

The doctrine of ancillary restrictions as a delimitation tool and an absorption principle: twin notions but not identical twins

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Key Points

- Contrary to the general view, ‘ancillary restrictions’ designate two separate conceptions, which should be treated as separate doctrines.
- As a ‘delimitation tool’, ancillarity separates ‘naked’ and ‘ancillary’ restrictions based on ‘reasonable necessity’.
- As an ‘absorption principle’, ancillarity is a rule of thumb that screens out certain lawful agreements based on the idea that a lawful main transaction (or the legality of the main transaction) absorbs all objectively necessary (indispensable) restrictions.

I. Introduction

‘Ancillary restrictions’ is a key notion of competition law on both sides of the Atlantic. This paper argues that, contrary to the general view, this term refers to two separate conceptions, which should be treated as separate doctrines. It coins two terms to label these doctrines (‘delimitation tool’ and ‘absorption principle’) and distinguishes them in terms of legal test.

The paper proposes the following scheme. On the one hand, ancillarity is a ‘delimitation tool’ that separates ‘naked’ and ‘ancillary’ restrictions and, thereby, facilitates the classification between ‘object’ and ‘effect’ agreements. The function of this doctrine is not the identification of lawful agreements but the identification of those that are not outright prohibited for being anticompetitive by object. The legal test embedded in this doctrine is ‘reasonable necessity’: a restriction is ancillary if it is reasonably related to a legitimate main transaction. On the other hand, ancillarity is also a rule of thumb that screens out certain lawful agreements based on the idea that a lawful main transaction (or the legality of the main transaction) absorbs all objectively necessary restrictions. Accordingly, if the main transaction is compliant with Article 101(1) TFEU, the ancillary restrictions should also be regarded as compliant. The legal test embedded in this doctrine is ‘objective necessity’: a restriction is ancillary if it is indispensable for the legitimate main transaction to work out.

The importance of the above distinction is not only conceptual but also practical. The two doctrines embed different legal tests. In EU competition law, the term ‘ancillary restrictions’ is almost exclusively used in the sense of absorption. This may lead to the application of the absorption principle’s more demanding legal test to the delimitation of anticompetitive object and, at the end

of the day, false object classification. A restriction can be ancillary for the purpose of the object-inquiry even if it is not ancillary for the application of the absorption principle.

The above distinction has important implications also for comparative analysis. It points to an interesting trans-Atlantic terminological division made up by convergent conceptualizations separated by a common language. In US antitrust law, the term ‘ancillary restrictions’ refers predominantly to the delimitation tool and is understood to embed a ‘reasonable necessity’ test. In EU competition law, the term is used predominantly (almost exclusively) in the sense of absorption and is understood to embed an ‘objective necessity’ test.

The paper’s argument is presented as follows. [Sections II and III](#) present the operation of ancillarity in EU competition law. [Section II](#) demonstrates how it functions as a delimitation tool, while [Section III](#) presents how it functions as an absorption principle. [Section IV](#) provides an overview of the doctrine of ancillarity in US antitrust law. [Section V](#) sets out the paper’s conclusions and proposals.

II. Ancillarity as a delimitation tool in object-inquiry

Ancillarity serves an important role in distinguishing ‘object’ and ‘effect’ restrictions. It is generally accepted that horizontal price fixing, market division, and output limitation are anticompetitive by object. In fact, however, only naked horizontal price fixing, market division, and output limitation can be automatically considered anticompetitive by object. If these restrictions are adopted in the context and are reasonably related to a legitimate cooperation, they cannot be condemned summarily and call for a substantive analysis.

Received: May 20, 2024. Revised: June 12, 2024. Accepted: June 13, 2024

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Several legitimate cooperations may involve restrictions, which, if standing alone, would *per se* violate Article 101(1) TFEU. Joint production, consortia, and joint commercialization may involve price limitations and market sharing. If these restrictions stand alone, they amount to a cartel. If they are, however, collateral to a legitimate cooperation, they may call for an effects-analysis. Automatically condemning all arrangements that involve some sort of a price-fixing or market division would throw the baby out with the bathwater. What distinguishes these from 'by object' restrictions is ancillarity. If the cooperation is limited to the fixing of the price, the restriction is 'naked' and, as such, anti-competitive by object. If economic activities are integrated by combining assets and exploiting synergies, it is ancillary, and an effects-analysis is warranted. Consequently, it is, in essence, not price-fixing but naked price-fixing (the lack of ancillarity) that makes an agreement anti-competitive by object.

The delimitation between naked and ancillary restrictions is carried out as part of the examination of the 'legal and economic context.' Although the CJEU has never used this term expressly, ancillarity serves a pivotal role in object-inquiry.

In *Generics*,¹ the Court held that a patent settlement, including reverse payments, calls for an effects-analysis, if it is connected with a genuine patent dispute. This was confirmed in the *Lundbeck* cases,² which embraced six appeals emerging from the same competition matter. Patent settlements may feature market-sharing, as one undertaking may promise not to enter another's market. If this is the agreement's only element (there is no genuine legal dispute), it is a 'naked' restraint. If the market division is linked to a genuine patent dispute, it is ancillary and, hence, not anti-competitive by object.

The same conceptual structure was used by the CJEU in *Pierre Fabre*³ and *Coty*,⁴ where, in the context of internet sales, it established that restrictions objectively justified by selective distribution (ancillary restraints) are not anti-competitive by object, while, absent such a link to selective distribution, they are automatically condemned.⁵

A further illustrative example of ancillarity is provided by the cases concerning payment card systems' multilateral interchange fees (MIF).⁶ The MIF is used in inter-bank clearing and is paid by the acquiring bank (which operates the bankcard terminal installed at the merchant) to the issuing bank (which issued the bankcard used for the payment). When the customer pays by card, the acquiring bank charges a fee to the merchant. Afterwards, the acquiring bank passes a portion of the merchant fee on to the issuing bank. Accordingly, the issuing bank has two sources of income: the cardholder may pay a fee for the issuance of the payment card, and the acquiring bank shares a part of the merchant fee. As a corollary, the payment card industry is a two-sided market. These fees are normally fixed on a multilateral basis.

The MIF may have the appearance of price fixing, as the fee paid in consideration of the services provided by the issuing bank is fixed uniformly by competitors. This conclusion is, however, overshadowed by the fact that both sides of the market (sellers and buyers) are involved in the agreement, and the MIF may be reasonably related to the effective operation of the payment card system. Accordingly, the CJEU has consistently refused to treat it as anticompetitive by object and required an effects analysis for its assessment.⁷

Likewise, the distinction between naked and ancillary restrictions plays a pivotal role in cases involving joint purchasing, joint selling (commercialization), and technology pools. According to the Commission's *Horizontal Guidelines*,⁸ it is not anticompetitive by object, if 'two or more purchasers jointly negotiate and conclude an agreement with a given supplier relating to one or more trading terms governing the supply of products to the cooperating purchasers.'⁹ On the contrary, 'buyer cartels' are naked restrictions and are distinguished from joint purchasing by the lack of 'joint negotiations vis-à-vis the supplier.'¹⁰ Price fixing, output limitations, or market partitioning are anticompetitive by object. Nonetheless, if included in a commercialization agreement and are 'ancillary to the main aim of the agreement and where that main aim falls outside the prohibition of Article 101(1),' they are not automatically condemned.¹¹ A bidding consortium, to be assessed on the basis of effects, implies 'a joint bid in a public or private procurement competition.'¹² On the contrary, bid rigging (collusive tendering) is anticompetitive by object.¹³ The major difference between the two is that '[b]id rigging generally does not involve joint participation in the tender procedure,'¹⁴ while '[b]idding consortium agreements can involve a significant degree of integration of resources and activities by the parties for the purpose of participating in the tender procedure, in particular when forms of joint production are included in the activity subject to the tender.'¹⁵ In the absence of a significant degree of integration of resources and activities, a bidding consortium may avoid 'by object' condemnation, if the parties are unable to bid individually.¹⁶

The hardcore lists of block exemption regulations also feature the concept of ancillarity.

The Specialization Regulation¹⁷ lists price-fixing, output limitation, and market and customer sharing as hardcore,¹⁸ however, this classification does not apply to ancillary restrictions in production agreements.¹⁹ '[T]he fixing of prices when selling the specialisation products to third parties' is a hardcore restriction, 'with the exception of the fixing of prices charged to immediate

⁷ *Ibid.*

⁸ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C 259/1.

⁹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 8), para 278.

¹⁰ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 8), para 279.

¹¹ Para 328.

¹² Para 347.

¹³ Para 348.

¹⁴ Para 349.

¹⁵ Para 350.

¹⁶ Paras 352 & 357.

¹⁷ Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2023] OJ L 143/20.

¹⁸ Article 5 of the Regulation 2023/1067.

¹⁹ See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 8), paras 222–223.

¹ Case C-307/18 *Generics*, EU:C:2020:52. See Bernadette Zelger, 'By Object or Effect Restrictions—Reverse Payment Settlement Agreements in light of *Lundbeck*, *Servier*, and *Generics*' (2020) 12(4) *Journal of European Competition Law and Practice* 273.

² Case C-586/16 P *Sun Pharmaceutical & Ranbaxy*, EU:C:2021:241, paras 68–71; Case C-588/16 P *Generics*, EU:C:2021:242, paras 66–69; Case C-591/16 P *Lundbeck*, EU:C:2021:243, paras 112–115; Case C-601/16 P *Arrow*, EU:C:2021:244, paras 71–75; Case C-611/16 P *Xellia & Alpha*, EU:C:2021:245, paras 96–99; Case C-614/16 P *Merck*, EU:C:2021:246, paras 84–88.

³ Case C-439/09 *Pierre Fabre*, EU:C:2011:649.

⁴ C-230/16 *Coty*, EU:C:2017:941.

⁵ *Pierre Fabre* (n 3), para 39; *Coty* (n 4), para 24.

⁶ Case C-67/13 P *Groupement des cartes bancaires*, EU:C:2014:2204; C-382/12 *MasterCard*, EU:C:2014:2201; C-228/18 *Budapest Bank*, EU:C:2020:265.

customers in the context of joint distribution.²⁰ The limitation of output or sales is a hardcore restriction, 'with the exception of: (i) provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements; (ii) the setting of capacity and production volumes in the context of a joint production agreement; (iii) the setting of sales targets in the context of joint distribution.'²¹

The R&D Regulation²² follows a similar approach. '[T]he limitation of output or sales' is a hardcore restriction, with the exception of

- (i) the setting of production targets, where the joint exploitation of the results includes the joint production of the contract products;
- (ii) the setting of sales targets, where the joint exploitation of the results:
 - (1) includes the joint distribution of the contract products or the joint licensing of the contract technologies; and
 - (2) is carried out by a joint team, organisation or undertaking, or is jointly entrusted to a third party;
- (iii) practices constituting specialisation in the context of exploitation;
- (iv) the restriction of the freedom of the parties to produce, sell, assign or license products, technologies or processes which compete with the contract products or contract technologies during the period for which the parties have agreed to jointly exploit the results.²³

In the same vein, while 'the fixing of prices when selling the contract products or licensing the contract technologies to third parties' is a hardcore restriction, this classification does not apply to 'the fixing of prices charged to immediate customers or the fixing of licence fees charged to immediate licensees where the joint exploitation of the results: (i) includes the joint distribution of the contract products or the joint licensing of the contract technologies and (ii) is carried out by a joint team, organisation, or undertaking, or is jointly entrusted to a third party.'²⁴

III. Ancillarity as an absorption principle

The CJEU's case law uses 'ancillary restrictions' solely in the sense of absorption and labels with it restrictions that are objectively necessary (indispensable) to carry out a legitimate main transaction. This notion first appeared in *Remia*,²⁵ although the ruling did not use the term. The CJEU found that the transfer of the business enhanced competition by increasing the number of market operators and the insertion of a non-compete clause into the contract was necessary to carry out this legitimate transaction. The Court explained that the seller had profound information and experience about the business and, hence, could easily frustrate the purchaser's legitimate expectations by re-entering the market. The Court concluded that, failing a non-compete clause, the purchaser might be disinclined to take over the business.²⁶

The term 'ancillary restrictions' appeared a few years later, in the borderland between Article 101 and merger control. The

EU's first merger control regulation extended the merger clearance to the 'restrictions directly related and necessary to the implementation of the concentration'.²⁷ The pertinent Commission notice expressly referred to these as 'ancillary restrictions'.²⁸ The case law espoused the term a decade later, in *Métropole*,²⁹ where the General Court turned the merger control rule into a general doctrine and established the formulation that the case law has used ever since. Citing both *Remia* and the then-effective merger control regulation,³⁰ the General Court concluded that 'the concept of "ancillary restriction" covers any restriction which is directly related and necessary to the implementation of a main operation'.³¹ A restriction is directly related if it 'is subordinate to the implementation of that operation and (...) has an evident link with it'.³² The requirement of necessity stands for an abstract examination³³ and is met if 'the restriction is objectively necessary for the implementation of the main operation and (...) it is proportionate to it'.³⁴

The above formulation embeds a schematic absorption test, which involves neither substantive, nor case-by-case analysis.³⁵ The accessory restraint shares the fate of the main transaction. If the main operation is in conformity with Article 101(1), so is the ancillary restraint.³⁶

Métropole was followed by a number of ECJ rulings which applied the doctrine without expressly referring to it. It was unsettled whether the doctrine could be applied to all cases involving a legitimate cooperation or it applied solely to situations involving a preservation or transfer of value³⁷ or it had a more general scope.³⁸ Although the ECJ did not use the term, a number of other cases were viewed as applying the doctrine.³⁹ From these some, such as *Nungesser*⁴⁰ and *Coditel II*⁴¹, involved a transfer of value (technology). Nevertheless, there were some, for example, *Pronuptia*,⁴² which dealt with franchising, and *Telefunken*⁴³ and *L'Oréal*,⁴⁴ which concerned selective distribution, where it would be far-fetched to read a transfer of value into the fact pattern. Furthermore, in *Göttrup-Klim*,⁴⁵ the doctrine was applied to a joint-venture scenario. The agricultural cooperative forbade its members from having membership in competing organizations.

²⁷ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1, Article 8(2).

²⁸ Commission Notice regarding restrictions ancillary to concentrations, [1990] OJ C 203/5.

²⁹ Case T-112/99 *Métropole*, EU:T:2001:215.

³⁰ Paras 104–106. Article 8(2) of the then-effective merger control regulation, Regulation 4064/89, amended by Regulation 1310/97 OJ [1997] L 180/1, provided that '[t]he decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.' In essence, the same language is used by the currently effective merger control regulation: '[a] decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.' Article 6(1)(a) of Regulation 139/2004 OJ [2004] L 24/1.

³¹ Para 104.

³² Para 105.

³³ Para 109.

³⁴ Para 106.

³⁵ Paras 107–108.

³⁶ Paras 115–116.

³⁷ F. Enrique Gonzalez Diaz, 'The Notion of Ancillary Restraints under EC Competition Law' (1996) 19 *Fordham International Law Journal* 951. See Valentine Korah, *An Introductory Guide to EC Competition Law and Practice* (2007) 101.

³⁸ Diaz (n 37), 958–996.

³⁹ See Joanna Goyder, *EU Distribution Law* (4th ed., 2005) 28; Korah (n 37), 80–83.

⁴⁰ Paras 56–58.

⁴¹ Case 262/81 *Coditel v Ciné-Vog* EU:C:1982:334, paras 15–20.

⁴² Case 161/84 *Pronuptia*, EU:C:1986:41.

⁴³ Case 107/82 *AEG-Telefunken*, EU:C:1983:293.

⁴⁴ Case 31/80 *L'Oréal*, EU:C:1980:289.

⁴⁵ Case C-250/92 *Göttrup-Klim*, EU:C:1994:413.

²⁰ Article 5(a) of the Regulation 2023/1067.

²¹ Article 5(b) of the Regulation 2023/1067.

²² Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2023] OJ L 143/9.

²³ Article 8(b) of the Regulation 2023/1066.

²⁴ Article 8(c) of the Regulation 2023/1066.

²⁵ Case 42/84 *Remia*, EU:C:1985:327.

²⁶ *Remia* (n 25), paras 19–20.

The ECJ found that the cooperative was compliant with Article 101 for intensifying competition in the market and this extended to the membership restriction as long as this was necessary to ensure the proper functioning of the cooperative.⁴⁶

Finally, the ECJ expressly recognized the doctrine in *MasterCard*⁴⁷ by transcribing the formulation of *Métropole*. It held that the doctrine may apply to any legitimate cooperation (not only transfers of value) and endorsed the requirements set out by the General Court, including the idea that objective necessity is the glue that attaches the ancillary restriction to the legitimate cooperation.⁴⁸ The restriction is required to be both 'necessary for the implementation of the main operation or activity' and 'proportionate to the underlying objectives of that operation or activity'⁴⁹ in the sense that there are no 'realistic alternatives that are less restrictive of competition than the restriction at issue'.⁵⁰ The ECJ established a quite demanding absorption test that is met only if '[the main] operation (...) [were] impossible to carry out in the absence of the restriction in question'⁵¹ in the sense that it 'is likely not to be implemented or not to proceed'.⁵² '[T]he fact that that operation is simply more difficult to implement or even less profitable without the restriction' does not make the restriction objectively necessary.⁵³ This conception was confirmed by the ECJ in *F. Hoffmann-La Roche*⁵⁴ and *Autoridade da Concorrência v Ministério Público*⁵⁵ and recently by AG Collins in *Booking.com*.⁵⁶

The schematic absorption test is somewhat illogical but offers a highly practical rule of thumb.⁵⁷ On the one hand, the doctrine provides no general methodology. It applies only to cases where the main cooperation has been found legitimate in the first place but, apart from referring to common sense, abstains from defining the arrangements that may serve as an 'anchor cooperation'.⁵⁸ The latter's assessment under Article 101(1) cannot be spared, which leads back to the pristine competition law issue. Even a transfer of value or a joint venture may be anticompetitive and, hence, require a competition analysis. Furthermore, it is inconsistent to examine only the main instead of the entire cooperation. Although the main cooperation, by definition, has an overwhelming weight in the competition assessment, it is still only a part of the included restrictions. Furthermore, the case law does not require the main transaction to be procompetitive, it merely requires it not to breach Article 101(1) 'owing to its neutrality or positive effect in terms of competition'.⁵⁹ This implies

that, in theory, the main transaction may have no procompetitive merits to counterbalance the ancillary restriction's negative effects on competition. On the other hand, although the efforts to ascertain if a cooperation may serve as an anchor cannot be saved, ancillarity offers a valuable rule of thumb to approve restraints reasonably connected to a legitimate cooperation and justified by the common sense. In practical terms, it is reasonable to assume that if the main cooperation complies with Article 101(1), the ancillary restraints should not turn the scale. There is very little chance that if the main transaction is compliant with Article 101, it will be the ancillary restriction that breaks the camel's back. The ancillarity analysis has a huge practical benefit. It can be carried out without a detailed effects-analysis or empirical market inquiry. The legal and economic context needs to be considered, but the examination is legal in nature and based on common sense. Although the case law requires the purported ancillary restraint to be proportionate, what it required here is not genuine proportionality in terms of balancing the anti- and procompetitive effects, but an inquiry as to whether the restriction goes beyond what is necessary, including whether there are less restrictive alternatives fulfilling the same function.

The CJEU has considered transactions involving a transfer of business, joint venture, technology transfer, trademark licensing, franchising, exclusive, and selective distribution to be legitimate cooperations. Recently, the 2023 *Horizontal Guidelines* employed the doctrine to exempt the exchange of information that is 'strictly necessary' to a legitimate horizontal cooperation, merger or acquisition.⁶⁰ The CJEU used a similar conception, though without using the label of 'ancillary restriction', to exempt professional rules of ethics⁶¹ and certain restrictions of sporting associations.⁶² In the scholarship, this is often referred to as regulatory⁶³ or deontological ancillarity,⁶⁴ based on the idea that it is a legitimate regulatory or deontological purpose that justifies restrictions ancillary to this.

IV. Ancillary restraints in US antitrust law

Although US antitrust accommodates both notions of ancillary restraints, the term is predominantly used in the sense of delimitation tool.

In the early days of antitrust, naked-ancillary dichotomy was a strong candidate to become a general theory and, as such, powerful competitor of the dualism of *per se* and rule of reason. The notion appeared as early as in 1898 in *US v Addyston Pipe*,⁶⁵ where the Court of Appeals for the Sixth Circuit, in its opinion written by Judge Taft, imported the cognate concept of common law into antitrust law and held that '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

⁴⁶ Although the CJEU did not use the label of 'ancillary restriction', the advocate general did. Opinion of AG Tesouro in Case C-250/92 *Gøstrup-Klim*, EU:C:1994:249, para 19, fn 22.

⁴⁷ *MasterCard* (n 6).

⁴⁸ In the time between the rulings in *Métropole* and *MasterCard*, the requirement of 'objective necessity' was embraced a few years later by the *Guidelines on Article 81(3)*. Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97, para 18(2).

⁴⁹ Para 107.

⁵⁰ Para 109.

⁵¹ Paras 91 (emphasis added).

⁵² Paras 93.

⁵³ Paras 91.

⁵⁴ Case C-179/16 *F. Hoffmann-La Roche*, EU:C:2018:25, paras 70–71 & 75.

⁵⁵ Case C-331/21 *EDP v Autoridade da Concorrência*, EU:C:2023:812, paras 89–90 & 94.

⁵⁶ Case C-264/23 *Booking.com*, ECLI:EU:C:2024:470, paras 43–46 & 53.

⁵⁷ See Oliver Wendell Holmes, *The Common Law* (1881) 1 ('The life of the law has not been logic; it has been experience...').

⁵⁸ Cf. Ali Nikpay, Lars Kjøbye et al., 'Chapter 3: Article 81', in Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition* 252 (2d edn, Oxford University Press 2007) ('[T]he very finding that a particular activity is legitimate implies a value judgment; in a commercial ancillarity case this will inevitably involve an assessment of whether the main agreement "taken as a whole (...) is capable of encouraging competition on the market" or is, at least neutral in competitive terms').

⁵⁹ *MasterCard* (n 6), para 89.

⁶⁰ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 8), paras 357(d), 369 & 371.

⁶¹ Case C-309/99 *Wouters*, EU:C:2002:98; Case 1/12 *Ordem dos Técnicos Oficiais de Contas*, ECLI:EU:C:2013:127; Case C-136/12 *Consiglio nazionale dei geologi*, ECLI:EU:C:2013:489; Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 & C-208/13 *API*, ECLI:EU:C:2014:2147; Case C-427/16 *CHEZ Elektro*, ECLI:EU:C:2017:890; Case C-438/22 *Em akaunt BG EOOD*, EU:C:2024:71; Case C-128/21 *Lietuvos notarų rūmai*, ECLI:EU:C:2024:49.

⁶² Case C-519/04 *P. Meca-Medina & Majcen*, EU:C:2006:492; Case C-333/21 *European Superleague*, EU:C:2023:1011; Case C-680/21 *Royal Antwerp Football Club*, EU:C:2023:1010; Case C-141/21 *P International Skating Union*, EU:C:2023:1012.

⁶³ See Richard Whish & David Bailey, *Competition Law* 138 (2015).

⁶⁴ See Edith Loozen, 'Professional Ethics and Restraints of Competition' (2006) 31(1) *European Law Review* 28.

⁶⁵ *US v Addyston Pipe*, 85 F. 271 (1898).

the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.⁶⁶ Although ancillarity did not become antitrust law's general theory⁶⁷ and was side-lined by the dichotomy between *per se* and rule of reason, it remained part of the analytical toolkit, though its meaning slightly changed. Judge Taft's pristine notion combined the two strands of ancillarity and offered a general theory: ancillary restraints were lawful, while non-ancillary restraints unlawful. The subsequent case law, however, used this notion as a delimitation tool: naked restrictions are *per se* illegal, while ancillary restrictions call for a rule-of-reason analysis.⁶⁸ The key function of 'ancillary restraints' is to distinguish price-fixing (and market division, output limitation etc.) in literal sense from price-fixing in antitrust sense and has embedded a 'reasonably necessary' test from the outset.⁶⁹

In *Broadcast Music v Columbia Broadcasting*,⁷⁰ the parties created a collective management scheme for their intellectual property rights and issued blanket licences (individual licences could be purchased from the members directly). The scheme involved price fixing collateral to the joint blanked licensing, but the Supreme Court refused to treat it as a naked restriction. It conceived the scheme as a joint venture and the determination of the licence fee as ancillary and applied a full-blown rule of reason.⁷¹ The Court held that only naked price-fixing is *per se* illegal, ancillary price fixing comes under the rule of reason.⁷² It noted that price-fixing 'in the literal sense' is not necessarily price-fixing in an antitrust sense.⁷³

In the same vein, *Texaco v Dagher*⁷⁴ involved price fixing in the context of a joint venture. Again, the Court looked into the context and concluded that the price-fixing was not naked but ancillary and, hence, deserved a full-blown consideration. The fork-in-the-road classification was, however, not based on market analysis but an inquiry into the context. The Supreme Court noted in both cases that a price-determination 'may be price fixing in a literal sense,' but may 'not [be] price fixing in the antitrust sense.'⁷⁵ Market power played no role in this classification.

*FTC v Actavis*⁷⁶ involved market-sharing in a literal sense but not market-sharing in the antitrust sense. The FTC argued that the patent settlement involving reverse payment was *per se* illegal because it involved market division. Indeed, absent a genuine patent dispute, this would have amounted to market-sharing. The Supreme Court held, however, that the promise not to enter the market, if reasonably related to a genuine patent dispute and proportionate, may be market-sharing in a literal sense but, due to its ancillarity, not in the antitrust sense.

⁶⁶ *Addyston Pipe* (n 65), 282.

⁶⁷ Finally, in *Standard Oil, the Supreme Court adopted the rule of reason standard. Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)

⁶⁸ See e.g. *National Society of Professional Engineers v US*, 435 U.S. 679, 689 (1978); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008); *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 345 (2010); (Sotomayor, J.).

⁶⁹ See *Addyston Pipe* (n 65), 281–282; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.* (n 68), 224 & 227; *In re Insurance Brokerage Antitrust Litig.*, (n 68), 345–346; *Antitrust Guidelines for Collaborations Among Competitors Issued by the Issued by the Federal Trade Commission and the U.S. Department of Justice* (April 2000), p. 8; 11 Herbert Hovenkamp, *Antitrust Law* (2d ed. 2005) 320, para 1912c.

⁷⁰ *Broadcast Music v Columbia Broadcasting System*, 441 U.S. 1 (1979).

⁷¹ *Broadcast Music* (n 70), 21.

⁷² *Broadcast Music* (n 70), 23 ('Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints.').

⁷³ *Broadcast Music* (n 70), 8–9 (1979).

⁷⁴ *Texaco v. Dagher*, 547 U.S. 1 (2006).

⁷⁵ *Texaco v. Dagher* (n 74), 6, citing *Broadcast Music* (n 70), 9.

⁷⁶ *FTC v. Actavis*, 570 U.S. 136 (2013).

In *NCAA v. Alston*,⁷⁷ the Supreme Court examined the NCAA's rules on student-athletes' education-related benefits and treated them as ancillary and applied the rule of reason.⁷⁸ Although the Supreme Court did not use the term 'ancillary' in *NCAA v. Alston*, it noted that the scheme may be regarded as a joint venture ('even assuming (without deciding) that the NCAA is a joint venture') and acknowledged '[t]hat some restraints are necessary to create or maintain a league sport', although not 'all "aspects of elaborate interleague cooperation are."⁷⁹

V. Conclusions

Ancillarity has a dual role in the application of Article 101 TFEU, and each role constitutes a separate notion.

First, ancillary, as a delimitation tool, helps to distinguish between naked restrictions, which are anticompetitive by object, and ancillary restrictions, which call for an effects-analysis. The same restriction that, standing alone, may be anticompetitive by object, may merit an effects-analysis if adopted in the context of a legitimate cooperation. Ancillary restraints may feature elements characteristic to object restrictions but are not naked, that is, they are reasonably linked to a legitimate cooperation involving the integration of economic activities. Joint production, selling and commercialization, consortia, joint purchasing may and technology pools very naturally involve price limitations and territorial restrictions but have nothing to do with naked restraints. As put by the US Supreme Court in *Texaco v. Dagher*, a price-determination ancillary to a joint venture 'may be price fixing in a literal sense, but it is not price fixing in the antitrust sense.'⁸⁰

Second, ancillarity also has a role in effects-analysis, where it may function as an absorption principle. It is a rule of thumb based on conventional wisdom that simplifies the analysis by extending the legal fate of the main transaction to closely connected restrictions. The effects-analysis requires the comprehensive assessment of the whole transaction, including the main and the accessory restrictions. The doctrine of ancillarity simplifies this inquiry based on the notion that if the main transaction is legitimate, the accessory restrictions are not likely to overturn this assessment. This notion may also be referred to as a requirement of 'qualitative appreciability', which may justify, for example, the grant of an exclusive licence, restrictions that are the inherent part of franchising and obligations that are necessary for protecting intellectual property rights.⁸¹

In US antitrust law, the term 'ancillary restraints' is predominantly used in the sense of a delimitation tool. In EU competition law, the term 'ancillary restrictions' is used exclusively in the sense of an absorption principle, albeit that it also appears as an unlabelled delimitation tool in the object inquiry.

The distinction and identification of these two doctrines is not merely terminological or conceptual but has significant practical implications. The two doctrines embed different legal tests. Ancillarity as a delimitation tool merely requires 'reasonable necessity',

⁷⁷ *NCAA v Alston*, 594 U.S. 2147 (2021).

⁷⁸ Although the Supreme Court did not use the term "ancillary" in *NCAA v. Alston*, it noted that the scheme may be regarded as a joint venture ('even assuming (without deciding) that the NCAA is a joint venture') and acknowledged '[t]hat some restraints are necessary to create or maintain a league sport, although not "all "aspects of elaborate interleague cooperation are."⁷⁹ *NCAA v Alston* (n 77), 2162.

⁷⁹ *NCAA v Alston* (n 77), 2162.

⁸⁰ *Texaco v. Dagher* (n 74), 6, citing *Broadcast Music* (n 70), 9.

⁸¹ Lennart Ritter and W. David Braun, *European Competition Law: a Practitioner's Guide* (3d ed., Kluwer Law International 2005) 274.

that is, it applies if the restriction is reasonably related to a legitimate main transaction. On the other hand, the application of the absorption principle is premised on the notion that the restriction is 'objectively necessary' for the main transaction to be carried out. This implies a more demanding legal test, which applies only if the restriction is essential for the legitimate main transaction to work out.

The exclusive use of the term in the sense of absorption and the lack of an explicit ancillarity doctrine of delimitation entails the risk that the terminological issue is turned into a substantive one. Although the CJEU has applied ancillarity as an unlabelled delimitation tool in a number of cases and this also features the Commission's 2023 *Horizontal Guidelines* and the block exemption regulations, the unclear status of this conception has led to inconsistent interpretations and decisions.

First, although, as noted, the CJEU has applied ancillarity as an unlabelled delimitation tool in a number of cases, it failed to sense ancillarity in others.

In *Royal Antwerp Football Club*,⁸² the UEFA rules required football clubs have a minimum number of nationally trained players. This was a territorial division of the human resources among competitors and, as such, market-sharing and the pivotal question was whether the input-side market-sharing was ancillary to the championships and, hence, called for an effects-analysis, or not ancillary and, hence, anticompetitive by object. Nonetheless, the CJEU did not address this facet at all and, instead, engaged in a frameless and amorphous analysis about whether the arrangement was anticompetitive object. The Court seemed to sense that the reason why the restriction could not be treated as a smoke-filled hotel room cartel was that it was adopted in the context of a legitimate cooperation. Still, it still failed to realize that the pivot of the competition assessment was whether this context reached the level of ancillarity or not. It was beyond question that the requirements of absorption were not met, as the restriction was not indispensable for the championships' operation. Nonetheless, it could have been inquired whether it was reasonably related to the proper operation of the championships. If it was not, it could be pronounced anticompetitive by object. This could have saved the Court's redundant explanation about why market-sharing impairs competition.

The EFTA Court's judgment in *Ski Taxi*⁸³ features the same compassless approach. The EFTA Court held that it depends on an undefined set of circumstances, if a consortium is anti-competitive by object, and the fact that the parties define a common price (which is inherent in a joint offer) tilts the balance of probabilities towards anti-competitive object.⁸⁴ Consortia often enable firms to combine their assets, make use of synergies and benefit from economies of scale and scope. Quite often, these arrangements enable small companies to combine and make offers that are capable of competing with big companies. Of course, joint selling arrangements and consortia may also have detrimental effects on competition; however, this can be ascertained only if looking into the market. The EFTA Court set out a frameless and amorphous legal test for ascertaining whether the arrangement was anticompetitive by object or merit an effects-analysis. Accordingly, a consortium and a joint bid involving the integration of economic activities may be anti-competitive by object, if it 'reveals a sufficient degree of harm'

taking into account 'the substance of the cooperation, its objectives and the economic and legal context of which it forms part',⁸⁵ based on a detailed examination and a case-by-case assessment of the market.⁸⁶ The Court overlooked that what makes a price-fixing not naked is not its ultimate impact on competition demonstrated by a speculative assessment of the totality of the circumstances but its ancillarity to the genuine integration of resources and activities.

Sadly, the judgment in *Ski Taxi* brings to mind two notorious 'Justizmords' of US antitrust law from half-century ago. In *US v Sealy*⁸⁷ and *US v Topco*,⁸⁸ SMEs engaged in joint productive activities and created collective trademarks, which they licenced to members on an exclusive basis. In the since-then overruled judgments, the US Supreme Court found that these arrangements amounted to *per se* illegal market-sharing. Since then, it has become a truism that these judgments stifled clearly pro-competitive arrangements and suppressed competition in the name of competition.⁸⁹ The integration of economic activities, such as joint production and commercialisation, cooperatives, and collective trademarks, may very naturally involve price limitations and territorial restrictions, but have nothing to do with 'naked' restraints. The examination of these schemes comes to a fork in the road at the early stage of the competition analysis, where it needs to be decided if they are automatically condemned. Here, the relevant question is whether they involve a genuine integration of economic activities. If they do, they qualify as effect agreements (even if some circumstances, for instance, the size of the undertakings, are claimed to foreshadow the outcome of this effects-analysis). *US v Sealy* and *US v Topco* illustrate how the failure to use ancillarity as a delimitation tool entails false positives.

Second, although the *Horizontal Guidelines* make use of the notion of ancillarity as a delimitation tool, they are not consistent in using it and contradict themselves, when providing that '[a]greements limited to joint selling and in general commercialisation agreements that include joint pricing (...) are (...) likely to restrict competition by object.'⁹⁰ Joint pricing ancillary to joint selling that consists of the genuine integration of resources and activities should merit an effects-analysis, since it may feature significant pro-competitive effects and raises little competition concerns in case of no or low market power. For instance, a joint logistic platform and marketing cooperative created by SMEs may enhance the effectiveness of the commercialization of their products and, thus, intensify competition, while the participating firms' low market share may raise no outweighing competition concerns. This shortcoming is partially rectified by the provision that puts non-exclusive arrangements outside the ambit of anti-competitive object.⁹¹ The same applies to output limitations, where the *Horizontal Guidelines* apply the object rule to exclusive arrangements.⁹²

⁸⁵ *Ski Taxi* (n 83), para 101.

⁸⁶ *Ski Taxi* (n 83), para 95.

⁸⁷ *US v Sealy*, 388 US 350 (1967).

⁸⁸ *US v Topco*, 405 US 596 (1972).

⁸⁹ Richard H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) 274–78.

⁹⁰ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 8), para 329.

⁹¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 8), para 330.

⁹² Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (n 8), para 331.

⁸² *Royal Antwerp Football Club* (n 62).

⁸³ E-3/16 *Ski Taxi*, [2016] EFTA Ct Rep 1002.

⁸⁴ See Ignacio Herrera Anchustegui, 'Joint Bidding and Object Restrictions of Competition: The EFTA Court's Take in the *Taxi Case*' (2017) 1 *European Competition and Regulatory Law Review* 174.

Third, the *Technology Transfer Guidelines*,⁹³ however, still follows the blinkered approach of the earlier generation of guidelines. They pronounce the pooling of competing technologies anti-competitive by object and attach no relevance to the integration of resources and activities.⁹⁴ This practically means that horizontal technology pools may run the risk of object treatment, albeit that the inclusion of substitute technologies does not amount to a cartel, if they do not make up an overwhelming part of the pool. This approach applies even if the pool is not exclusive, that is, the licensors' right to license their technologies outside the pool is untouched. Naked price-fixing and price-fixing ancillary to joint selling are treated alike, although the latter may have significant pro-competitive benefits, including economies of scale and scope, as well as reduction of transaction and administration costs. A counter-factual analysis suggests that, if the pool has no exclusive licensing rights, it does not take away from competition. This shortcoming is mitigated by the *Guidelines*' notion that substitutability is not a technical but an economic quality and, hence, substitutable technologies have to be treated as complementary, if there is a joint demand for them in the market. Although the parties may be competitors in general, if there are no competitive

relationships between the technologies included in the pool, the cooperation is not horizontal.⁹⁵

The above showcase that ancillarity should not only be applied but also explicitly recognized as a doctrine of delimitation. Ancillarity is a very efficient conceptual tool in the object inquiry, it would be inconsistent to waste it just because it is also used as an absorption principle.

Funding

The research was supported by the ICT and Societal Challenges Competence Centre of the Humanities and the Social Sciences Cluster of the Centre of Excellence for Interdisciplinary Research, Development and Innovation of the University of Szeged. The author is a member of the 'Law and Competitiveness' research group. The author is indebted to Christian Bergqvist, Andre R. Fiebig, George Alan Hay, Max Huffman, and Zoltán Marosi for their comments on an earlier version of the paper. Of course, all views and any errors remain the author's own.

Conflict of interest. The author has no conflicts or competing interests to declare.

⁹³ Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C 101/2.

⁹⁴ Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (n 93), para 246.

⁹⁵ Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (n 93), para 254.