decision of 17.03.93, Harrisons & Crossfield/Akzo, Decision of 29.04.93, Aegon/Scottish Equitable, Decision of 25.06.93, BHF/CCF/Charterhouse, Decision of 30.08.93, Arvin/Sogefi, Decision of 23.09.93, American Cyanamid/Shell, Decision of 01.10.93, Synthomer/Yule Catto, Decision of 22.10.93, Mc Cormick/CPC/Rabobank/Ostmann, Decision of 06.10.93, SNECMA/TI, Decision of 17.01.94, Neste/Statoil, Decision of 17.02.94, ABB/Renault, Decision of 09.03.94, CGP/GEC Alstom/KPR/Kone, Decision of 14.04.94, AGF/La Unión y El Fénix, Decision of 25.04.94, Allied Lyons/HWE-Pedro Domecq, Decision of 28.04.94, ERG/NRG Victory, Decision of 27.05.94, GKN/Brambles/Leto Recycling, Decision of 07.06.94.

86. *But see* Nutricia, O.J. L 376/22, at 23 (1984), [1984] 2 C.M.L.R. at 168-69 (holding this type of clause to be acceptable).

87. Ancillary Notice, O.J. L 203/05, at 7 (1990).

88. *Id.*

rights, they need not be limited in time. Restrictions in license agreements, other than those described above, fall outside the scope of the Regulation. They must be assessed on their merits according to Article 85(1) and Article 85(3).

By analogy, the same principles apply to trademark licenses, business names, or similar rights where the vendor wishes to remain the owner of such rights in relation to activities retained while the acquirer needs the rights to use and market the products that are the object of the activity of the undertaking or part of an undertaking transferred. In such circumstances, the conclusion of agreements for the purpose of avoiding confusion between trademarks may be necessary.⁸⁹

As to purchase and supply agreements, the Commission recognizes that the transfer of an undertaking or part of an undertaking, in many cases, may entail the disruption of traditional lines of internal procurement and supply resulting from the previous integration of activities within the economic entity of the vendor. To make possible the break-up of the economic unity of the vendor and the partial transfer of the assets to the acquirer under reasonable conditions, it is often necessary to maintain, at least for a transitional period, similar links between the vendor and the acquirer. This objective is normally achieved through the use of purchase and supply agreements between the vendor and the acquirer of the undertaking or part of an undertaking. Taking account of the particular situation resulting from the break-up of the economic unity of the vendor, such obligations which can sometimes lead to restrictions of competition, can be recognized as ancillary as they may benefit the vendor as well as the acquirer.

The legitimate aim of such obligations may be to ensure the continuity of supply to one or the other of the parties of prod-

89. *See, e.g.*, Fiat Geotech/Ford New Holland, Decision of 08.02.91, Thomson/Pilkington, Decision of 23.10.91, Courtaulds/SNIA, Decision of 19.12.91, Grand Metropolitan/Cinzano, Decision of 07.02.92, GECC/Avis, Decision of 15.07.92, Elf Atochem/Rohm & Haas, Decision of 28.07.92, Northern Telecom/Matra Communication, Decision of 10.08.92, BTR/Pirelli, Decision of 17.08.92, Avesta/British Steel/NCC, Decision of 04.09.92, CCIE/GTE, Decision of 25.09.92, Linde/Fiat, Decision of 28.09.92, Ahold/Jeronimo Martins, Decision of 29.09.92, British Airways/TAT, Decision of 27.11.92, Waste Management/SAE, Decision of 21.12.92, Harrisons & Crossfield/Akzo, Decision of 29.04.93, BHF/CCF/Charterhouse, Decision of 30.08.93, Arvin/Sogefi, Decision of 23.09.93, American Cyanamid/Shell, Decision of 01.10.93, UAP/VINCI, Decision of 01.12.93, SNECMA/TI, Decision of 17.01.94.

ucts necessary to the activities retained for the vendor or taken over for the acquirer. Thus, there are grounds for recognizing, for a transitional period, the need for supply obligations aimed at guaranteeing the quantities previously supplied within the vendor's integrated business or enabling their adjustment in accordance with the development of the market.

The aim of purchase and supply agreements may also be to provide continuity of outlets for one or the other of the parties, as they were previously assured within the single economic entity. For the same reason, obligations providing for fixed quantities, possibly with a variation clause, may be recognized as necessary.

According to the Commission, however, there does not appear to be a general justification for exclusive purchase or supply obligations. Save in exceptional circumstances, for example, the absence of a market or the specificity of products, the Commission does not view such exclusivity as objectively necessary to permit the implementation of a concentration in the form of a transfer of an undertaking or part of an undertaking.⁹⁰ The undertakings concerned are thus bound to consider whether or not there are alternative means to the ends pursued, such as agreements for fixed quantities, which are less restrictive than exclusivity. Further, the duration of procurement and supply obligations must be limited to the time period necessary for the relationship of dependency to be replaced by autonomy in the market. The duration of such a period must be objectively justified.⁹¹

90. Commission Notice, O.J. L 203/10, at 11 (1990) [hereinafter *Undertakings Notice*].

91. See *Fiat Geotech/Ford New Holland*, Decision of 08.02.91, *Otto/Grattan*, Decision of 21.03.91, *ICL/Nokia Data*, Decision of 17.07.91, *Digital/Philips*, Decision of 02.09.91, *Courtaulds/SNIA*, Decision of 19.12.91, *Tarmac Steetly*, Decision of 12.02.92, *Generali/BCHA*, Decision of 06.04.92, *Solvay/Laporte*, Decision of 30.04.92, *Thomas Cook/LTU/West LB*, Decision of 14.07.92, *GECC/Avis*, Decision of 15.07.92, *Elf Atochem/Rohm & Haas*, Decision of 28.07.92, *Rhône-Poulenc/SNIA*, Decision of 10.08.92, *BTR/Pirelli*, Decision of 17.08.92, *Avesta/British Steel/NCC*, Decision of 04.09.92, *CCIE/GTE*, Decision of 25.09.92, *Mannesmann/Hoesch*, Decision of 12.11.92, *Rhône-Poulenc Chimie/SITA*, Decision of 26.11.92, *British Airways/TAT*, Decision of 27.11.92, *BHF/CCF/Charterhouse*, Decision of 30.08.93, *Rhône-Poulenc/SNIA(II)*, Decision of 08.09.93, *American Cyanamid/Shell*, Decision of 01.10.93, *Pilkington Techint/SIV*, Decision of 21.12.93, *SNECMA/TI*, Decision of 17.01.94, *Mannesmann/Vallourec/Ilva*, Decision of 31.01.94, *ABB/Renault*, Decision of 09.03.94. (applying principles set forth by Commission).

V. *JOINT VENTURES*

*SHV/Chevron*⁹² was the first Commission decision to examine ancillary restraints in the context of joint venture⁹³ agreements. This case concerned SHV and Chevron, two companies involved in the petroleum industry, and their establishment of jointly and equally owned subsidiaries to sell certain petroleum products in Belgium, the Netherlands, Luxembourg, Germany, and Denmark, where they previously had independent distribution networks.⁹⁴ These pre-existing independent distribution networks were transferred to the joint venture as a result of the agreements.⁹⁵ As for the petroleum products covered by the agreements, the parent companies agreed not to compete against each other for fifty years, which was the duration of the agreements, without the prior consent of the other.⁹⁶

After determining that the joint venture agreements created a concentration between each of the parent companies and their joint subsidiaries, and that the agreements relating to the distribution of the products specified by the agreements did not contain any clause that restricted competition between Chevron and SHV in areas other than those covered by the joint subsidiaries, the Commission held that:

As regards distribution of the products covered by the agreement, Chevron and SHV have each agreed not to compete with the other without the prior consent of the other. This clause provides SHV with the assurance that the assets transferred by it to the joint subsidiaries will not lose value as a result of competition by Chevron with those subsidiaries. In view of the fact that Chevron has no industrial or commercial interest which could imaginably lead it to compete with its own 50% — owned subsidiaries, and given also that SHV will disappear as an independent wholesaler on the petroleum

92. *SHV/Chevron*, O.J. L 38/14 (1975), [1975] 1 C.M.L.R. D68.

93. For the purpose of this Article, the term joint venture means: cooperative joint venture as defined by the Commission in its Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty and concentrative joint venture as defined in its Notice concerning the distinction between concentrative and cooperative joint ventures. Commission Notice, O.J. C 43/2 (1993) [hereinafter *Cooperative Joint Venture Notice*]; Council Regulation No. 4064/89, O.J. C 385/2 (1994) [hereinafter *Concentrative Joint Venture Notice*].

94. *SHV/Chevron*, O.J. L 38/14, at 14 (1975), [1975] 1 C.M.L.R. at D69.

95. *Id.*

96. *Id.*

product market, with no likelihood of ever returning, the clause in question cannot be said to involve an appreciable restriction of competition.

The foregoing analysis is not affected by the fact that SHV, which jointly with other companies holds exploration licenses for the North Sea, might come into possession of crude oil, since SHV's freedom to sell its crude oil to any buyer is unlimited.⁹⁷

Although the Commission's analysis of the non-competition clause rests essentially on the clause's lack of appreciable effect on competition given the very limited possibilities of re-entry by the parent companies on the joint venture's product and geographical markets, the decision also stressed the need to protect the value of the assets transferred to the joint venture and, in particular, those of SHV who had less objective possibilities to re-enter the market.⁹⁸ This latter assessment is similar to the assessment of non-competition clauses carried out in the context of the transfer of undertakings in that the non-applicability of Article 85(1) is justified by the need to protect the full value of the transfer. The Commission has followed the approach set forth in *SHV/Chevron*, although there was a substantial time-gap before its subsequent administrative practice.⁹⁹

In its 1990 decision, *Elopak/Metal Box-Odin*,¹⁰⁰ the Commission explicitly applied the ancillary restraints doctrine in a negative clearance decision to a number of contractual restrictions on the commercial freedom of action of the parties to a joint

97. *Id.* at 15, [1975] 1 C.M.L.R. at D70-D71.

98. *Id.* In other geographic areas, Chevron apparently remained active in the joint venture product market. *See id.*

99. Mitchell Cotts/Sofitra was the first Commission decision after SHV/Chevron where this doctrine was applied. Commission Decision No. 87/100/EEC, O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111 (Mitchell Cotts/Sofitra). The restriction under scrutiny in this decision concerned an obligation imposed on the joint venture not to manufacture or deal in products competing with the licensed products. *Id.* at 33, [1988] 4 C.M.L.R. at 113. This obligation was considered necessary in order to protect the considerable capital investment and technology transfer. *Id.* at 33-36, [1988] 4 C.M.L.R. at 118-22. The Commission explicitly concluded that the restriction did not constitute an appreciable restriction of competition. *Id.* Other Commission decisions and the Cooperative Joint Venture Notice later confirmed that the underlying rationale for the non-applicability of Article 85(1) was also that of the ancillary restraints doctrine. Cooperative Joint Venture Notice, O.J. C 43/2, at 13 (1993).

100. Commission Decision No. 90/410/EEC, O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832 [hereinafter *Elopak/Metal Box-Odin*].

venture agreement.¹⁰¹ *Elopak/Metal Box-Odin* concerned the establishment of a joint venture, Odin, and related agreements between Elopak and Metal Box, two companies involved *inter alia* in the packaging business, who sought to conduct research and develop a container with a carton base and separate closure that could be filled by an aseptic process with UHT processed foods.¹⁰² The joint venture was also established to develop the machinery and technology for filling these new containers and, if successful, to produce and distribute the new containers and their filling machines.¹⁰³ After deciding that the creation of the joint venture itself did not fall under Article 85(1),¹⁰⁴ the Commission analyzed a number of related clauses and held that while they restricted the commercial freedom of action of the parent companies and/or the joint venture, they did not restrict competition within the meaning of Article 85(1).¹⁰⁵

The following restrictions relating to the activities of the parent companies and/or the joint venture were considered ancillary: (1) the grant to the joint venture by the parent companies of the exclusive right to exploit anywhere in the world all their respective intellectual property rights relevant for the field of the agreement, which was very narrowly defined to include only the highly specific product in question, for the duration of the joint venture agreement;¹⁰⁶ (2) the obligation imposed on the joint venture not to use the intellectual property rights licensed for any purpose other than in the field of the agreement and to keep the information confidential;¹⁰⁷ (3) the right of first refusal granted to the parent companies to exploit the joint venture's new technology when this technology is offered by the joint ventures to third parties;¹⁰⁸ (4) the provisions relating to the non-exclusive license of improvements that may be granted by Odin to its parents and the limitations placed on the parents on the use of these technological improvements licensed back;¹⁰⁹ (5) the grant to Odin of a non-exclusive license to use

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 19, [1988] 4 C.M.L.R. at 841.

105. *Id.* at 21, [1988] 4 C.M.L.R. at 844.

106. *Id.* at 20, [1988] 4 C.M.L.R. at 842.

107. *Id.*

108. *Id.* at 21, [1988] 4 C.M.L.R. at 844.

109. *Id.* at 20, [1988] 4 C.M.L.R. at 843.

its parents' know-how and the provisions for updating this know-how and keeping it confidential;¹¹⁰ and (6) the parties' obligations in relation to licensing technology at dissolution or break-up of the joint venture and the restriction concerning its subsequent use by the parties.¹¹¹

The Commission summarized its analysis of particular restrictions in the agreement under Article 85(1) in the following manner:

The above analysis has shown that neither the establishment of Odin nor any of the detailed provisions fall within the scope of Article 85(1). In fact the individual provisions are seen to be either: provisions not restricting competition in the sense of Article 85(1), or provisions which in other contexts might restrict competition but which in the context of the present case do not. Since such provisions cannot be dissociated from the creation of Odin without undermining its existence and purpose and since the creation of Odin does not fall within the scope of Article 85(1), these specific provisions also fall outside the scope of Article 85(1).¹¹²

In concluding that neither the creation of the joint venture nor any of the related agreements mentioned above restricted competition, the Commission stated that "[f]inally, there are no explicit restrictions relating price, quantity or territory imposed on Odin,"¹¹³ thus implying that the inclusion of such a provision could have resulted in the application of Article 85(1) to the very creation of Odin or at least to those clauses relating to Odin's use of the parent's know-how and the maintenance of its confidentiality.¹¹⁴

This statement in *Elopak/Metal Box-Odin* raises the question as to whether these clauses ought to be examined under the ancillary restraints theory.¹¹⁵ Assuming that Article 85(1) applies to the contractual relationship between parent companies and their joint ventures with regard to price, quantity, and territory, it could be argued that agreements on these matters should be

110. *Id.*

111. *Id.* at 20-21, [1988] 4 C.M.L.R. at 843.

112. *Id.* at 21, [1988] 4 C.M.L.R. at 844.

113. *Id.*

114. *Id.*

115. This statement also raises the question of whether restrictions of this kind should fall within the scope of Article 85(1). An examination of this issue, however, goes beyond the scope of this Article.

seen as the exercise of the parent's powers to control the joint venture and, consequently, as inherent to the very creation of the joint venture.

Following the adoption of the Merger Regulation¹¹⁶ and the legal institutionalization of the distinction between cooperative and concentrative joint ventures, the Commission has provided separate guidelines detailing the way in which it intends to apply the ancillary restraints doctrine in the contexts of concentrative and cooperative joint ventures respectively.¹¹⁷

In a Notice defining the scope of Article 3(1) of the Merger Regulation¹¹⁸ ("Undertakings Notice"), the Commission essentially applied the same principles used in the case of the transfer of an undertaking to ancillary restraints used in the context of concentrative joint ventures.¹¹⁹ With respect to non-competition clauses, however, the Commission stated that to the extent that a prohibition on the parent's undertakings competing with the joint venture is an actual withdrawal by the parents from the market assigned to the joint venture, it will be recognized as an integral part of the concentration.¹²⁰

In applying these principles, the Commission appears to subscribe to the view that non-competition clauses imposed on the parent companies of a joint venture do not restrict competition because they do nothing more than reflect the economic reality of their lasting withdrawal from the market and, consequently, they do not appreciably restrict competition.¹²¹ Thus, the analysis of the need to preserve the legitimate interest of the parent companies in protecting the value transferred to the joint venture appears to play no role in the appraisal of non-competition clauses in the context of concentrative joint ventures. This is probably explained by the fact that the 1990 Notice was adopted at a time when the Commission determined that a joint venture could be characterized as a concentration only if the parent companies irreversibly left the joint venture's market and

116. Council Regulation No. 4064/89, *supra* note 76, O.J. L 257/13 (1990).

117. *Id.* art. 3(2), O.J. L 257/13, at 17 (1990).

118. Undertakings Notice, O.J. C 203/10 (1990).

119. *Id.*

120. *Id.* at 13.

121. SHV/Chevron, O.J. L 38/14 (1975). *See supra* notes 92-98 and accompanying text (analyzing SHV/Chevron decision).

neighboring markets.¹²²

The evolution of the Commission's views on concentrative joint ventures, as codified in its recent Notice of December 31, 1994,¹²³ and the recent developments in its decisional practice with regard to cooperative joint ventures will no doubt have some impact on the Commission's analysis of non-competition clauses in the context of concentrative joint ventures.

The Commission may also be influenced by the Court's recent judgment in the field of cooperatives. In *Gottrup-Klim*,¹²⁴ the Court held that a provision in the statutes of a cooperative purchasing association forbidding its members from participating in other forms of organized cooperation, which are in direct competition with the cooperative, is not prohibited under Article 85(1) of the Treaty so long as this provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.¹²⁵ With regard to cooperative joint ventures, the Commission's approach to ancillary restraints developed in *Elopak/Metal Box-Odin*¹²⁶ has been further confirmed in a number of recent Commission decisions¹²⁷ and was summarized in its 1993 interpretative Notice ("1993 Notice").¹²⁸

122. Concentrative Joint Venture Notice, O.J. C 385/2 (1994).

123. *Id.*

124. *Gottrup-Klim v. Dansk Landbrugs*, Case 250/92, [1994] E.C.R. I-5641.

125. *Id.* at I-5659.

126. *Elopak/Metal Box-Odin*, O.J. L 209/15 (1990), [1991] 4 C.M.L.R. 832.

127. *See, e.g.*, Commission Decision No. 94/986/EEC, O.J. L 378/37 (1994) (*Philips Osram*); Commission Decision No. 94/895/EEC, O.J. L 354/75 (1994) (*International Private Satellite Partners*); Commission Decision No. 94/771/EEC, O.J. L 309/24 (1994) (*Olivetti-Digital*); Commission Decision No. 90/446/EEC, O.J. L 228/31, [1992] 4 C.M.L.R. 54 (ECR 900).

128. *See* Cooperative Joint Venture Notice, O.J. C 43/2 (1993). According to this Notice:

A distinction must be made between restrictions of competition which arise from the creation and operation of a JV, and additional agreements which would, on their own, also constitute restrictions of competition by limiting the freedom of action in the market of the participating undertakings. Such additional agreements are either directly related to and necessary for the establishment and operation of the JV in so far as they cannot be dissociated from it without jeopardizing its existence, or are simply concluded at the same time as the JV's creation without having those features.

Additional agreements which are directly related to the JV and necessary for its existence must be assessed together with the JV. They are treated under the rules of competition as ancillary restrictions if they remain subordinated in importance to the main object of the JV. In particular, in determining the

It is to be expected that in applying the principles developed in the 1993 Notice the Commission will follow the more detailed guidelines contained in the 1990 Notice¹²⁹ with regard to concentrative joint ventures as its recent administrative practice seems to confirm.

As with the transfer of undertaking cases, the Commission appears to justify its application of the ancillary restraints doctrine in joint venture cases by stressing the need to preserve the full effectiveness of the transfer of value involved in the creation of a joint venture. Equally, once the Commission decides that a restriction must be considered ancillary, no analysis of its impact on competition is carried out. This is not only true when the main transaction does not fall under Article 85(1), and also when the transaction falls under Article 85(1) but merits exemption under Article 85(3). This approach has also been followed in the context of technology and trademark licensing agreements, franchising, and selective distribution systems.

VI. *TECHNOLOGY TRANSFER AGREEMENTS*

The Commission has also applied the ancillary restraints doctrine to a number of restrictions on the commercial freedom of action of undertakings included in patent and know-how licensing agreements. Its decisional practice in this field has essentially been codified in both the patent license block exemption regulation¹³⁰ ("Patent Regulation") and the know-how li-

'necessity' of the restriction, it is proper not only to take account of its nature, but equally to ensure that its duration, subject-matter and geographical field of application do not exceed what the creation and operation of the JV normally requires.

If a JV does not fall within the scope of Article 85(1), then neither do any additional agreements which, while restricting competition on their own, are ancillary to the JV in the manner described above. Conversely, if a JV falls within the scope of Article 85(1), then so will any ancillary restrictions. The exemption from prohibition is based for both on the same principles. Ancillary restrictions require no special justification under Article 85(3). They will generally be exempted for the same period as the JV.

Additional agreements which are not ancillary to the JV normally fall within the scope of Article 85(1), even though the JV itself may not. For them to be granted an exemption under Article 85(3), a specific assessment of their benefits and disadvantages must be made. This assessment must be carried out separately from that of the JV.

Id. at 13.

129. Undertakings Notice, O.J. C 203/10 (1990).

130. Commission Regulation No. 2349/84, O.J. L 219/15 (1984).

cense block exemption regulation ("Know-how Regulation").¹³¹

The underlying rationale for the application of the ancillary restraints doctrine in the field of patent and know-how licensing agreements as in the sale of an undertaking and joint venture agreements, is the need to protect the transfer of value constituting the main object of the transaction. In contrast to agreements involving the sale of an undertaking or the establishment of joint ventures, where the value in terms of goodwill and know-how is generally meant to be transferred, however, technology transfers are more likely to be rented or shared rather than transferred or sold. Thus, in the context of technology transfers, the grantor of the license maintains, after the conclusion of the license agreement, a legitimate interest in controlling the way in which the technology is exploited by the licensee, especially where wrongful use may have detrimental repercussions on the licensor in terms of remuneration, and/or reputation, or on the other licensees.¹³²

Several types of clauses serve as examples of restrictions imposed in patent and/or know-how licensing agreements which have been scrutinized under the ancillary restraints doctrine.¹³³ The first type of clause to be examined involves obligations on the licensee to mark the licensed product with an indication of the patentee's name, the licensed patent, or the patent licensing agreement.¹³⁴ This clause has been justified on the basis that it facilitates supervision by the licensor of the quality and quantity of the products covered by the agreement.¹³⁵

131. Commission Regulation No. 556/89, O.J. L 61/1 (1989). The draft block exemption regulation on technology transfer will not be examined in this Article. Commission Regulation No. 4087/88, O.J. L 359/46 (1988).

132. As shown below, the same rationale also applies to trade-mark licensing agreements, franchising, and selective distribution based on qualitative criteria.

133. Some of the restrictions relating to patent licenses examined in this section have been cleared by the Commission on the basis of the "scope of patent theory." According to this theory, those restrictions falling within the specific subject matter of the intellectual property right involved do not fall under Article 85(1). It is submitted, however, that the same result could have been achieved by resorting to the ancillary restraints doctrine, as the Commission's practice in dealing with similar restrictions in the context of know-how licenses appears to indicate.

134. Commission Regulation No. 2349/84, *supra* note 130, art. 2(1)(6), O.J. L 219/15, at 19 (1984).

135. See Commission Decision No. 72/26/EEC, J.O. L 13/53 (1972), [1972] 2 C.M.L.R. D127 [hereinafter *Burroughs/Geha*]; Commission Decision No. 72/25/EEC, J.O. L 13/50, at 51 (1972), [1972] 2 C.M.L.R. D67 [hereinafter *Burroughs/Delplanque*]. However, in *Windsurfing Int'l Inc. v. Commission*, the Court held that such

A second example is an obligation on the licensee to observe specifications concerning the minimum quality of the licensed product, provided that such specifications are necessary for a technically satisfactory exploitation of the licensed invention and to allow the licensor to carry out related checks.¹³⁶ This type of restriction has been justified as being indispensable to an appropriate exploitation of the invention.¹³⁷ Specifically, in the context of know-how licenses, the Commission stated:

The obligations on the licensee to manufacture the products strictly in accordance with the methods of manufacture communicated to him by the licensor, to market the products in packages strictly conforming to specimens or specifications proposed by the licensee and accepted by the licensor, and not to modify the formulae of manufacturing methods without the agreement of the latter, do not fall within Article 85(1) of the Treaty. All these obligations are inspired by the legitimate desire of the licensor to ensure the strict conformity of the products manufactured by the licensee with his own products. This is particularly important, because the products carry either the registered trade-mark or the commercial name belonging to the licensor, and because any change in the quality of a trademarked product has an effect on the goodwill of that trade-mark, thus affecting the legitimate interest of its holder. This applies equally to the legitimate interests of the licensor in ensuring that the products manufactured under licence which contain active chemical ingredients be packaged in packages providing maximum, transport security and usability for purchasers.¹³⁸

A third type of restriction is an obligation on the licensee

clause "may be covered by the specific subject matter of the patent provided that the notice is placed only on components protected by the patent." Case 193/83, [1986] E.C.R. 611, 660, ¶ 72, [1986] 3 C.M.L.R. 489, 537.

136. Commission Regulation No. 2349/84, *supra* note 130, art. 2(1)(9), O.J. L 219/15, at 20 (1984); Commission Regulation No. 556/89, *supra* note 131, art. 2 (1)(5), O.J. L 61/1, at 8 (1989).

137. See Commission Decision No. 72/238/EEC, J.O. L 143/39 (1972), [1972] 1 C.M.L.R. D45 [hereinafter Raymond/Nagoya]. *But see* Burroughs/Geha, J.O. L 13/53 (1972), [1972] 2 C.M.L.R. D127; Burroughs/Delplanque, J.O. L 13/50 (1972), [1972] 2 C.M.L.R. D67 (relying essentially on scope of patent theory to exclude applicability of Article 85(1)).

138. Commission Decision No. 88/563/EEC, O.J. L 309/34, at 40 (1988), [1989] 4 C.M.L.R. 535, at 546 [hereinafter Delta Chemie/DDD]. See Commission Decision No. 88/143/EEC, O.J. L 69/21, at 27 (1988), [1988] 4 C.M.L.R. 527, at 538 [hereinafter Rich Products/Jus-rol].

not to divulge know-how communicated by the licensor during and after the expiration of the agreement.¹³⁹ In *Burroughs-Delplanque*,¹⁴⁰ the Commission permitted restrictions on the licensee from divulging know-how on grounds of secrecy. It held that, "[s]ecrecy is a necessary condition for the owner of technical know-how to be able to grant it to other undertakings for its full exploitation and it is thus a pre-condition for any marketing of technical know-how, as long as the latter has not fallen into the public domain."¹⁴¹

A fourth example is an obligation on the licensee not to grant sub-licenses or assign the license.¹⁴² Although in *Burroughs-Delplanque*,¹⁴³ *Burroughs/Geha*,¹⁴⁴ and *Davidson Rubber*¹⁴⁵ the Commission based the non-applicability of Article 85(1) to restrictions on the scope of the patent theory,¹⁴⁶ the reasoning applied by the Commission to the know-how aspect of the license, based on the need to protect the secrecy of technology communicated, could equally be used in the context of patent licenses.¹⁴⁷

139. Commission Regulation No. 2349/84, *supra* note 130, art. 2(1)(7), O.J. L 219/15, at 20 (1984). See Commission Regulation No. 556/89, *supra* note 131, art. 2(1)(1), O.J. L 61/1, at 8 (1989).

140. *Burroughs-Delplanque*, J.O. L 13/50, at 51 (1972), [1972] 2 C.M.L.R. at D67.

141. *Id.* For know-how licenses see *Delta Chemie/DDD*, O.J. L 309/34, at 40 (1988), [1989] 4 C.M.L.R. at 546; *Rich Products/Jus-rol*, O.J. L 69/21, at 26 (1987), [1988] 4 C.M.L.R. at 536. In *Delta Chemie*, the Commission stated:

[T]he commercial value of know-how rests very largely in its confidential character, and each disclosure brings prejudice to the holder of that know-how. Such an obligation must be considered to be necessary in the context of the present type of agreement. Furthermore, since the validity of know-how, is not limited in time by the expiry of a period of legal protection, as is the case for a trade mark, it is legitimate for its holder to impose upon a licensee the obligation to respect its secrecy for so long as this know-how has not entered in the public domain and is freely accessible to all interested parties.

Delta Chemie/DDD, O.J. L 309/34, at 40 (1988), [1989] 4 C.M.L.R. at 546-47.

142. Commission Regulation No. 2349/84, *supra* note 130, art. 2(1)(5), O.J. L 219/15, at 20 (1984). See Commission Regulation No. 556/89, *supra* note 131, art. 2(1)(2), O.J. L 61/1, at 8 (1989).

143. *Burroughs-Delplanque*, J.O. L 13/50, at 51 (1972), [1972] 2 C.M.L.R. at D67.

144. *Burroughs/Geha*, O.J. L 13/53, (1972), [1972] 2 C.M.L.R. D127.

145. Commission Decision No. 72/237/EEC, O.J. L 143/31, at 35 (1972), [1972] 1 C.M.L.R. D52 [hereinafter *Davidson Rubber*].

146. See *supra* note 133 and accompanying text (defining "patent theory" as theory professing that restrictions falling within specific subject matter of intellectual property rights do not fall under Article 85(1)).

147. For applicable know-how licensee decisions see *Rich Products/Jus-rol*, O.J. L

A fifth restriction is an obligation on the parties to the agreement to communicate to one another any experience gained in exploiting the licensed invention, and to grant one another licenses with respect to inventions relating to improvements and new applications, provided that such communications or licenses are non-exclusive.¹⁴⁸ The Commission, once again, relied on the scope of the patent theory to approve this restriction for patent licenses.¹⁴⁹ In assessing the legality of this clause in know-how licenses, however, the Commission concluded that the obligation to communicate all information regarding modifications or improvements on a reciprocal and non-exclusive basis, "gives effect to the legitimate wish of the licensor to ensure that the manufacture of the licensed products by the licensee remains in conformity with the prescriptions relative to the formulae and methods which he instigated and does not compromise the maintenance of the quality of the products."¹⁵⁰ This rationale could also be used in the patent field.

The sixth type of clause is one that requires the licensee not to exploit the patent after termination of the agreement, assuming the patent is still in force.¹⁵¹ As in the previous case, the non-applicability of Article 85(1) to this clause can be justified on the basis of both the scope of the patent theory and the ancillary restraints doctrine. As the Commission noted in *Delta Chemie*:

[T]he undertaking must therefore be able to limit in time the grant of its know-how and to refuse its use by a licensee at the expiry of the agreement. Although such an obligation has as a consequence the removal of the licensee from the market for the licensed products at the expiry of the agreement the necessary conditions for the transfer of technical knowledge

69/21, at 26 (1987), [1988] 4 C.M.L.R. at 536-37; *Delta Chemie/DDD*, O.J. L 309/34, at 41 (1988), [1989] 4 C.M.L.R. at 548-49.

148. Commission Regulation No. 2349/84, *supra* note 130, art. 2(1), O.J. L 219/15, at 20 (1984). See Commission Regulation No. 556/89, *supra* note 131, art. 2(1)(5), O.J. L 61/1, at 8 (1989).

149. See *Davidson Rubber*, J.O. L 143/31 (1972), [1972] 1 C.M.L.R. D52; *Raymond Nagoya*, J.O. L 143/39 (1972), [1972] 1 C.M.L.R. D45.

150. See *Delta Chemie/DDD*, O.J. L 309/34, at 40 (1988), [1989] 4 C.M.L.R. at 547.

151. Commission Regulation No. 2349/84, *supra* note 130, art. 2(1)(4), O.J. L 219/15, at 19 (1984). See *Kai Ottung v. Klee*, Case 320/87, [1989] E.C.R. 1177, [1990] 4 C.M.L.R. 915 (discussing need to carry out full-blown economic analysis before deciding whether post-term-use ban after expiration of patent violates Article 85(1)).

should prevail. Without these conditions this element of public interest may not be safeguarded.¹⁵²

A final example of these scrutinized contractual provisions is the obligation placed on the licensee to restrict his exploitation of the licensed invention to one or more technical fields of application covered by the licensed patent.¹⁵³ In *Windsurfing v. Commission*,¹⁵⁴ the Court followed the Commission and held that field of use restrictions can only be justified by quality control considerations if they come within "the specific subject matter of the patent."¹⁵⁵ This requires that "they relate to a product covered by the patent since their sole justification is that they ensure that the technical instructions as described in the patent and used by the licensee may be carried into effect."¹⁵⁶

Despite having made considerable use of the ancillary restraints doctrine to permit a significant number of restrictions commonly found in technology transfer licensing agreements, the Commission has been reluctant to apply this doctrine either to the exclusivity of the license or to the different types of territorial protection granted to the licensee.¹⁵⁷ Building on the Commission's practice in the context of transfers of undertakings and joint ventures, however, it could be argued that the recipient of technology, be it a buyer or a licensee, should be protected from the competition of the licensor and/or of the "older" licensees

152. *Delta Chemie/DDD*, O.J. L 309/34, at 41 (1988), [1989] 4 C.M.L.R. at 548. See *Rich Products/Jus-rol*, O.J. L 69/21, at 26 (1988), [1988] 4 C.M.L.R. at 537 (confirming *Delta/Chemie* position). See also Commission of the European Communities, Tenth Report on Competition Policy, at ¶ 129 (1981).

153. Commission Regulation No. 2349/84, *supra* note 130, art. 1(1)(3), O.J. L 219/15, at 19 (1984). See Commission Regulation No. 556/89, *supra* note 131, art. 2(1)(8), O.J. L 61/1, at 9 (1989).

154. *Windsurfing*, [1986] E.C.R. 611, [1986] 3 C.M.L.R. 489.

155. *Id.* at 655, ¶ 45, [1986] 3 C.M.L.R. at 533.

156. *Id.* A somewhat different rationale for justifying the same clause has been used by the Commission in know-how licenses. See *Delta Chemie/DDD*, O.J. L 309/34, at 40 (1988), [1989] 4 C.M.L.R. at 549; *Rich Products/Jus-rol*, O.J. L 69/21, at 26 (1988), [1988] 4 C.M.L.R. at 536-37.

157. Commission Regulation No. 2349/84, *supra* note 130, arts. 1(1), 1(1)(3)-(6), O.J. L. 219/15, at 19 (1984). An examination of the question of whether the different types of territorial protection listed in Article 1 of the patent Regulation could be justified under the scope of the patent theory as not falling under Article 85(1) goes beyond the scope of this Article. Some indications that this might be the case, however, at least in the Commission's view, can be found in the recent draft block exemption Regulation for technology transfer licensing agreements. Commission Regulation No. 4087/88, *supra* note 131, art. 2(1), O.J. L 359/46, at 49 (1988).

at least for as long as it objectively needs to assimilate the transferred technology. Otherwise, either the licensor or the other licensees, who are already acquainted with the licensed technology, could easily jeopardize the full effectiveness of the contract between the licensor and the new licensee. To be sure, as in the case of a transfer of an undertaking, such territorial protection should be limited to what is necessary to effect a proper assimilation of the licensed technology in terms of subject-matter, duration, and territorial scope.¹⁵⁸

VII. TRADEMARK LICENSING AGREEMENTS

As with technology transfer licensing agreements, the Commission has also applied the ancillary restraints doctrine to a number of restrictive clauses included in trademark licensing agreements, in particular, those that guarantee quality control and the secrecy of the transferred know-how. The Commission has approved the following clauses: (1) an obligation on the licensee to manufacture at plants that are capable of guaranteeing the quality of the product;¹⁵⁹ (2) an obligation to follow the licensor's instructions regarding manufacture and ingredients, and to purchase certain secret raw materials from the licensor itself;¹⁶⁰ and (3) an obligation to use the transferred know-how

158. See *Louis Erauw-Jacquery v. La Hesbignonne*, Case 27/87, [1988] E.C.R. 1919, [1988] 4 C.M.L.R. 576.

159. Commission Decision No. 78/253/EEC, O.J. L 70/69, at 74 (1978), [1978] 2 C.M.L.R. 397 [hereinafter *Campari*]. The Commission notes:

The effect of this restriction . . . does not go beyond a legitimate concern for quality control; further, this obligation upon the licensees does not constitute an absolute limitation of production to any particular place . . . this type of agreement as to quality control is very important for the licensor, since the maintenance of quality is referable to the existence of the trade mark right

Id., [1978] 2 C.M.L.R. at 408-09. This compares with *Windsurfing*, where the obligation to restrict production to a specific manufacturing plant was within Article 85(1) as the Court held that the equality control argument does not apply when the manufacturing of components, as often is the case, are contracted out. [1986] E.C.R. at 666-67, ¶ 104-10, [1986] 3 C.M.L.R. at 531-41.

160. *Campari*, O.J. L 70/69, at 74 (1978), [1978] 2 C.M.L.R. at 409. The Commission states:

Here again, control over the quality of the products manufactured under license and over their similarity to the original Italian product is in the present case very important for the licensor, in the sense that it is again bound up with its interest in the maintenance of quality, which is referable to the existence of the trademark right.

Id. Although the Commission resorts to both the doctrine of ancillary restraints and

only for the manufacture of the contractual product and to keep all know-how provided confidential.¹⁶¹

In *Moosehead/Whitbread*,¹⁶² the Commission justified the non-applicability of Article 85(1) to those restrictions on the following grounds:

The know how provisions . . . do not fall under Article 85(1) because the grant of know-how is not exclusive and the obligations imposed on the licensee are simply ancillary to the grant of the trademark license and enable the license to take effect.

In particular the exclusive purchasing obligation regarding yeast set out in paragraph 9(2), does not fall under Article 85(1) because it is necessary to ensure technically satisfactory exploitation of the licensed technology and a similar identity between the lager produced originally by Moosehead and the same lager produced by Whitbread.¹⁶³

Here again, the transfer of value, reputation, or know-how, for example, is at the heart of the Commission's rationale for applying the ancillary restraints doctrine in the field of trademark licensing.

VIII. FRANCHISING AGREEMENTS

In the context of franchising agreements, the Court and, by and large, the Commission have considered that a certain number of clauses can be justified under Article 85(1) on the basis of the ancillary restraints doctrine. In *Pronuptia*,¹⁶⁴ the Court held that clauses requiring the franchisee to apply the franchisor's commercial methods: to sell the franchisor's products only in a store outfitted according to the franchisor's instructions, to have all advertising approved by the franchisor, to locate the store in a certain area, and prohibitions against changing the location of the store or assigning the franchise agreement without the prior consent of the franchisor did not violate

the scope of the trademark theory, later decisions only refer to ancillary restraints. See, e.g., Commission Decision No. 90/186/EEC, O.J. L 100/32 (1990), [1991] 4 C.M.L.R. 391 [hereinafter *Moosehead/Whitbread*].

161. See *Moosehead/Whitbread*, O.J. L 100/32, at 34 (1990), [1991] 4 C.M.L.R. at 395-96.

162. O.J. L 100/32 (1990), [1991] 4 C.M.L.R. 391.

163. *Id.* at 35, [1991] 4 C.M.L.R. at 398.

164. *Pronuptia*, [1986] E.C.R. 353, [1986] 1 C.M.L.R. 414.

Article 85(1).¹⁶⁵ These restrictions placed on the franchises were considered necessary to preserve the reputation, identity, trademark, and name of the franchisor.

More specifically, the Court found the obligation to purchase products exclusively from the franchisor or a source approved by it, necessary to protect the identity and reputation of the franchise network, provided the franchisees could obtain these products from each other and that the formulation of quality standards would be impractical, or, if practical, where such standards, due to the large number of franchises, could not efficiently be enforced.¹⁶⁶ Similarly, the prohibition against opening a second shop that conducts business in competing products during the term of the agreement and for a reasonable period thereafter was justified on the basis that the franchisor's know-how should not be used for the benefit of the franchisor's competitors.¹⁶⁷

Conversely, obligations placed on the franchisee not to compete, not to designate other franchises in the exclusive territory, and not to permit other franchisees to open a store were held to violate Article 85(1) in that they amounted to absolute territorial protection.¹⁶⁸

It has been argued that, as a practical matter, a given area, unless it is very large, can support only one franchisee. Exclusivity and territorial protection would appear to be indispensable to the successful organization of the franchise at least where the territories are small and the restrictions in question would amount to no more than ancillary restraints.¹⁶⁹

This analysis, however, does not seem to be correct. The doctrine of ancillary restraints in EC competition law has been used essentially to justify the inapplicability of Article 85(1) where the imposed restriction on the freedom of action of undertakings makes it possible to guarantee the full enjoyment of the value transferred. The opening of a second, identical, shop would not harm either the reputation and/or the image of the network, or the franchisor's know-how. It could only, in some

165. *Id.* at 379-85, ¶¶ 9-27, [1986] 1 C.M.L.R. at 441-46.

166. *Id.*

167. *Id.* at 385-87, ¶¶ 28-34, [1986] 1 C.M.L.R. at 446-47.

168. *Id.*

169. J.S. VENIT, *PRONUPTIA: ANCILLARY RESTRAINTS — OR UNHOLY ALLIANCES* 220 (1986).

specific cases, jeopardize the financial viability of the franchisee. If this were the case, for instance because of the small size of the territories, an exemption could be granted and maybe even a negative clearance based on the more generous appreciability test for vertical restraints developed by the Court under *Société Technique Minière*¹⁷⁰ if new entry in under-developed markets is made possible. The Court's quasi *per se* analysis can only be attributed to the cumulative effect of the restrictions, absolute territorial protection, and to the size of the territories affected by the restraints in the instant case.

In contrast, resale price maintenance was held to fall within the scope of Article 85(1) since it was perceived as unnecessary to protect the uniformity of the franchisor's image.¹⁷¹ Once again, the transfer of value in terms such as reputation or know-how, constitutes the core of the Court's rationale for applying the ancillary restraints doctrine in the field of franchising.¹⁷²

IX. EXCLUSIVE AND SELECTIVE DISTRIBUTION AGREEMENTS

It is sometimes suggested that distribution agreements that do not fall within Article 85(1) are in a *sui generis* category, separate from both the ancillary restraints doctrine and from the commercial risk cases.¹⁷³ However, under the theory of ancillary restraints presented here, according to which ancillary restraints are considered necessary for the protection of the transfer of value in an otherwise acceptable transaction from the competition point of view, it is submitted that a re-categorization of distribution agreements may be appropriate. More specifically, selective distribution agreements based on qualitative criteria fall within the ancillary restraints doctrine, while exclusive distribution and quantitative selective distribution agreements fall outside this doctrine, being better explained according to the commercial risk cases. Such a reclassification has the additional benefit of giving some intellectual coherence to the much criti-

170. *Société Technique Minière*, [1966] E.C.R. at 235, [1966] C.M.L.R. 357.

171. *Pronuptia*, [1986] E.C.R. at 370-71, ¶ 27, [1986] 1 C.M.L.R. at 445.

172. The Commission followed the Court's approach in both its decision and the franchising block exemption Regulation. Commission Regulation No. 4087/88, *supra* note 131, O.J. L 359/46 (1988).

173. See WHISH, *supra* note 19, at 236-38.

cized Commission distinction between qualitative and quantitative selective distribution agreements.

It is well settled in the case-law of the Court that some products or services of a complex nature possess certain characteristics that, in order to be sold to the public in an adequate or proper manner, require a specialized distribution system.¹⁷⁴ Indeed, some products may require considerable after-sales services, others may require facilities equipped or staff qualified to demonstrate the product, or to advise consumers regarding the product.¹⁷⁵ Clearly, many firms are not sufficiently vertically integrated to enable, or to wish to engage in, such distribution themselves, or vertical integration is simply not profitable from an economic point of view. They choose, therefore, to enter into agreements with specialized distributors to sell their products or services. Such agreements are, like franchising agreements or technology transfers, transactions that may involve the transfer not only of goods but also of additional value such as the reputation and/or image of a brand.

These transfers of additional value from producer to distributor necessitate certain obligations on the part of the distributor. The producer may, for example, require that the distributors have certain qualifications in order to provide the after sales service, to demonstrate the product, and not to sell outside the network. Without such obligations, the protection of the additional transferred value of such complex products may not be possible. Consequently, a whole range of qualitative obligations relating to the distributor may be regarded as ancillary restraints, necessary for the transfer of value to occur. Such obligations, like other ancillary restraints, if proportionate, are also generally regarded as *per se* legal in that they do not require a market analysis to qualify for clearance.

Two examples illustrate the point. In *Villeroy & Boch*,¹⁷⁶ the Commission approved a selective distribution system for ceramic tableware and porcelain dinner services.¹⁷⁷ Clauses in the agree-

174. *AEG v. Commission*, Case 107/82, [1983] E.C.R. 3151, 3194, ¶ 33, [1984] 3 C.M.L.R. 325, 391.

175. *L'Oreal v. DeNieuwe AMCK*, Case 31/80, [1980] E.C.R. 3775, 3790-91, ¶¶ 15-16, [1981] 2 C.M.L.R. 235, 252.

176. Commission Decision No. 85/616/EEC, O.J. L 376/15 (1985), [1988] 4 C.M.L.R. 461 [hereinafter *Villeroy & Boch*].

177. *Id.* at 18, [1988] 4 C.M.L.R. at 467. The Decision notes: "the long life of the

ment requiring the goods to be displayed in an attractive manner and separating the goods from other makes and types of products that might be damaging to Villeroy & Boch's reputation were permitted on the grounds that they were:

[D]esigned simply to improve the appearance of, and assist in identifying Villeroy & Boch products and avoid any confusion with similar makes and any equating of Villeroy & Boch products with inferior products capable of detracting from a product line on which Villeroy & Boch wishes on the contrary to confer a certain prestige.¹⁷⁸

There is a clear analogy with this obligation, motivated by the desire to preserve brand value and distinctiveness, and similar ancillary restraints in trade-mark licensing and franchising agreements.¹⁷⁹ Furthermore, with respect to the principle that the producer should verify the qualifications of all specialized retailers to ensure that the system remains uniform and closed, the Commission has stated, using language very close to that of ancillary restraints and the proportionality or necessity test, that:

Inasmuch as it is accessory to the main obligation of specialization incumbent on the retailer, and contributes to ensuring compliance with that obligation, the principle that the producer should himself control the access of specialized retailers to the network does not go beyond what is necessary to maintain the network.¹⁸⁰

Likewise, in the *IBM* decision,¹⁸¹ the Commission recognized that it is important for buyers of personal computers to be able to obtain information or advice on the nature of the operations the computer can perform, how to program such computers, how to select between various products, and the costs and capabilities of different systems.¹⁸² The Commission also considered that "it is reasonable that a manufacturer should insist that its dealers are able to give such information or advice about the

products concerned justifies the legitimate interest of the producer in entrusting their sale only to retailers who are prepared to undertake after-sales service so as to ensure continuity of supply to the customer." *Id.*

178. *Id.*

179. *See, e.g.*, Commission Decision No. 89/94/EEC, O.J. L 35/31, at 8 (1989), [1989] 4 C.M.L.R. 591 (Charles Jourdan) (discussing franchising agreements).

180. Villeroy & Boch, O.J. L 376/15, at 18 (1985), [1988] 4 C.M.L.R. at 468.

181. Commission Decision No. 84/233/EEC, O.J. L 118/24 (1984), [1984] 2 C.M.L.R. 342 [hereinafter *IBM*].

182. *Id.* at 27, [1984] 2 C.M.L.R. at 347.

manufacturer's products."¹⁸³ The criteria for appointment as an authorized dealer included possessing an adequately trained staff, appropriate space for demonstration and display, the ability to provide technical support and training, servicing facilities, favorable bankers' references, and compliance with IBM's code of conduct.¹⁸⁴ The Commission, however, did not engage in an in-depth market analysis and a consideration of each clause in this context. Instead, it regarded such provisions as outside the scope of Article 85(1) for the simple reason that these criteria for selection of dealers "go no further than may reasonably be thought necessary for the distribution of the products in question."¹⁸⁵

In view of such decisions, it is suggested that qualitative selection criteria in a distribution of a branded complex product fall within the doctrine of ancillary restraints. In contrast, other clauses in such distribution agreements, which may also fall outside Article 85(1) following an economic analysis, do not fall within this doctrine. For example, a best endeavors clause or an obligation to stock a full range of products, or agreements relating to the joint supply of products may, as in *Villeroy & Boch*, qualify for negative clearance,¹⁸⁶ but only after a full economic analysis of the market where it is determined that the obligations do not lead to an appreciable restriction of competition.¹⁸⁷ Such clauses do not qualify for automatic exemption simply because they are ancillary to or reasonably necessary for the transfer of value in the main transaction. Finally, there are some clauses that may be regarded either as ancillary restraints or as justified by the commercial risk doctrine. Commitments to resell only to other authorized retailers or to private customers, for example, may fall into this grey area.¹⁸⁸

183. *Id.*

184. *Id.* at 25, [1984] 2 C.M.L.R. at 344-45.

185. *Id.* at 27, [1984] 2 C.M.L.R. at 348.

186. *Villeroy & Boch*, O.J. L 376/15, at 18-19 (1985), [1988] 4 C.M.L.R. at 469.

187. *See* Commission Decision No. 85/404/EEC, O.J. L 233/1, at 5 (1985), 1 C.M.R. 10701 [hereinafter *Grundig*] (holding that Article 85(1) prohibits requirement that retailers display reasonably full range of products and that wholesalers have necessary resources and facilities and stock full range of goods).

188. *See* *Villeroy & Boch*, O.J. L 376/15, at 19 (1985), [1988] 4 C.M.L.R. at 470; *Grundig*, O.J. L 233/1, at 5 (1985) (finding restrictions on supply to retailers outside network fall within Article 85(1)). *But see* Commission Decision No. 80/489/EEC, O.J. L 120/26, at 27 (1980), [1980] 3 C.M.L.R. 274, 275-76 (*Krups*); Commission Decision

This brings us to the issue of quantitative restrictions in selective distribution systems and pure exclusive distribution agreements. The exclusivity obligations imposed in these types of agreement cannot, it is submitted, be regarded as ancillary restraints. It could doubtless be argued, however, that, just as these qualitative restrictions are "necessary" for the transaction to occur, so exclusive distribution or quantitative restrictions on distributors may be equally "necessary" for the transaction to take place. If the distributors are not granted some level of exclusivity, it is argued, they may not enter into a distribution agreement in the first place. Consequently, it may be claimed that the proposed separation between quantitative and qualitative distribution systems is simply a distinction without a difference.

No doubt on some, or even most occasions, this may be true, and the granting of exclusivity or the introduction of quantitative criteria in selective distribution agreements becomes necessary if the distributor is to be persuaded to "make the market" and engage in the kind of advertising, promotion, and training that the manufacturer requires. However, this justification is different from the ancillary restraints doctrine in at least two respects. First, whether this exclusivity is necessary requires an economic analysis of the market. This is not necessary with qualitative requirements. Second, while exclusivity is related to the economic risk that the distributor takes, it is not integral to the preservation of value, such as the reputation of the manufacturer, that is provided by the ancillary restraints. It may be necessary to the transaction, but in a quite a different respect to which qualitative obligations are necessary.

In short, a selective distribution system based on qualitative criteria aims to preserve an additional value to the mere transfer of goods supplied, such as the reputation of the manufacturers brand. Selective distribution systems based on quantitative criteria normally have a different purpose, providing economic protection to the distributor for his investment. This is not to say that quantitative criteria should, or do, also fall outside Article 85(1) on the grounds that, viewed *ex ante*, they are pro-competitive or that they should remain for assessment under Article

No. 83/610/EEC, O.J. L 348/20, at 22 (1983), [1984] 1 C.M.L.R. 219, 222 (Murat) (citing other exempted selection distribution systems).

85(3) on grounds of legal certainty. What is suggested here is simply that they do not fall, unlike qualitative criteria, within the doctrine of ancillary restraints, since they play a different underlying role in the transaction and, consequently, cannot be cleared without a more or less complex economic analysis. For this reason, it is also submitted that the different treatment of qualitative and quantitative selective distribution systems under EC competition law, whether or not it is ultimately justified, is not as intellectually incoherent as is sometimes supposed.

However, there do remain certain undoubted difficulties with the jurisprudence relating to selective distribution. A distributor may, for example, set up a quantitative selective distribution system for precisely the same reason he sets up a qualitative system—to preserve the quality of the network or its reputation. If this is the case, then, logically, the quantitative restrictions would count as ancillary restraints in such circumstances. The determination never to treat them as such might be defended on the grounds that it is impossible to determine in every individual case the nature of the motivation behind quantitative restraints—whether to reward commercial risk or to protect the reputation and/or the image of the product.

CONCLUSION

It would appear from this non-exhaustive survey that the theory of ancillary restraints as restrictions necessary for the transfer of value in various types of transaction conforms rather well with both the decisions of the Commission and the jurisprudence of the Court, at least with regard to certain restrictions. Furthermore, this survey shows that implementing such a doctrine provides a welcome safe harbor of certainty for undertakings that wish to avoid a full blown economic analysis of the market.

This Article also demonstrates, however, that some currents of uncertainty exist, even within the doctrine of ancillary restraints. For example, in the context of the transfer of undertakings, the Commission applies the doctrine under Article 85(3) and not under Article 85(1) when it perceives the main purpose of the transaction to be something quite different, such as a specialization agreement. With respect to selective distribution agreements, if the restraints are ancillary to a distribution agree-

ment that forms part of a network of similar agreements foreclosing the market, then the entire agreement may violate Article 85(1).¹⁸⁹

Furthermore, the doctrine of ancillary restraints has not always been applied explicitly. In the context of agreements for the licensing of intellectual property, the doctrine has been invoked infrequently, as authorities often prefer to use the specific subject matter theory¹⁹⁰ of the intellectual property right in question. A comparison with the reasoning in the field of know-how licenses shows, however, that similar clauses in such licenses are deemed ancillary restraints. It is submitted that this doctrine would have provided an alternative justification to that of the specific subject matter right with regard to numerous restrictions in intellectual property licenses. In relation to joint ventures, the Commission has, until its recent Notices, shown a similar reticence in making explicit reference to the concept of ancillary restraints.

Finally, as might be expected, the theory of ancillary restraints, defended in this paper, does not perfectly comply with all of the jurisprudence. For example, it is hard to explain why, in selective distribution systems, quantitative criteria whose *raison d'être* is the protection of the reputation or image of the network, rather than providing exclusivity as a reward for the distributor's commercial risk, should not be viewed as ancillary restraints. This is particularly puzzling in the light of the fact that such quantitative criteria, aimed at the preservation of value, have been approved in analogous franchising agreements.

If ancillary restraints are not merely an *ad hoc* collection of clauses, but are united by a common purpose relating to the preservation of value in a transaction, then to propose that the doctrine should be extended to cover other restrictions not related to that objective would appear to be contradictory. However, the question can be usefully restated as: should we apply the same test of "necessity," a less demanding test that does not require a full economic analysis of the market, to clauses other than ancillary restraints, such as those falling within the "commercial risk" category?

189. *Metro v. Commission*, [1986] E.C.R. at 3085, [1987] 1 C.M.L.R. at 158.

190. See *supra* notes 130-58 and accompanying text (discussing patent and know-how licenses).

It is submitted that, other than in a few well-defined instances, the Court and the Commission are unlikely to take such a step. These institutions will not wish to restrict their analysis of what are regarded as potentially anti-competitive restrictions to a mere necessity test. They are not likely to tie their hands in examining the competitive impact of such restrictions in light of, among other things, the business justifications adduced in their defense. More progress, it is suggested, is likely to be made in improving the nature and scope of analysis under Article 85(1) by an expansion of the appreciability test.

Another possibility is to modify the necessity test and allow for competitive considerations and more detailed economic analysis in the assessment of ancillary restraints. This would have the consequence of putting all forms of restrictions on the same level and subject to the same degree of scrutiny. However, it would also deprive businesses of the relative certainty that they currently enjoy with respect to restrictions analyzed under the necessity test. Consequently, unless or until the economic analysis of restrictions can be undertaken in a more predictable manner, ancillary restraints, it would appear, are here to stay.