

EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy

*George Metaxas and Hector Armengod**

 Ancillary restraints; Competition policy; EC law; European Commission; Mergers

1. Introduction

In the scheme of things relating to EC Merger Regulation, the European Commission (the “Commission”) has done its best to remove the assessment of ancillary restrictions from its “to do” list. The Commission is understandably reluctant to dedicate resources to the assessment of this type of restrictions which, although not part of the main competition law issues raised by a notifiable concentration, can be complex, case-specific and difficult to process within short procedural deadlines. However, once a concentration has been cleared by the Commission and is implemented, contractual clauses that may potentially qualify as ancillary, such as non-competes or various exclusivities, are also among those most likely to lead to future disputes between the private parties concerned. This is especially the case where the parties’ original deal consists in a continuing commercial relationship (e.g. a joint venture) rather than a clean, full transfer of companies or assets.

* *George Metaxas* (gmetaxas@hhlaw.com) is a partner and *Hector Armengod* (harmengod@hhlaw.com) is an associate in the Brussels office of Hogan & Hartson.

Ancillary restrictions or, according to the more official EU terminology, “restrictions directly related and necessary to concentrations”, are entered into by parties to a concentration (*i.e.* a merger, acquisition or joint venture), simultaneously or in close connection with their main agreement. Their key feature is that they introduce contractual restrictions to the parties’ commercial freedom of action that may be potentially anti-competitive if considered in isolation, but are crucial for the attainment of the concentration’s economic objectives. Examples of ancillary restrictions include non-compete and non-solicitation clauses, licensing agreements, and exclusive purchase and supply obligations.

In this article, we examine the evolution and current status of the Commission’s policy on ancillary restrictions, from the adoption of the first EC Merger Regulation 4064/89¹ (“Old Merger Regulation”) to the entry into force of the new EC Merger Regulation 139/2004² (“New Merger Regulation”) and the publication of the third relevant Commission Notice³ (the “2005 Notice”). We do not discuss the specific competition law issues relating to each of the individual types of ancillary restrictions dealt with in the Commission’s decisions and the 2005 Notice. Instead, we examine the question of EU and national jurisdiction over ancillary restrictions, as this has evolved over time, and its implications for future transactions and disputes.

2. The regime under the Old Merger Regulation

2.1 *The regime until 2001*

Ancillary restrictions were addressed expressly in the Old Merger Regulation. Its preamble stated that the “Regulation should still apply where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration”.⁴ Article 8(2) of the Old Merger Regulation provided 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”. While this provision seemed to refer only to “Phase II” Commission decisions, this apparent

1 Council Regulation (EEC) No.4064/89 of December 21, 1989 on the control of concentrations between undertakings [1989] O.J. L395/1.

2 Council Regulation (EC) No.139/2004 of January 20, 2004 on the control of concentrations between undertakings [2004] O.J. L24/1.

3 Published in [2005] O.J. C56/24.

4 25th recital.

legislative gap did not prevent the Commission from addressing ancillary restrictions in its “Phase I” decisions.⁵ The legislative position was clarified in the 1997 amendment of the Old Merger Regulation.⁶ This introduced, *inter alia*, an express reference to ancillary restrictions in Art.6(1)(b) (relating to Phase I decisions), similar to the text of Art.8(2).

Assessment of ancillary restrictions under the merger control procedure was meant to avoid the need to enter into parallel proceedings before the European Commission, one proceeding concerned with the assessment of the concentration under the Regulation, and the other aimed at the application of Arts 81 and 82, EC to restrictions ancillary to a concentration.

The Commission’s duty to assess ancillary restrictions together with the notified concentration was discussed in more detail in the first Commission notice regarding restrictions ancillary to concentrations⁷ (the “1990 Notice”). In the 1990 Notice, the Commission set forth its interpretation of the concept of ancillary restrictions and provided guidance on the criteria it would apply in assessing specific types of ancillary restrictions.

The procedural status of ancillary restrictions under the 1990 Notice and the Commission’s practice that followed until 2001 were relatively straightforward and unproblematic. The Commission was consistent in its practice of assessing ancillary restrictions within the framework of the merger control procedure. In its pre-2001 Notice decisions, the Commission would usually reserve a few paragraphs under the heading of “Ancillary Restrictions” for the analysis of ancillary restrictions. (See, for instance, the Commission’s Decisions in *Steetley/Tarmac*,⁸ *Pechiney/Viag*,⁹ *BHF/CCF (II)*,¹⁰ *Akzo Nobel/Monsanto*,¹¹ *Mannesmann Demag/Delaval Stork*¹² or *Union Carbide/Enichem*¹³). These restrictions were therefore covered by the scope of the Commission’s clearance decision. Restrictions that did not qualify as ancillary, had to be separated from the main transaction to be assessed independently under

Arts 81 and/or 82 EC,¹⁴ or were found partly ancillary, for a reduced duration or scope.

2.2 The Commission’s practice under its 2001 Notice

The Commission’s practice on ancillary restrictions changed drastically with the publication of the second Commission Notice on restrictions directly related and necessary to concentrations¹⁵ (the “2001 Notice”). This included a statement to the effect that the Old Merger Regulation did not impose an obligation on the Commission to assess and formally address ancillary restrictions. According to the Commission, this was a consequence of the principle that all restrictions meeting the criteria set out by the Merger Regulation (“directly related and necessary to the concentration”) were already covered by Art.6(1)(b) and Art.8(2) of the Regulation, and were “therefore cleared by operation of law, whether or not explicitly addressed in the Commission’s decision”.¹⁶ Consequently, the Commission announced that it did not intend to make such an assessment in its merger decisions any more. Further, the 2001 Notice encouraged the involvement of national courts in ancillary restrictions disputes, arguing that

“[d]isputes between the parties to a concentration as to whether restrictions are directly related and necessary to its implementation and thus automatically covered by the Commission’s clearance decision fall under the jurisdiction of national courts”.¹⁷

Consistent with this view, the Commission thereafter refrained from addressing ancillary restrictions during the period between the publication of the 2001 Notice and the entry into force of the New Merger Regulation.¹⁸

However, the Commission’s post-2001 administrative practice of refusing to assess ancillary restrictions in merger decisions was rejected by the Court of First Instance (the “CFI”) in the *Lagardère and Canal+* case.¹⁹ The CFI held that the Commission’s sole jurisdiction with respect to the supervision of concentrations

5 For an early example see, *e.g.* Case No.IV/M 97 *Pechiney/Usinor-Sacilor*, para.16.

6 Council Regulation (EC) No.1310/97 of June 30, 1997 amending Regulation (EEC) No.4064/89 on the control of concentrations between undertakings, [1997] O.J. L180/1. See, in particular, the 7th Recital of its Preamble and its Art.1(5).

7 [1990] O.J. C203/5.

8 Case No.IV/M.180.

9 Case No.IV/M.198.

10 Case No.IV/M.508.

11 Case No.IV/M.523.

12 Case No.IV/M.180.

13 Case No.IV/M.550.

14 There have been very few such cases in practice. See, *e.g.* Case M. 179 *SPAR/Dans Supermarked* and Case M.263 *Abold/Jerónimo Martins*.

15 Published in [2001] O. J. C188/5.

16 *ibid.* para.2.

17 *ibid.* para.3.

18 As an apparent consequence of *Lagardère and Canal+*, which is discussed immediately below, the section on ancillary restrictions made a comeback in the Commission’s decision in Case No.COMP/M.3396 (*Group 4 Falck/ Securicor*). This case was notified and examined under the Old Merger Regulation, but the Commission adopted its decision on May 28, 2004 following the entry into force of the New Merger Regulation.

19 Case T-251/00, judgment of 20.11.2002.

with a Community dimension also extended to the assessment of whether restrictions notified by the parties to a concentration were directly related and necessary to the implementation of that concentration. National courts could share jurisdiction with the Commission over ancillary restrictions only in the context of Art.81 EC cases, but not in the context of concentrations.²⁰ As a consequence of the Commission's exclusive jurisdiction over ancillary restrictions in concentrations with a Community dimension, the court concluded that:

“when the parties to a concentration notify the Commission of contractual clauses as restrictions directly related and necessary to the implementation of the concentration, they must be deemed to form an integral part of the notification of the concentration. In the case of a clear and precise request falling within the competence of the Commission, the latter must provide an adequate reply”.²¹

Lagardère and Canal+ helped re-emphasise not only the 2001 Notice's lack of legal binding character, but the fact that the Commission's interpretations of the EC Merger Regulation, however official, are not necessarily infallible.

3. The new regime

The New Merger Regulation's provisions on ancillary restrictions have changed only slightly from those of the Old Merger Regulation, but the change is legally significant. Under its Arts 6(1)(b) and 8(2), “[a] decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.” Thus the words “shall cover” of the Old Merger Regulation have been replaced by “shall be deemed to cover”. The thinking behind this change is explained in the 21st recital of the preamble to the New Merger Regulation:

“Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertaking concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant

Commission notice in force or a published Commission decision”.

The 2005 Notice refers to the 21st recital cited above and reiterates the Commission's earlier view that “[d]isputes as to whether restrictions are directly related and necessary to the implementation of the concentration and thus automatically covered by the Commission's clearance decision may be resolved before national courts.”

In the same Notice, the Commission states that cases involving exceptional circumstances not covered by the Notice may justify departing from its principles. With regard to these cases, the Commission encourages parties to obtain further guidance in the published Commission decisions, as to whether their agreements can be regarded as ancillary. Furthermore, according to the 2005 Notice, to the extent that such exceptional cases have been addressed previously by the Commission in its published decisions, they do not constitute “novel and unresolved questions”.

At the time of writing this article, we are not aware of any published case dealt with under the New Merger Regulation in which ancillary restrictions were discussed in detail by the Commission, but such restrictions were referred to briefly and inconclusively in *Airbus/SITA*.²² In this case, the Commission approved the creation of a joint venture, OnAir, between Airbus and SITA. In addressing a claim by third parties that the joint venture could limit customers' choice and foreclose the market, the Commission also briefly referred to a non-compete agreement of three years between the parties to the transaction and stated that this agreement appeared to be in line with the 2005 Notice.²³ This decision does not offer any guidance on the interpretation of the concept of novel and unresolved questions, and the non-compete agreement of three years referred to in its text does not appear to have raised such questions. Further, the Commission's references to the non-compete were heavily truncated in the public version of the decision, to protect the parties' business secrets. Therefore, the legal relevance, if any, of the Commission's brief comment is unclear, to say the least.

4. So, where does all this leave us?

The new legal regime and the Commission's expected new policy on ancillary restrictions are the product of a

²⁰ *ibid.* para.87.

²¹ *ibid.* para.90.

²² Case No.COMP/M.3657, decision of 27/01/2005.

²³ *ibid.* para.29.

compromise. As a starting point, the Commission does not want to have to deal with ancillary restrictions—that much has been clear for some time now. In fact, the Commission’s original proposal for the New Merger Regulation²⁴ did not even provide for the possibility of the exceptional Commission assessment of ancillary restrictions raising “novel and unresolved” questions; the Commission evidently preferred not having to deal with ancillary restrictions under any circumstances.

Commission officials are increasingly sensitive to the legal pitfalls lurking in the EU merger clearance process and the risk of high-profile Commission defeats before the CFI. The Commission case-teams’ attention is focused on substantiating their decisions through unsailable facts and arguments, despite the constraints of strict deadlines and limited resources. Under these circumstances, Commission officials are anything but keen to be burdened with an additional, time-consuming and potentially litigious side-show on ancillary restrictions. Moreover, at least on its face, rendering the examination of ancillary restrictions a matter of self-assessment by the parties seems consistent with the new, post-May 2004 EU competition regime, which has done away with the previous EU system of individual notification and clearance of potentially anti-competitive agreements.

There was, of course, the recent precedent of *Lagardère and Canal+*, which needed to be addressed somehow. Evidently, the official view would be that this has been taken care of in the New Merger Regulation. As mentioned above, its provisions introduce express language aimed at extending automatically the beneficial effect of Commission decisions clearing a concentration to its ancillary restrictions (“a decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentrations”). As the CFI’s decision in *Lagardère and Canal+* was based on the Old Merger Regulation, it can be argued that the court’s decision would have been different if the same set of issues were to be assessed under the New Merger Regulation; and that the latter’s provisions clearly allow the Commission to refuse to deal with ancillary restrictions without violating any of the principles relied upon by the CFI in *Lagardère and Canal+*.

As a practical matter, the new regime should usually address both the Commission’s and the notifying parties’ concerns in a pragmatic and satisfactory manner. However, for the reasons discussed below, its legal basis and effective enforcement may be floating in uncertain

waters, particularly as regards the question of sole or concurrent jurisdiction over ancillary restrictions. These potential flaws may remain dormant in the vast majority of notified concentrations, involving typical ancillary restrictions and parties that would prefer to close their deal as soon as possible and “let sleeping dogs lie” rather than seek absolute legal clarity on the enforceability of their (actually or potentially) ancillary restrictions. Problems may arise, however, if the enforceability of an ancillary restriction rises to the forefront of a legal conflict, *e.g.* in a contractual dispute between the primary parties concerned or an antitrust dispute involving third parties.

The Commission’s assessment of only those ancillary restrictions that present novel or unresolved questions raises interpretation issues on at least two levels. First, the definition of novel or unresolved questions is a discretionary and hence legally uncertain exercise. Secondly, the legal status of the (presumably rare) Commission decisions dealing with “novel and unresolved” ancillary issues is not altogether clear.

5. What is “novel and unresolved”?

As the court remarked in *Lagardère and Canal+*

“as the Commission itself pointed out in the notice on ancillary restrictions (see paragraph II 6), the question whether a restriction is directly related and necessary to the implementation of the concentration cannot be answered in general terms. Whether a restriction is directly related and necessary in any particular case therefore requires complex economic assessments for which the competent authority has a broad discretion”.²⁵

If the distinction between ancillary and non-ancillary can be such a complex and discretionary exercise, the same must apply to the distinction between resolved and unresolved questions relating to ancillary restrictions. Significantly, the Commission’s own practice on ancillary restrictions has evolved over time, from a more flexible and lenient approach in its initial decisions to a stricter one in more recent cases, before the publication of the 2001 Notice. Differences between the three Commission Notices on ancillary restrictions provide evidence that the Commission’s approach has not always been consistent and requires periodic reappraisal. This may limit the precedent value of some older Commission decisions on ancillary restrictions—and may further blur the concept of “novel or unresolved

24 Proposal for a Council Regulation on the control of concentrations between undertakings, COM(2002) 711 final of 11.12.2002.

25 para.98 of the decision.

questions”, to the extent that “old” questions may need to be re-assessed as “novel” in the light of more recent regulatory experience, emerging new market conditions or a changed legal environment.

The 2005 Notice provides as clear-cut rules as one could hope for under the circumstances, and certainly much clearer and less case-specific than those found in similar guidelines, notices and comparable non-binding texts adopted by the Commission on competition matters. However, the “novel and unresolved questions” referred to in the Notice will still be very case-specific, and interested parties may find it difficult to assess their applicability to their own transaction without any *ad hoc* assessment by the Commission. Such assessment will normally not be available, as even “cases involving exceptional circumstances [that] have been previously addressed by the Commission in its published decisions . . . do not constitute ‘novel or unresolved questions’ within the meaning of recital 21 of the Merger Regulation”. The distinction between “exceptional” and “novel” seems too uncertain and subjective a basis for a dividing line with material substantive and jurisdictional implications.

5.1 The status of Commission decisions on ancillary restrictions

A second level of uncertainty concerns the legal status of the Commission’s decisions on ancillary restrictions in the—presumably rare—cases raising “novel and unresolved” questions justifying such a decision. It should be remembered that the Commission’s “power” and readiness to take such decisions are mentioned in the preamble to the New Merger Regulation and the Commission’s 2005 Notice, both of which are not legally binding.²⁶ The operative, and legally binding, part of the New Merger Regulation does not include any mention of such decisions. Further, the language used in Arts 6(1)(b) and 8(2) of the New Merger Regulation (“is deemed to cover restrictions”) can only be interpreted as introducing an irrebuttable presumption that even the Commission could not reverse on an *ad hoc* basis, especially as nothing in the operative text of the New Merger Regulation provides it with a power to do so.

Therefore, unlike Commission decisions on ancillary restrictions under the Old Merger Regulation regime,

future Commission decisions on ancillary restrictions raising novel and unresolved questions will presumably be solely declaratory in nature, rather than constitutive of any rights or obligations. This is also likely to be the Commission’s own view about them.²⁷

Notwithstanding their declaratory nature, these future and rare Commission decisions could arguably still be challenged before the CFI. It is settled EU case-law that only a measure producing binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in its legal position is an act or decision which may be the subject of an application for annulment.²⁸ The Commission could perhaps argue that a merely declaratory decision on the ancillary nature of a restriction, recognising an existing legal position, would not meet this condition. However, the constitutive element of a declaratory decision is the absence of a provision for, or order of, enforcement and not, necessarily, the absence of any “distinct change” in the legal position of its addressee(s). Thus, for example, a Commission decision in the form of a letter terminating its investigation of a formal complaint against an alleged infringement of EC competition rules for lack of evidence of any infringement would seem to be declaratory in the above sense. However, it can still be validly challenged before the CFI—and there have been many such successful challenges by complainants in practice.

5.2 The uncertain limits of national jurisdiction

But what about national courts and competition authorities? For all intents and purposes, these are the bodies most likely to have to deal with disputes on ancillary restrictions, if a notified and cleared M&A deal or JV deal goes sour and the parties invoke rights based on potentially ancillary restrictions contained in the original contracts. Evidently, the Commission’s view, as also reflected in its 2005 Notice, is that restrictions that cannot be regarded as directly related and necessary to the implementation of the concentration fall under the scope of Arts 81 and 82 EC as well as any applicable national competition rules. Therefore, according to the Commission, national courts and competition authorities will have the power to adjudicate on the non-ancillary character of restrictions contained in

26 While a preamble’s recitals do not constitute legally binding text, they do provide authoritative interpretation and clarification of the operative part of the Directive or Regulation concerned. The European Courts routinely rely upon recitals for such purposes. See, e.g. Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam*, [2003] E.C.R. I 10155, para.68; Case C-340/98 *Italy v Council* [2002] E.C.R. I 2663, para.56.

27 This was the Commission’s view already under the post-2001 regime, as reflected in para.2 of the 2001 Notice and in the Commission’s submissions in *Lagardère and Canal+*; see para.54.

28 See, e.g. Case 60/81 *IBM v Commission* [1981] ECR 2639, para.9; Case C-476 *Nutral v Commission* [1995] E.C.R. I 4125, paras 28 and 30; Joined Cases T-125/97 and T-127/97 *Coca Cola v Commission* [2000] E.C.R. II 1733, para.77.

concentrations with or without Community dimension. Presumably, the same national authorities will have the power to take appropriate enforcement measures linked to non-ancillary restrictions by virtue of reg.1/2003.²⁹ Naturally, in this regime, the risk of conflicting or inconsistent case-law across the EU affecting the same parties and issues cannot be excluded. Arguably, however, it would be part of the more general risk facing private parties under the new, modernized EU competition regime for all types of Art.81 and 82 EC infringements.

However, it is difficult to see how national authorities are supposed to apply simultaneously two different sets of jurisdictional and substantive sets of rules to one and the same contractual clause, splitting it notionally in an ancillary part that falls to be assessed solely under the criteria of the New Merger Regulation (*i.e.* whether it is “directly related and necessary to the implementation of the concentration”) and a non-ancillary part that must be assessed based on general competition rules—*i.e.* primarily Art.81(1) and (3) EC. In any dispute concerning the ancillary nature of a restriction before a national court or competition authority, the first task will be to assess the extent, if any, to which the restriction in question can be considered ancillary. Thus, for example, if a notified concentration contains a four year non-compete clause, a national court dealing with a related dispute will have to decide whether the non-compete’s ancillarity stops at the end of the third year (as would be the rule under the 2005 Notice) or whether exceptional, case-specific circumstances justify a longer or a shorter period. In other words, a national court cannot deal with the non-ancillary part of a restriction in isolation without, at the same time, assessing its ancillary part.

The question then arises as to whether the national court’s assessment on the ancillary nature of a restriction, even if merely declaratory in nature, constitutes “an application” of the New Merger Regulation to the concentration to which the ancillary clause is linked. If so, a decision by the national court might conceivably exceed the limits of its jurisdiction. It is at least arguable that a national court would not have the power to apply directly Art.81 EC in this case, because this power is conferred to it by reg.1/2003, and Art.21(1) of the New Merger Regulation provides expressly that Council reg.1/2003 does *not* apply to concentrations “as defined in Article 3” (of the New Merger Regulation). It is unclear if the concept of concentrations “as defined in Article 3” should be interpreted to also include restrictions that are directly related and necessary to the

concentration—but it is at least credible to argue that it does also include such restrictions. Similarly, in the same scenario, the national court would not be allowed to apply its national legislation on competition to the concentration, as provided in Art.21(3) of the New Merger Regulation.

In *Lagardère and Canal+*, the CFI held that “to categorise a contractual clause notified in the context of a concentration as directly related and necessary to the implementation of the concentration is an application of Regulation No 4064/89 within the meaning of Article 22(1) of that Regulation”.³⁰ This statement should be read in the context of the previous regime and might arguably not apply under the regime introduced by the New Merger Regulation. It is reasonable to assume, in any event, that the Commission’s preferred interpretation will be that, under the new regime, the categorisation of a contractual clause notified in the context of a concentration as directly related and necessary to the implementation of the concentration does *not* constitute an “application” of the New Merger Regulation for the purposes of its Art.21. Thus while both the concept of ancillary restrictions and their consequences are legally defined in the text of the New Merger Regulation, the Commission would presumably argue that a merely declaratory interpretation of whether a clause would be deemed ancillary under the New Merger Regulation would not amount to an “application” of this regulation.

The reasoning behind this possible view would be that the ancillary nature of a contractual clause is an objective feature, whose existence does not depend on the Commission’s or a national body’s decision; such a decision will only be declaratory in nature. However, consistent with this view, and if the Commission has neither an obligation nor an exclusive power to decide on ancillary restrictions, the decision of a national body on an ancillary restriction should be as good as the Commission’s views; there should be no precedence of one over the other option. If the Commission’s view on ancillary restrictions were to take precedence over that of a national body, this would need to be based on a concrete provision in EU legislation—but no such provision seems to be available here.

Similar questions relating to parallel EU and national jurisdiction on Art.81/82 EC issues and the avoidance of conflicting decisions are addressed in detail in reg.1/2003. Its provisions expressly define the limits of the national authorities’ relevant powers,³¹ cooperation between them and the Commission³² and the ultimate

29 Council Regulation (EC) No.1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the EC Treaty [2003] O.J. L1/1.

30 para.81 of the decision.

31 See, in particular, Arts 3, 5 and 6 of reg.1/2003.

32 *ibid.*, Arts 12 to 16.

precedence of proceedings initiated by the Commission over those initiated by national competition authorities in the same case.³³ However, no similar “regulatory co-existence” framework has been introduced yet for the New Merger Regulation, whose application is based on the principle of the Commission’s one-stop-shop exclusive jurisdiction—and a non-binding Commission Notice or comments in the preamble are not a proper substitute for such a “co-existence” framework. Moreover, the applicability of Regulation 1/2003 to concentrations falling under the New Merger Regulation is expressly excluded pursuant to its Art.21.

Under these circumstances, a potential problem raised by the idea of concurrent, non-exclusive and equal EU/national jurisdiction over ancillary restrictions is that, if the reasoning behind it is correct, it can also justify an extension of national jurisdiction over other issues covered by the New Merger Regulation. More specifically, if a court’s decision on the ancillary or non-ancillary nature of a clause is an assessment of an objective set of circumstances, purely declaratory in nature and not reserved to the Commission, why should the position be different as regards, *e.g.*, the existence of joint or sole control, a concentration’s Community dimension or the full-function nature of a joint venture, all of which too depend on solely objective factors? If one were to project this whole reasoning to its probably unrealistic (but legally consistent) conclusion, would it then not be possible for private parties to rely on a national court’s decision that their concentration has no Community dimension, even if the Commission thought otherwise? And why should the Commission’s view, in this latter example, have a higher normative value than in the case of ancillary restrictions? In other words, concurrent and equal EU and national jurisdiction over ancillary restrictions, if accepted, might well lead to a more general erosion of the Commission’s exclusive jurisdiction in the context of the New Merger Regulation.

6. Conclusion

The Commission’s new policy on ancillary restrictions is a pragmatic solution that should keep the parties concerned happy in the great majority of cases. Nevertheless, it is also a political compromise built on

untested and probably shaky jurisdictional grounds. The associated problems may surface in the (probably very limited) number of cases where private party disputes on potentially ancillary restrictions in notified and cleared concentrations end up before a national court or similar body.

On the substantive side, the assessment of ancillary restrictions will remain a largely discretionary exercise, despite the fairly clear guidance given by the Commission’s 2005 Notice. On the procedural side, the new regime is built on the intention to refer ancillary restrictions to national authorities as a rule. Commission decisions on ancillary restrictions should be the exception, limited to those rare cases that raise novel and unresolved issues. This solution may reflect a satisfactory policy compromise, but its legal basis and potential implications raise some questions.

The seemingly concurrent EU and national jurisdiction over ancillary restrictions described in the Commission’s 2005 Notice bears intended similarities with the more decentralized enforcement of Arts 81 and 82 EC under the new, modernized, EU competition regime in place since May 1, 2005. However, the New Merger Regulation and Regulation 1/2003 reflect fundamentally incompatible approaches on jurisdiction—one exclusive, one shared. The assessment of ancillary restrictions falls somewhere in the gap between the two, but must be systematically attached to one or the other jurisdictional alternative. Both of these alternatives could be inherently problematic. If the assessment of ancillary restrictions qualifies as an “application” of the New Merger Regulation, the provisions of Regulation 1/2003 cannot apply and the legal basis for the national authorities’ powers, if any, to deal with ancillary restrictions seem questionable. If, on the other hand, one were to take the view that the assessment of ancillary restrictions is a purely declaratory judgment on an objective situation rather than an “application” of the New Merger Regulation falling under the Commission’s exclusive competence, the same reasoning could open the floodgates of national concurrent jurisdiction over a range of other issues relating to the New Merger Regulation, thus eroding the Commission’s core exclusive competence over concentrations with a Community dimension—a solution with potentially serious consequences for the future of EU merger clearance. It is worth wondering whether the Commission’s apparent acceptance of concurrent EU and national jurisdiction over ancillary restrictions could be extended to other provisions of the New Merger Regulation with equal generosity.

33 *ibid.*, Arts 11(6) and 16.