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The Article 7 EUMR Prohibition Implementation and Conduct of Business-Clause as Legal Measure of Risk Minimization

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General Note about the Content

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Abstract

This paper examines the EU competition law aspects of the prohibition on the implementation of a merger under Article 7 of the EU Merger Regulation and the Conduct of Business-Clause as a risk mitigation measure. Under the EU Merger Regulation, parties to concentration must notify the European Commission of a proposed transaction that reaches the prescribed Community dimension. The merging parties are initially subject to a standstill obligation, i.e. they may not take any measures to integrate the target company into the seller's portfolio ahead of time until the Commission has approved the transaction. However, mere preparatory acts for the pending concentration do not constitute a violation of the implementation prohibition within the meaning of Article 7 EUMR and may be carried out by the parties to the merger. The demarcation between preparatory acts and early integration measures has not been conclusively clarified by the EU judicial bodies and represents a "grey area" of the EU Merger Regulation. In a not inconsiderable number of cases, the EU Commission has imposed significantly high fines on the offenders for violations of the implementation prohibition and has thus increasingly become the focus of public attention. In one of its most recent decisions, the EU Commission names concrete preventive measures that serve to protect the parties in the period between notification and approval of the transaction, including Conduct of Business-Clauses that are part of the share purchase agreement. Nevertheless, caution must be exercised in their formulation, as a too far reaching Conduct of Business-Clause constitutes a premature integration of the target company and thus a violation of Article 7 EUMR: The aim of this article is therefore to highlight the legal nature of the Conduct of Business-Clause and its suitability for solving the above-mentioned competition law issue.

Keywords: EU Merger Regulation, Article 7 EUMR, prohibition of implementation, Signing and Closing Date, Conduct of Business-Clause, risk minimization

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1. Introduction

The prohibition of implementation of a concentration as defined in Article 7 EUMR (hereinafter referred to as the "prohibition of implementation") and its infringement represents one of the most significant issues in the practice of European merger control.[1] The applicable standards of European competition law provide that the companies involved in a merger are to be regarded as independent competitors on the market until the Closing Date. As such, they must always act independently and separately from each other so that competition in the market is not impaired. In the recent past, however, there have been repeated violations of the prohibition of implementation within the meaning of Article 7 of the EUMR; these involved cases of the premature implementation of integration measures of the target company prior to the approval of the merger by the European Commission (cf. Article 4 of the EUMR). Once the scope of application of the EUMR is opened, the transaction must be approved by the European Commission prior to its execution, whereby in this case the Signing and Closing Date necessarily diverge in time. The implementation of a merger subject to the EUMR often takes several months and the parties involved – primarily the acquirer – strive in such a situation to realize the acquisition of the company as quickly as possible, which leads to the implementation of early integration measures before the in rem execution of the acquisition of the company. Since the merging companies are still to be regarded as independent competitors on the market at this point in time, early integration measures lead to a disadvantage for other market participants and thus to an impairment of competition, which constitutes a violation of the implementation prohibition within the meaning of Article 7 of the Merger Regulation. In this respect, merger practice shows that the determination of the scope of application of the implementation prohibition is always associated with considerable problems. From this point of view, it had not yet been conclusively

[1] A breach of the prohibition of implementation of the concentration prior to approval by the European Commission is often referred to as "gun-jumping".

clarified which legal instruments the parties may use to prevent the infringement of Article 7 of the EUMR. With regard to this issue, the EU Commission has emphasized that a Conduct of Business-Clause can be considered as a measure which does justice to the interests of both merger parties and prevents the simultaneous violation of Article 7 of the EUMR.[2] However, the substantive components of the Conduct of Business-Clauses and their compatibility with the applicable provisions of EU competition law provisions have to be examined in order to ultimately answer the question of whether this instrument is suitable for balancing the existing tension between the prohibition of execution as defined in Article 7 EUMR and the interests of the parties in the expeditious completion of the corporate transaction.

2. Legal Basis of the Implementation Prohibition according to Article 7 EUMR

The prohibition of implementation in the European competition law has its fundamental basis in Article 7 of the EUMR, whereby this legal norm must always be read in conjunction with other provisions of the EU Merger Regulation[3]. According to this provisions, a concentration with a Community dimension within the meaning of Article 7 of the Merger Regulation or a concentration which is to be examined by the Commission pursuant to Article 4(5) of the Merger Regulation may not be implemented until it has been declared compatible with the common market by a decision of the Commission or a presumption pursuant to Article 10(6) of the Merger Regulation (so-called "standstill obligation"). If the parties to the concentration take integration measures prior to the clearance of the transaction by the Commission, this constitutes an infringement of the implementation prohibition. Such violations are declared null and void and

[2] Commission decision in case M.7993 of 24.04.2018 – Altice/PT Portugal, paras. 70–72; Summary of Commission Decision of 24 April 2018 imposing fines under Article 14 (2) of the Merger Regulation on Altice N.V. for infringing articles 4 (1) and 7 (1) of the Merger Regulation (2018/C 315/08), OJ C 2018/315, 11, para.19 (hereinafter referred to as the "Commission Summary").

[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1.

are subject to substantial fines.[4]

Considerable difficulties arise in the practice of mergers and acquisitions when attempting to determine the exact extend of Article 7 EUMR; the question arises as to which actions of the merger parties constitute a violation of the implementation prohibition and how exactly the borderline between a mere preparatory act and the act of implementation of concentration runs. In order to counteract this legal uncertainty, the parties may agree on Conduct of Business-Clause as a protective measures. However, the legal implications of such a measure and the question of how it should be interpreted in the light of European competition law have not yet been conclusively clarified and are be explained in more detail below.[5]

First, therefore, the legal basis of the prohibition of implementation under Article 7 EUMR must be addressed, i.e. the scope of application (see paragraph 2.1), and the exceptions to the implementation prohibition (see paragraph 2.2). This is followed by a discussion of the range of the implementation prohibition (see paragraph 2.3) and the legal consequences of a violation of the prohibition (see paragraph 2.4). Finally, the legal nature of the Conduct of Business-Clauses as a preventive legal measure for risk minimization against the violation of Article 7 EUMR (see paragraph 3) is to be discussed in more detail and examined in the context of European competition law.

2.1. Scope of Application of the Implementation Prohibition under Article 7 EUMR

In examining the constituent elements of Article 7 of the EUMR, it must first be determined whether the scope of application of the implementation prohibition is open. The examination process is three-dimensional and is divided into a temporal, material and territorial scope of

[4] See under section 3.3.
[5] See section 4.5.

application. Only when all three applicability requirements of the scope of application have been met is it necessary to examine whether the actions of the parties to the concentration constitute a violation of Article 7 of the Merger Regulation.

2.1.1. Temporal Scope of Application

The temporal scope of application of Article 7 of the Merger Regulation is already opened upon the existence of the intention to effect a merger.[6] The temporal scope of application extends up to the point in time at which the concentration is declared compatible with the common market on the basis of a decision within the meaning of Article 6 (1) lit b of the Merger Regulation or Article 8(1) and (2) of the Merger Regulation or the fiction pursuant to Article 10(6) of the Merger Regulation. From this point in time, the merging parties may take integration measures without any concerns regarding a possible infringement of Article 7 EUMR.[7] The prohibition of implementation therefore exists until the time at which the merger is fully effected; the Closing Date thus represents the temporal limit of the prohibition of implementation. After this date, the concentration can no longer be implemented from a legal point of view. Prior to this date, the Commission may approve the completion of the concentration, so that the integration of the target company into the portfolio of the acquirer can already take place prior to the completion date. To this extent, the Commission's approval constitutes a statutory exception to the prohibition of implementation.

2.1.2. Territorial Scope of Application

In principle, the Merger Regulation is only applicable if the companies involved in the merger

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[6] Thomas Wessely, "Artikel 7 FKVO" in *Münchener Kommentar: Europäisches und Deutsches Wettbewerbsrecht* I, vol. 3, ed. Günter Hirsch et al. (Munich: C.H. Beck 2020), para. 31; cf. recital 34 of EU Merger Regulation.
[7] Wessely "Artikel 7 FKVO", para. 33.

have their registered office in the European Union.[8] However, the Merger Regulation is characterized by the "effects doctrine"; according to this, it is decisive that a merger has effects on the internal market even if the merger is carried out in the third country. Whether the company has its registered office or branch in the territory of EU-Member State is irrelevant.[9] The effect doctrine is also reflected in Article 1 (2) of the Merger Regulation by the fact that the calculation of the worldwide turnover does not depend on whether a company has its registered office in the territory of the European Union.[10]

The case law practice of the EU jurisdictional bodies has reaffirmed the global scope of mergers covered by the EUMR. In the first instance, the "economic unit doctrine" has emerged, according to which the European competition rules apply when a third-country company causes a restriction of competition in the internal market through its directed subsidiaries.[11] Subsequently, the Court of Justice broadened this approach to the so-called "implementation doctrine" according to which it is the realization of the restriction of competition in the common market that is relevant.[12] In the *Gencor* decision, the implementation doctrine was further expanded by stating that a merger taking place in a third country may infringe the provisions of the EUMR if "*it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.*"[13] Finally, the Court of Justice has endorsed effects doctrine as a valid connecting factor for determining the scope of European competition law.[14]

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[8] Ibid. para. 13.
[9] Stephan Simon, "Einführung FKVO" in *Kartellrecht - Europäisches und Deutsches Recht*, vol.3., ed. Ulrich Loewenheim et al. (Munich: C.H. Beck, 2020), para. 30.
[10] Torsten Körber, "Art. 1 Anwedungsbereich" in *Wettbewerbsrecht: Fusionskontrolle* III, vol. 6, ed. Ulrich Immenga and Ernst-Joachim Mestmäcker (Munich: C.H. Beck, 2020), para. 59.
[11] Wolfgang Wurmnest, "Rom II-VO Art 6" in *Münchener Kommentar zum BGB XIII*, vol.8, ed. Bettina Limpberg et al. (Munich: C.H. Beck) para. 279; The CJEU judgement in case 48/69 of 14.07.1971 – ICI/Commission, *ECLI*:EU:C:1972:70, para.132 et seq.
[12] Wurmnest, "Rom II-VO Art 6" para. 279.
[13] The CJEU judgement in case T-102/96 of 25.03.1999 – Gencor Ltd/Commission, ECLI:EU:T:1999:65, para. 90.
[14] The CJEU judgement in case C-413/14 P of 06.09.2017 – Intel/Commission, ECLI:EU:*C*:2017:632, para. 40.

On the basis of these considerations, it becomes clear that the territorial scope of application is not limited to the territory of the internal market, but unfolds its legal implications worldwide across the borders of the European Union. The territorial scope of application of the implementation prohibition thus has a global dimension and is not limited to the territory of the EU.

2.1.3. Material Scope of Application

The prohibition of implementation applies to mergers of undertakings which have a Community dimension within the meaning of Articles 1 and 3 of the Merger Regulation. According to Article 1(2) EUMR, a concentration has a Community dimension if it achieves the following cumulative turnover:

- a total worldwide turnover of all companies involved of more than EUR 5 000 million;
- a Community-wide turnover of at least two undertakings of more than EUR 250 million each.

If the criteria set out in Article 1(2) of the Merger Regulation are not met, Article 1 (3) of the Merger Regulation provides that the concentration shall exceptionally be deemed to have a Community dimension if the following cumulative conditions are met:

- the combined worldwide turnover of all the companies concerned is more than EUR 250 million (lit a);
- the aggregate turnover of all undertakings concerned in at least three Member States exceeds EUR 100 million each (lit b);
- in each of at least three Member States covered by lit b, the aggregate turnover of at least two undertakings concerned is more than EUR 25 million each (lit c);
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million.

The calculation of the turnover is based on Article 5 EUMR. Even if the turnover threshold of Article 1(2) is reached, a concentration with a Community dimension does not exist if the undertakings concerned each achieve more than two thirds of their aggregate Community-wide turnover in one and the same Member State. For the purpose of calculating the aggregate turnover within the meaning of this Regulation, the turnover which the undertakings concerned have achieved with their goods and services in the preceding business year must be aggregated.[15]

If a concentration without a Community dimension is referred to the Commission by a national competition authority pursuant to Article 22(1) of the Merger Regulation, the prohibition of implementation within the meaning of Article 7 of the Merger Regulation shall only apply pursuant to Article 22(4) of the Merger Regulation if the concentration has not been implemented by the time the Commission notifies it of the receipt of the request for referral. On the other hand, the unlimited application of the prohibition of implementation is also to be assumed in the case of concentrations without Community-wide significance if, pursuant to Article 4(5) of the Merger Regulation, the concentration is referred to the Commission at the request of the undertakings concerned.[16]

2.2. Exception to the Implementation Prohibition according to Article 7(2) EUMR

An implementation prohibition does not automatically apply if the requirements of Article 7 (1) of the Merger Regulation are fulfilled; in a further step, it must be examined whether the exceptional circumstances of Article 7(2) EUMR are also fulfilled. If these requirements are met, Article 7(1) does not have any legal effect on the execution of the merger in the specific case.

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[15] Cf. Article 5 (1) EU Merger Regulation.
[16] Astrid Ablasser-Neuhuber, "Art. 7 FKVO" in *Kartellrecht: Kommentar zum Deutschen und Europäischen Recht* vol. 4, ed. Ulrich Loewenheim et al. (Munich: C.H. Beck, 2020) para. 2; Jan-Christoph Rudowitz, *Gun Jumping*-Verstöße gegen Art 7 FKVO und Art 101 AEUV durch den vorzeitigen Vollzug angemeldpflichtiger Zusammenschlüsse (Berlin: Dunker&Humbolt, 2016), 148.

Article 7(2) of Merger Regulation covers acquisition of control transaction within the meaning of Article 3 EUMR, in which the company is acquired by several acquirers either by way of a public takeover bid or by way of a series of legal transactions involving securities. Even if control is acquired in this way, this transaction must be notified to the Commission without undue delay (lit a) and the acquirer may not exercise the voting rights thereby obtained or may exercise them only on the basis of an exemption granted by the Commission pursuant to Article 7 para 3 EUMR in order to maintain the value of the investments (lit b).

As a result, only if all legal requirements of Article 7 para. 2 of the Merger Regulation are fulfilled, the integration of the target company is permissible and there is no violation of the implementation prohibition. The requirements of Article 7 para. 2 of the Merger Regulation must therefore always be taken into account.

2.3. Range of the Implementation Prohibition

The question of the extend of the implementation prohibition is increasingly coming to the forefront and has recently also become the focus of the European competition authorities. The reason for this is the lack of clarity regarding the exact legal confines of the implementation prohibition under Article 7 of the EUMR.

As already indicated, the parties to the merger must refrain from taking any action until clearance by the Commission or the Closing Date. Nevertheless, the parties involved often tend to take integration measures in order to accelerate the synergy effects between the merging companies, as the completion of the corporate transaction in many cases takes several months and the acquirer fears that the target company might lose considerable value by then. In such situations, violations of Article 7 of the EUMR frequently occur, triggering investigations by the competition authorities and, in the event of an established violation of the implementation prohibition, being punished with substantial fines.

With regard to the ambit of the standstill obligation, the case law of the EU judicial authorities has drawn certain legal contours from which the limits of the implementation prohibition can be derived. In the following, a legal assessment of the acts of the parties to the concentration will be made in order to clarify which acts are to be regarded as lawful preparatory measures and thus not as an infringement of the implementation prohibition and how the act of implementation of the concentration is to be defined.

2.3.1. Pure Preparatory Measures

The parties to the concentration are interested in preparing the integration of the target company as well as possible in order to achieve optimal synergy benefits and the best possible integration of the target company into the portfolio of the acquirer. To this end, the parties involved – in particular the acquirer – tend to take preparatory measures even before the approval by the Commission. In this context, the question arises as to how exactly the borderline between a permitted preparatory action and an early unlawful (partial) implementation of the concentration is drawn.[17]

In this respect, the Commission clarifies that contractual agreements concluded in the context of a phased merger are generally not to be regarded as a restriction directly related to and necessary for the implementation of the merger, insofar as they relate to transactions that take place prior to the determination of the constituent elements of control within the meaning of Article 3 (1) and (2) of the Merger Regulation.[18] In addition, due diligence is also covered, which is understood as a purely preparatory act, provided that it is reduced to the necessary extent and no strategically relevant information is disclosed. However, if there is an outflow of strategic data, this is deemed

[17] Cf. Stefan Purps and Matilde Beaumunier, "„Gun Jumping" nach Altice: Im Westen was Neues?", *Neue Zeitschrift für Kartellrecht* (2017): 227.
[18] Commission Notice on Restrictions of Competition Directly Related and Necessary to the Implementation of Concentrations, OJ C 2005/56, 24, para. 14 (hereinafter referred to as the "Commission Notice").

to be a premature completion of the merger and therefore a violation of the implementation prohibition under Article 7 EUMR.[19]

Pure preparatory acts are those measures which are necessary for the implementation of the concentration without exerting any influence on the target company.[20] Necessary preparations acts include, for example, integration planning, information events for employees, leasing of premises, changes to the IT infrastructure, notarial deeds and incorporation acts.[21]

It is questionable whether the development of a market strategy excluding the exchange of sensitive information constitutes a purely preparatory act. Some scholars are in favor of such an approach, although a rather strict standard must be applied here.[22] For example, the merger of two separate digital television activities into a joint digital platform was found by the Commission to be in violation of Article 7 EUMR, as joint marketing before the merger was cleared led to premature integration and thus partial implementation of the merger.[23] A joint market presentation that creates the impression that a merger has already been implemented violates the prohibition of implementation.[24] The Commission confirmed this strict standard in the *Altice* decision by finding that the acquirer's involvement in preparing an advertising campaign and the inviting bids constituted a violation of the Article 7 of the Merger Regulation.[25]

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[19] See Wessely "Artikel 7 FKVO", para. 31; Tobias P. Maass, "Art. 7 Feststellung und Abstellung von Zuwiderhandlungen" in *Kartellrecht-Kommentar* II vol. 14, ed. Hermann-Josef Bunte (Munich: Luchterhand, 2021), para. 14.
[20] Manuel Kellerbauer, "Art 7 FKVO" in *Deutsches- und EU-Kartellrecht*, vol. 3, ed. Werner Berg and Gerald Mäsch (Munich: Luchterhand, 2018), para. 9.
[21] Wessely, "Artikel 7 FKVO", para. 38; Maass, "Art. 7 Feststellung und Abstellung von Zuwiderhandlungen", para. 13
[22] Petra Linsmeier and Jan Balssen, "*Die Kommission macht ernst: Erstmals Durchsuchungen wegen Gun Jumping*", Betriebs-Berater (2008): 741 et seq.
[23] Cf. European Commission, press release of 15.12.1997, IP/97/1119, available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_97_1119> (accessed 16.09.2022).
[24] Wessely, "Artikel 7 FKVO", para. 36.
[25] Ablasser-Neuhuber, "Art. 7 FKVO", para. 6; Commission decision in case M.7993 of 24.04.2018 – Altice/PT Portugal, OJ C 77, 05.03.2015, para. 180 (251) et seq.

2.3.2. Implementation Act

The starting point for determining the scope of application of Article 7 of the Merger Regulation is the definition of an implementation act; how exactly this is to be defined is disputed. Some authors are of the opinion that it should be understood as having as their object the implementation of a concentration. In any case, actions that influence the market structure and the competitive behavior of a new entrepreneurial unit are to be included.[26] On the other hand, another part of the doctrine advocates that such an abstract definition of the act of implementation is not expedient, so that the concrete circumstances of the individual case must always be taken into account. In this context, the requirement of independence is relevant, which is to serve as a yardstick for the parties to the concentration, while the acquisition of control over target companies is regarded as the outermost borderline of the implementation prohibition.[27] This is also the basis for the view that, in determining the act of implementation, only the change of control at the target company is decisive.[28] A similar standpoint is that only the change of control over the target company is taken into account when determining the act of implementation.[29]

In the long-awaited *Ernst & Young* decision, the EJC finally also commented on this and drew a distinction from the preparatory measures by means of a negative definition of the implementation act. Accordingly, all acts which lead "*in whole or in part, in fact or in law, to a lasting change in control of the target undertaking*" fall within the scope of the prohibition on implementation*;* those acts which have no direct connection with the conclusion of the transaction do not qualify as implementation acts.[30] It is irrelevant whether the actions of the merging companies have an impact on the relevant market or not. However, it has been confirmed that all those activities that

[26] Körber, "Art. 1 Anwedungsbereich", para. 7.
[27] Michael Rosenthal and Stefan Thomas, *European Merger Control* (Baden-Baden: Nomos, 2020), 45.
[28] Wessely, "Artikel 7 FKVO", para. 35.
[29] Kellerbauer, "Art 7 FKVO", para. 6.
[30] The CJEU judgment in case C-633/16 of 31.05.2018 – Ernst & Young, ECLI:EU:*C*:2018:371, para. 59.

may in any way influence the market structure and the strategic behavior of the new entrepreneurial entity constitute an implementation act, even if this is done by obtaining only partial control.[31]

By means of a teleological reduction in the sense of *argumentum e contrario,* the conclusion can be drawn that all actions which do not lead to a permanent change of control in the target company are not to be understood as implementation acts. Typical examples of implementation acts are measures such as the implementation of joint business strategies, the exercise of control rights, exchange of sensitive information, the assertion of termination rights, the premature influencing of corporate management or its change and other organizational arrangements.[32]

2.4. Legal Consequences of the Violation of the Implementation Prohibition of Article 7 EUMR

Infringements of the implementation prohibition do not go unpunished. The legal consequences of the violation range from the imposition of fines by the Commission to the nullity of the legal transaction under civil law. In the following, the most important legal consequences of the violation of Article 7 of the EUMR are set out.

2.4.1. Commission Fines

In addition to the consequences under civil law, the Commission may impose a fine of 10% of the total turnover of the undertakings concerned for an infringement of the implementation prohibition pursuant to Article 14(2) (b) EUMR. In determining the amount of the fine, circumstances such as the nature, gravity and duration of the infringement are to be taken into account as grounds for

[31] Ibid. para. 50 (77).
[32] Ablasser-Neuhuber, "Art. 7 FKVO", para. 26.

calculating the fine (Article 14(3) EUMR). The implementation of the concentration constitutes a serious violation of European competition law, which may lead to a change in the market structure or an impairment of competition.[33]

Moreover, the failure to notify a merger subject to notification under Article 4 of the Merger Regulation constitutes an independent violation of EU competition law, which the Commission has to punish in addition to the violation of Article 7(1) of the Merger Regulation. In a number of decisions, fines were imposed on infringing parties for violating the notification obligation and sanctioned as independent acts in violation of EU competition law.[34]

There is no express provision stating that the contract is null and void under civil law due to the failure to notify the merger. Therefore, the mere violation of the obligation to notify does not lead to the nullity of the concluded legal transaction.[35]

2.4.2. Civil Law Sanctions

Article 7(4) of Merger Regulation governs the legal consequences of a merger which has been effected in violation of the prohibition of implementation. Such merger transactions are suspended. Once the Commission gives clearance to the transaction, it is deemed to have a retroactive effect. In the event that the merger is prohibited, the entire transaction is to be considered void *ab initio*; the legal consequences resulting therefrom are determined by the relevant civil law provisions of the national legal systems.[36]

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[33] Rudowitz*, Gun Jumping*, 152.
[34] Commission decision in case M.920 of 26.05.1997 – Samsung/Ast; Commission decision in case M.969 of 10.02.1999 – A. P. Moller; Commission decision in case M. 4994 of 08.09.2009 –Electracabel/Compagnie Nationale du Rhône; Commission decision in case M.7184 of 23.07.2014 – Marine Harvest/Morpol; Commission decision in case M.7993 of 24.04.2018 – Altice/PT Portugal.
[35] Gerhard Wiedemann ed., *Handbuch des Kartellrechts* vol. 4 (Munich: C.H.Beck, 2020) § 17 para. 9
[36] Ablasser-Neuhuber, "Art. 7 FKVO", para. 20.

However, this provision does not affect the validity of transactions in securities if these securities are admitted to trading on the stock exchange or a comparable market, unless the contracting parties knew or should have knew that the relevant legal transaction was concluded in disregard of Article 7(1) of the Merger Regulation (Article 7(4) subpara. 2 of the Merger Regulation). It can be deduced from this that the parties to the concentration must demonstrate to the Commission that they did not act with knowledge or grossly negligent ignorance of the disregard of Article 7 EUMR when concluding the legal transaction. This is to ensure protection and confidence of the third party acting in good faith on the capital market.[37]

3. Conduct of Business-Clause as a legal measure for risk minimization

Company and share purchase agreements regularly contain contractual provisions according to which the vendor must continue to run the target company as before – i.e. in an unaltered manner – until the effective date of the takeover (so-called "Conduct of Business-Clauses"). This is an integral contractual provision which has become a standard clause in the contractual structuring practice of M&A transactions for the time period between Signing and Closing.

The employment of these contractual clauses has become increasingly important for the resolution of competition law related issues in corporate transactions and is understood as a legal instrument for minimizing the risk of a potential violation of Article 7 of the EUMR. However, M&A practice shows that the use of the rights granted by the Conduct of Business-Clauses can lead to the premature completion of the merger and thus to a violation of the implementation prohibition. The associated legal risk lies primarily in the uncertainty regarding the legal limits of Article 7 of the Merger Regulation and the associated contractual formulation of these clauses, as it remains

[37] Körber, "Art. 1 Anwedungsbereich", para. 48.

unclear which rights may be granted to the acquirer by means of Conduct of Business-Clauses. Thus, there is uncertainty about the exact demarcation line between a Conduct of Business-Clause permitted under EU competition law and the implementation prohibition of Article 7 of the EUMR.

In the following, reference is made to the aforementioned legal problems from the perspective of European competition law as a legal analysis of the contractual instrument of Conduct of Business-Clauses is undertaken. Subsequently, the time frame of validity, the content of the Conduct of Business-Clauses and their contractual variants will be discussed. Finally, the tension between the Conduct of Business-Clauses and the implementation prohibition under Article 7 EUMR and other EU competition law provisions will be explained.

3.1. Purpose of the Conduct of Business-Clauses

In the case of company and share purchase agreements, the Signing and Closing date usually take place at different points in time, mainly due to the necessity of obtaining clearance for the planned merger from the competent competition authority.[38] Under EU competition law, the transaction may not be completed until the merger has been approved by the Commission; otherwise, the corporate transaction will be executed prematurely and the prohibition of implementation as defined in Article 7 of the Merger Regulation will be violated.[39]

[38] Moreover, other reasons also require the temporal discrepancy between the commitment and disposal transaction, such as the required approval of the supervisory board or the shareholders' meeting, the approval of trading partners for the assumption of material contractual relationships, the taking of certain measures by the target company. See Werner Mielke and Inken Welling, "Kartellrechtliche Zulässigkeit von Conduct of Business-Klauseln in Unternehmenskaufverträgen", *Betriebs-Berater* (2007): 277.

[39] See point 4; cf. also Florian Kästle and Dirk Oberbracht, *Unternehmenskauf - Share Purchase Agreement* vol. 3, (Munich: C.H. Beck: 2018) 130.

With the Signing, the contracting parties enter into the the company or share purchase agreement, thereby creating the legal basis of the transaction. The Closing Date usually takes place at a later date when all other conditions precedent have been fulfilled. The corporate transaction is therefore not completed until the Closing has been completed. After conclusion of the company or share purchase agreement, the transferor remains the legal owner of the company and has de facto power of disposal over the same until the transfer date. For this reason, acquirers often fear that the vendor will no longer care about the well-being of the company to the same extent and that the value of the company could decline until the Closing Date. This could result in the seller remaining obligated to take over the company even though it is worth less than it was at the time the contract was signed, especially since the vendor undertook to do so when the legal transaction was concluded and could be held liable under civil law if he refuses to take over the company.[40]

To this end, the legal instrument of Conduct of Business-Clauses has emerged in the practice of M&A transactions, which is intended to prevent the aforementioned loss in value of the target company. These contractual clauses are thus aimed at ensuring that there is no significant reduction in the value of the company caused by a lack of due diligence on the part of the seller until the transaction is completed. This is intended to lead to a smooth transfer of the target company to the acquirer on the transfer date without the company value being significantly reduced by the (in)actions of the acquirer.

3.2 Legal Nature of the Conduct of Business-Clause

The legal nature of Conduct of Business-Clauses is multifaceted. It is a legal figure originating in the Anglo-American legal sphere that has become established in the contractual drafting practice

[40] The legal question here is how the governing legal order regulates the problem of risk distribution. This problem could be solved by agreeing on a right of withdrawal.

of M&A transactions. Conduct of Business-Clause - along with other clauses such as MAC clauses and other conditions precedent - belong to the group of *pre-closing covenants* that regulate the legal relationships of the contracting parties between Signing and Closing.[41] Although Conduct of Business-Clauses do not derive their legal basis directly from national legislation, there are nevertheless legal provisions in certain national civil law systems that indirectly regulate the problems associated with Conduct of Business-Clauses.

Due to the fact that the Conduct of Business-Clauses restrict the target company's freedom of action and are closely related to the business merger, they are to be qualified as ancillary restraints under antitrust law.[42] As a consequence of this legal classification the Commission Notice on ancillary restraints may also be considered as their legal sources.[43]

In addition, there are legal provisions in the legal systems of the EU member states that have similar legal effects as Conduct of Business-Clauses; these are civil law standards that pursue the same objective.[44] Thus, the national legal systems also partially regulate the problems associated with the Conduct of Business-Clauses, even if the parties have not expressly included this clause in the contract.

3.3. Temporal Validity of the Conduct of Business-Clauses

As already follows from the nature of the matter, Conduct of Business-Clauses govern the legal relationships of the parties to the merger in the period between the Signing and the Closing Date.

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[41] Cf. Rita Wittmann, "Vertragliche Gewährleistungsregelungen beim Unternehmenskauf unter besonderer Berücksichtigung des Anteilskaufs" (PhD diss., University of Vienna, 2011), 129.
[42] Cf. Rudowitz, *Gun Jumping*, 329.
[43] Cf. Körber, "Art. 1 Anwedungsbereich", para. 38; Commission Notice, para. 1; cf. section 3.7.1.
[44] In Austria, for example, § 1049 in conjunction with § 1066 ABGB stipulates that all deteriorations occurring between the conclusion of the contract and the date of performance are to be borne by the transferor, who must transfer the company on the transfer date in the same quality as it was at the time of signing the contract. For more details see Walter Brugger, *Unternehmenserwerb* (Vienna: Manz, 2014), para. 927.

The period thereafter and before is not directly covered by the Conduct of Business-Clauses. Nevertheless, the interests of the acquirer, which are generally protected by them, can also be regulated by other contractual instruments.

The same legal purpose could be achieved for the period from the last balance sheet date to the Signing of the contract by means of a so-called "*business since balance sheet date clause"*, which is intended to ensure that no extraordinary measures are taken by the management of the target company during this period or that no circumstances have occurred which have a material adverse effect on the net assets, results of operations or financial position of the company. If it subsequently transpires that such extraordinary measures have in fact been taken, the purchaser has a claim for compensation for the loss incurred.[45]

Likewise, warranty commitments, non-competition clauses or certain post-merger obligations may be helpful to protect the affected interests of the acquirer in the post-merger phase, although at this point it is already practically in the hands of the purchaser of the target company to take extraordinary measures itself. For this reason, further considerations regarding this matter are unnecessary, as the acquirer acts as the legal owner of the target company after the transfer date and is no longer in need of protection in this respect.[46]

3.4. Content of the Conduct of Business-Clauses

The content of the Conduct of Business-Clauses typically embodies the obligation of the vendor to manage the company with the diligence of a prudent businessman for the period between Signing and Closing and to refrain from taking any extraordinary measures or to take them only

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[45] Günther Hanslik und Clemens Grossmayer*, Big Deal? M&A-Verträge rechtssicher verhandeln!*, (Vienna: Orac Rechtspraxis, 2013), 85.
[46] Cf. Hanslik and Grossmayer*, Big Deal*, 85.

with the consent of the acquirer. This results in certain contractual duties or prohibitions on action on the part of the seller, which are structured as absolute prohibitions or are reduced to duty to make efforts ("best effort").[47] Conduct of Business-Clauses generally grant the acquirer the following rights:

- Restriction of the target company to ordinary management as before and without material change.
- Prohibition to conclude contracts with customers containing change of control clauses and/or to grant other special rights directly related to the corporate transaction.
- Prohibition to take measures that significantly reduce the value of the target company.
- Prohibition to declare or issue new dividends and/or issue shares.
- Prohibition of amendments to the articles of association.
- Prohibition to sell companies (parts of companies) or new business units or to buy other companies or new business units.
- Prohibition of encumbering or pledging of shares or of the company's fixed assets.
- Prohibition of (substantial) change in the area of tax election decisions.
- Prohibition to initiate and actively participate in legal proceedings, unless they are normal payment actions.[48]

[47] Cf. Wittmann, "Vertragliche Gewährleistungsregelungen", 129.
[48] Stefan Krenn, "Zusammenschlussvollzug durch Conduct of Business Clauses?", *Österreichische Zeitschrift für Kartellrecht*, no. 6 (2011): 217 (219); Brugger, *Unternehmenserwerb,* para. 2238.

Even if the contracting parties give legal effect to these provisions, this still does not mean that these contractually agreed rights and obligations are permissible under antitrust law. Which of these rights and obligations can be regarded as unobjectionable under EU competition law must be assessed on a case-by-case basis with regard to the requirements of competition law - in particular the prohibition of implementation within the meaning of Article 7 of the EUMR. In the literature, a typification of the Conduct of Business-Clauses is proposed, whereby these can appear as prohibition, consent, information and instruction clauses.[49] In the following, the content of the contractual variants of the Conduct of Business-Clauses will be examined.

3.4.1 Prohibition Clauses

By means of a prohibition clause, the seller of the company undertakes to refrain from taking certain management measures until the transfer date or - insofar as this concerns a share purchase - to ensure that no such management measures are taken in the target company.[50] The contractual obligations of the prohibition clauses have legal effect to the extend that the business is to be conducted exclusively in the ordinary course of business or that certain contracts may not be concluded, amended or terminated.[51]

In the case of a company or share purchase agreement, the prohibition clauses regulate not only measures affecting the target company's direct business area, but also those which affect the shareholder level. For example, the shareholders may undertake not to amend the articles of association, not to make a profit distribution in the resolution, not to deprive the company of the necessary liquidity funds until the takeover date, to maintain an existing company loan, etc.[52] In

[49] Mielke and Welling, "Kartellrechtliche Zulässigkeit", 278; Brugger*, Unternehmenserwerb,* para. 2238.
[50] Mielke and Welling, "Kartellrechtliche Zulässigkeit", 278.
[51] Brugger*, Unternehmenserwerb,* para. 947; Mielke and Welling, "Kartellrechtliche Zulässigkeit", 278.
[52] Mielke and Welling, "Kartellrechtliche Zulässigkeit", 278.

practice, the prohibition clause represents the simplest form of Conduct of Business-Clauses, which is expressed in an obligation to refrain from certain measures.

3.4.2. Consent Clauses

The consent clause is a subtype of the prohibition clause, which can take two forms: In the first variant, the seller submits to the obligation to refrain from taking certain measures unless he obtains the consent of the buyer to do so. In this case, the reservation of consent extends to measures outside the ordinary course of business of the target company and – in contrast to prohibition clauses – does not constitute an absolute prohibition, but provides for an exception to this prohibition in the form of the purchaser's consent. In the second variant, the seller is subject to a reservation of consent by the buyer to the taking of certain measures. Here - in contrast to the first alternative form of the consent clause - transactions in the ordinary course of business are also more frequently covered by the purchaser's reservation of consent.

In the case of a company or share purchase agreement, the consent clause – like the prohibition clauses – can subject all measures that intervene in the sphere of the shareholder to the consent requirement, so that amendments to the articles of association, profit distributions, contract terminations, etc. can also be covered by it.[53]

3.4.3. Information Clauses

Information clauses do not have the direct purpose of influencing the management of the target company, but are aimed at informing the acquirer about the course of business activities. Examples of such information include information granting the acquirer access to the target company's

[53] Ibid.

business premises, business documents or employees.[54]

The information clauses can also be designed as a combined information and consultation clause, according to which the transferor must not only inform the transferee about the event that has occurred, but also consult with him about it;[55] the scope of such clauses is thus narrower than that of prohibition and consent clauses. It should also be noted here that an excessively broad information clause and the subsequent exchange of sensitive information may violate the antitrust provisions of Article 7 EUMR, so that caution is required in view of these risks.[56]

3.4.4. Instruction Clauses

Instruction clauses grant the purchaser certain rights to issue instructions to the management of the target company. Typically, the instruction clauses are structured in such a way that the seller undertakes to operate the company in the same way as before (i.e. within the scope of ordinary business practice) until the transfer date. In addition, the purchaser is granted the right to issue instructions to the management bodies of the target company regarding specific business management measures.

The rights to issue instructions granted in the case of a share purchase may, for example, relate to rights to issue instructions regarding the appointment of certain persons as managing directors.[57] In this context, utmost caution is required if the constituent elements of Article 7 of the Merger Regulation are fulfilled, as the issuance of such instructions may lead to a premature integration of the target company into the portfolio of the acquirer and thus also to a violation of the prohibition of implementation. Instead, the parties to the concentration must wait until the merger

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[54] Ibid.
[55] See below section 3.5.
[56] For more information on the extend of prohibition on implementation, see section 3.2.2.
[57] Mielke and Welling, "Kartellrechtliche Zulässigkeit", 278.

has been approved by the Commission and only implement all planned integration measures from this point in time. In summary, it can be stated that the use of the instructions clause is very likely to violate Article 7 of the EUMR, so that this form of the Conduct of Business-Clause can only be considered for transactions that do not fall within the scope of the implementation prohibition under Article 7 of the EUMR.[58]

3.5. Contractual Design of the Conduct of Business-Clauses

In line with the various manifestations of Conduct of Business-Clauses, their contractual form may also vary. [59] The contractual form of Conduct of Business-Clauses depends, on the one hand, on the extent to which they can be regarded as permissible and, on the other hand, on the strength of the negotiating positions of the contracting parties.[60]

Conduct of Business-Clauses are typically formulated as absolute prohibitions or in the form of an effort obligation.[61] A large number of examples of the contractual formulation of Conduct of Business-Clauses can be found in the literature. An example of such a clause might read as follows:

"*Vendor agrees to ensure that between Signing and Closing, the business of the Company will be conducted in the ordinary course of business in accordance with past practice.*

Insofar as the Company intends to enter into transactions between the Signing and the Closing which are not part of the ordinary business operations of the Company or that exceed a total amount of EUR [●], the Vendor shall inform the Purchaser thereof without undue delay and

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[58] For more information on the lawfulness of such clauses under EU competition law, see section 3.7.
[59] Cf. COM (2018) 2418 final para 70.

[60] As a rule, such clauses are not controversially discussed by the seller and are accepted in most cases; see Kästle and Oberbracht*, Unternehmenskauf*, 265.
[61] Cf. section 3.4.

consult with the Purchaser on the further course of action in compliance with the statutory framework conditions [...]"[62]

As can already be seen from the wording, this is a Conduct of Business-Clause which is structured as a duty of effort ("*to ensure*"). By Signing the contract, the purchaser undertakes to run the business until the Closing Date in the same way as before and only in the ordinary course of business, which is, however, also limited in terms of value by a materiality threshold. If a legal transaction is concluded that exceeds this value threshold, this triggers the seller's duty to inform and consult, and the seller must inform the buyer of this without delay. This is therefore a type of information clause (*"the Vendor shall inform the Purchaser thereof without undue delay").* The seller only has to inform the buyer about the event and consult with him about this measure, taking into account the legal framework, in particular the antitrust provisions.[63] If the purchaser fails to do so, this may lead to claims for damages or other contractual sanctions.

The contractual formulation of the Conduct of Business-Clause does not have to be static, but can be adapted to the specific interests of the acquirer. In the practice of M&A contract drafting, numerous clauses with different formulations can be found. Another example of a Conduct of Business-Clause could be formulated as follows:

"*The Vendor warrants to the Purchaser that the Company will continue its business in the period between the Signing and the execution of this Agreement with the due care and diligence of a prudent businessman and in the ordinary course of business in the manner and to the extent hitherto conducted and, in particular, will not take any of the measures set forth below:*

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[62] Wittmann, "Vertragliche Gewährleistungsregelungen", 130; cf. Mark Kletter and Robert Bachner, "Wiener Vertragshandbuch I vol. 3" in *Anteilskaufvertrag (Share Deal)*, ed. Christian Hausmaninger et al. (Vienna: Manz, 2019) 10.
[63] Cf. Section 3.4.3.

– *amendments to the Articles of Association; mergers, spin-offs, spin-offs or other transformation measures or measures economically equivalent thereto;*

– *distributions of profits, payments or granting of benefits to the Vendor with its affiliate or related parties [...]*"[64]

Here, the seller is subject to a duty of care with regard to the continuation of the business, which has to comply with the previous practice, the violation of which triggers a liability for damages; in addition, demonstratively ("*in particular*") certain measures are mentioned, which are to be understood as a violation of this duty of care in any case. Even if this cannot be read directly from the wording of the clauses, it is a prohibition of the performance of certain measures. Consequently, we are talking about a prohibition clause.

Another example from the literature of a Conduct of Business-Clause written in English in the form of a consent clause reads as follows:

"*Between the date of Signing and the Closing Date, except as expressly contemplated herein or with the prior written approval of the Purchaser, the Vendors shall procure that the Company shall not:*

– *undertake anything that would materially interfere with the consummation of the transactions contemplated under this Agreement [...]*"[65]

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[64] This clause originates from practice and is provided for the purpose of this article by Dr. Werner Mielke.

[65] See Brugger, Unternehmenserwerb, para. 2241; typical initial wording of such a conduct of business clause is: "*Until the Closing Date, Seller shall not, without the prior written consent of Purchaser[...]*"; cf. Kästle and Oberbracht, *Unternehmenskauf - Share Purchase Agreement*, 262.

As is customary for a Conduct of Business-Clause, it first specifies a time frame between Signing and Closing during which the clause applies ("*Between the date of Signing and the Closing Date*"); then it also specifies an obligation on the transferor not to take certain actions specified in the contract ("*the Vendor shall*"), unless a contractually agreed exception is provided here ("*except as expressly contemplated herein*") or the purchaser gives the vendor written approval to do so ("*prior written approval of the Purchaser*"). Finally, the specific measures covered by the transferor's obligation are also specified, although this wording indicates that this is a taxative enumeration and thus the clauses exhaustively regulate these matters. Alternatively, it is possible to expand the scope of the Conduct of Business-Clause by adding the text phrase "in particular" and then also listing some measures demonstratively for this purpose.

It should be noted that the cited example is not limited to the vendor's sphere of influence, but also creates liability on the part of the vendor for unauthorized measures taken by the company ("*the Vendor [...] shall procure that the Company shall not*"). This extends the sphere of influence to the entire shareholder level and, to this extent, this circumstance has a less favorable effect for the vendor than if the restriction were reduced only to his position as vendor.

Finally, the Conduct of Business-Clause can be agreed in the form of an instruction clause. An example of such clauses could be as follows:

"*The Vendor warrants to ensure that, between the Signing and the Closing, the business of the Company is conducted in the ordinary course of business in accordance with past practice. As a result of the Purchaser's instruction, the Target Company undertakes to take or not to take certain measures, which include in particular the following measures:*

- *conclusion, amendment or termination of a contract determined by the acquirer*

– *to discontinue a business operation or close a department [...]*" [66]

As can be seen from the wording, this is the most pronounced obligation of the transferor; first, it is stipulated that the management of the target company must continue to operate the company within the framework of ordinary management, as has been the case up to this point in time. Subsequently, the acquirer is granted rights to issue instructions, according to which it can instruct the management bodies of the target company to carry out certain measures, with some measures being listed by way of example. However, it is clear from the wording of the clause and the addition of "in particular" to the text that this is a provision designed as a general clause. Accordingly, the management of the target company must comply with any instruction of the acquirer, which restricts its freedom of action almost without limitation.

It is also possible to change the wording of the clauses by a taxative enumeration of certain acts, which would reduce the scope of the clause to the actions mentioned. This variant also considerably restricts the seller's power of disposal and puts the seller in a very unfavorable position. Whether the purchaser can prevail in negotiations with such a clause depends on his negotiating position. In any case, such clauses have a very high risk potential with regard to a possible violation of antitrust regulation and constitute a violation of Article 7 of the EUMR. For these reasons, such clauses hardly ever occur in M&A practice.[67]

3.6. Legal Consequences of Violation of Conduct of Business-Clauses

The legal consequences resulting from the violation of the Conduct of Business-Clauses can basically be divided into two categories: On the one hand, there may be legal consequences under

[66] This clause originates from practice and is provided for the purpose of this article by Dr. Werner Mielke.
[67] For more on the antitrust aspect of Conduct of Business clauses, see section 3.7.

civil law and, on the other hand, legal consequences under competition law.

One of the most important consequences under civil law arising from a culpable breach of the Conduct of Business-Clauses is liability for damages. As indicated, purchaser's claim for damages presupposes the seller's fault. For all other deteriorations outside the obligations to act as well as for changes that have occurred through no fault of the seller, the buyer has to bear the risk.[68] For a possible liability of the seller for damages, the circumstance whether the Conduct of Business-Clause is formulated as a duty to act or as a duty to make efforts is of particular importance, especially since in the case of the latter variant the breach of contract is not as easy to prove as in the case of the first variant. In addition, the extent of the damage also depends on the nature of the Conduct of Business-Clause and its wording.

From an EU competition law perspective, the violation of the Conduct of Business-Clauses entails considerable legal consequences**,** in particular if the implementation prohibition of Article 7 of the EUMR has been violated. As a result, substantial fines may be imposed on the infringing party; the sanction under EU Merger Regulation is accompanied by the sanction of nullity of the underlying legal transaction, so that the entire company or share purchase agreement is to be regarded as null and void. In this respect, the legal consequences under antitrust law and civil law are closely interlinked and are always considered uniformly from the perspective of the violation of Article 7 EUMR.[69]

[68] Wittmann, "Vertragliche Gewährleistungsregelungen beim Unternehmenskauf unter besonderer Berücksichtigung des Anteilskaufs", 132.
[69] For more information on the legal consequences of the violation of Art. 7 of the EUMR see section 3.3.

3.7. Tension between the Conduct of Business-Clauses and the Prohibition of Implementation under EU Merger Law

The essential element of the legal problem associated with Conduct of Business-Clauses is their compatibility with the applicable competition law standards. The compatibility of Conduct of Business-Clauses with Article 7 EUMR correlates with their scope; Conduct of Business-Clauses that go too far influence the market behavior of the target company, which is still to be regarded as an independent economic unity up to the date of execution, and thus bring about a premature merger, which is to be seen as a violation of the implementation prohibition in the meaning of Article 7 of the Merger Regulation.

In view of this problem, the tension between the Conduct of Business-Clauses and the provisions of antitrust law is also expressed: On the one hand, the acquirer intends to achieve a smooth integration of the target company into its corporate portfolio on the transfer date, whereby the company is to be transferred to it in the state in which it is on the date of conclusion of the agreement. On the other hand, it is in the interest of European competition law and the requirement of independence derived from it that the two companies act independently on the market until the very last moment, i.e. until the legal transfer of the company on the transfer date, and determine their own market behavior independently of a possible merger. However, since the acquirers often fear that the target company will not be managed with the same diligence after the conclusion of the agreement until the economic transfer and could therefore lose value, they attempt to regulate the behavior of the target company accordingly until the transfer date by means of extensive Conduct of Business-Clauses, whereby the parties to the merger are often unclear as to whether such a clause violates antitrust regulations. This can lead to contractual agreements with excessive rights of the acquirer and thus also to a violation of the implementation prohibition as defined in Article 7 of the Merger Regulation. It is therefore necessary to examine the aforementioned issues

and, as a result, to specify the legal admissibility and scope of Conduct of Business-Clauses.

3.7.1. Admissibility of Conduct of Business-Clauses under EU Merger Law

Viewed from the perspective of European competition law, the admissibility of Conduct of Business-Clauses has its basis in the legal acts of the EU institutions. As already touched upon, Conduct of Business-Clauses are to be qualified as ancillary restraints by their very nature under antitrust law.[70] The fact that such clauses are common in the contractual practice of M&A transactions and are in themselves legally unobjectionable has already been clarified by the Commission in the Notice on Ancillary Agreements: "*an agreement to abstain from material changes in the target's business until completion is considered directly related and necessary to the implementation of the joint bid.*"[71]

Even if Conduct of Business-Clauses are as such permissible in European competition law, this does not yet mean that this also applies to mergers dealt with in merger control proceedings under the EU Merger Regulation. The answer to this question can be found in the case law of the judicial bodies of the European Union: In the *Altice* case, the Commission referred to Conduct of Business-Clauses in connection with the question of a possible violation of the prohibition of implementation within the meaning of Article 7 of the Merger Regulation and emphasized that such clauses are "*both common and appropriate for [...] protecting the value of an acquired business between the signing of a purchase agreement and Closing.*"[72] This made it clear that Conduct of Business-Clauses have a close factual connection with the proposed merger and are necessary for the implementation of the corporate transaction. From a merger control perspective,

[70] See section 3.2.
[71] Commission Notice, para. 14.
[72] COM (2018) 2418 final para 73.

conduct of business restrictions are therefore generally permissible and customary.[73]

However, it is questionable to what extent such clauses may protect the interests of the acquirer and to what extent the freedom of action of the vendor may be restricted. The limits of the content of Conduct of Business-Clauses must therefore be examined more closely.

3.7.2. Limits of the Conduct of Business-Clauses under EU Merger Regulation

Conduct of Business-Clauses are to be regarded as lawful under EU competition law if they are not too broad. The implementation of excessively broad Conduct of Business-Clauses may lead to violations of EU competition law provisions, with the prohibition of implementation under Article 7 of the EUMR being of primary importance. The use of the rights granted by Conduct of Business-Clauses may influence the market behavior of the target company before the merger proposal is approved and thus also lead to a premature completion of a merger, especially since de facto control is thereby exercised over the target company.

Based on the negative definition of an implementation act in case of *Ernst & Young,* which is expressed by the fact that the parties involved take a measure that "*contributes, in whole or in part, actually or legally, to a lasting change in control over the target* company", an excessive Conduct of Business-Clause can also be understood as such an exercise – even if only partial – of control over the target company. In this context, the general clause of Article 3(2) EUMR clarifies that control over the target company can be obtained by means of rights and contracts if, taking into account all factual or legal circumstances, this opens up the possibility of exercising a determining influence on the company's sphere of activity.

[73] Cf. Commission Notice, para. 11.

The question now arises as to how exactly the legal borderline between the permissible content of the Conduct of Business-Clauses and the facts of the prohibition of implementation within the meaning of Article 7 of the EUMR is to be drawn. In this respect, the Commission stated that the content of the Conduct of Business-Clauses may only extend as far as is necessary to ensure that the value of the target is maintained, whereby a strict standard is to be applied. Interference by the acquirer in the ongoing business operations is not justified under any circumstances.[74]

Already the mere possibility of such influence, which goes beyond this standard of necessity, is sufficient to assume a violation of Article 7 EUMR. Whether or not influence has actually been exercised on the target company is of no legal relevance. It is therefore in principle not necessary to make use of the stipulated rights in order to carry out a merger; the mere possibility of making use of these rights is sufficient, so that this must already be taken into account when drafting the contract, as otherwise the conclusion of the contract may already lead to a violation of merger law standards.[75]

The decisive criterion for determining a violation of the implementation prohibition by Conduct of Business-Clauses is whether the measure taken had a material impact on the value of the target company. Conduct of Business-Clauses can fulfill this criterion in two ways:

- if this regulates too broad a range of business matters, and
- if, as a result, thresholds that are too low are used as barriers to intervention; the permissible level of the thresholds is subject to a case-by-case assessment.[76]

[74] COM (2018) 2418 final para 71.
[75] COM (2018) 2418 final para. 59 et seq.
[76] Ibid. paras 71-72.

In the *Altice* decision, the Commission dealt in detail with the substantive components of the Conduct of Business-Clauses, providing some important pointers for assessing these criteria. For example, it was found that the reservations of consent favoring the acquirer with regard to the appointment of executives, pricing policy, standard terms and conditions of business or with regard to the conclusion/termination/amendment of contracts constitute an early implementation act if, due to the specific formulation, they go beyond the standard of maintaining the value of the target company and the possibility of exerting influence on the target company is opened up.[77]

With regard to executive appointments, the Commission confirmed that it is justified to a certain extent to have an overview of the target company's human resources, thereby maintaining the value of the target company. In particular, security arrangements designed to retain the target company's key employees were cited as an example here.[78]

At the same time, however, the Commission noted that reservations of consent relating to the appointment, termination or amendment of the employment contract of any employee exceed what is necessary to preserve the value of the target company. On the other hand, the veto rights granted must not be too broad and thus relate to the structure of the company, as is the case when the acquirer is granted the right to appoint the members of the board of directors. [79] The Commission further stated that the pricing policy is to be regarded as a fundamental part of the business policy, which means that independent pricing is essential for the competitive independence of the target company on the market. A consent requirement in this regard is therefore impermissible, as it significantly restricts the discretion and ability to set prices as an independent market participant and is also not necessary for maintaining the value of the company.[80]

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[77] Ibid. para. 59 et seq; see also Ablasser-Neuhuber, "Art. 7 FKVO", para. 6.
[78] COM (2018) 2418 final para. 75.
[79] Ibid. para. 76.
[80] Ibid. paras. 79-80.

Finally, the Commission made a reference to the possibility of the acquirer to conclude/amend/terminate the employment contracts. In this context, it was stated that it is generally permissible to grant the acquirer veto rights for this purpose if this appears expedient to preserve the value of the company. However, this goes too far if almost all matters relating to the management of the target company are thereby affected while the thresholds intended to serve as legal hurdles for the exercise of veto rights are set too low. In principle, it can therefore be stated that veto rights are only likely to relate to business matters of the target company which do not belong to the area of ordinary business operations, and that the threshold values are thus not set too low but at an appropriately high level. The criterion of maintaining the value of the company must always be taken into account.[81]

4. Final Observations

4.1. Summary

The present chapter summarizes the results of this work. At the outset, the merger-related issues of the prohibition of implementation within the meaning of Article 7 of the Merger Regulation were addressed, which were referred to in the introduction (section 1). This legal question plays a very important role in the practice of M&A transactions and presents some ambiguities to which doctrine and case law have not yet provided a concrete answer. The core of the legal problem concerning the implementation prohibition arises from the premise of the independence requirement, according to which the merging parties must act independently of each other until the Closing Date, as their behavior could otherwise cause distortion of competition.

[81] Ibid. para. 89.

These principles naturally also apply for corporate transactions, especially since the Signing and Closing Date fall apart due to the required regulatory approvals or other conditions precedent, so that the parties to the merger must proceed carefully from the first contact to the takeover date so as not to take any actions in violation of antitrust law. However, it is no entirely clear which integration measures (do not) constitute a violation of the implementation prohibition set out in Article 7 EUMR and may (not) therefore be taken prior to the Closing. In order to identify the legal demarcations between permitted and prohibited implementation actions, it was first necessary to discuss the legal basis of the implementation prohibition as defined in Article 7 of the EUMR, which was presented in section 2. At the beginning, the scope of application of Article 7 EUMR was discussed (section 4.1), which is divided into a temporal (section 4.1.1), a material (section 4.1.2) and a territorial scope (section 4.1.3).

Even if the scope of application of the implementation prohibition is opened, Article 7 of the EUMR does not automatically apply. In the next step, it must be examined whether the requirements of Article 7(2) of the EUMR are met, in which an exception to the implementation prohibition can be found. If this is the case and Article 7(2) of the EUMR applies, the concentration may be implemented despite the opening of the scope of application of the EUMR (see section 4.3).

One of the focal points of this work is the determination of the extend of the prohibition of implementation (see section 4.4). First, a distinction was made between simple preparatory acts (see section 4.4.1) and an implementation act contrary to EU Merger Regulation (see section 4.4.2). Subsequently, the legal consequences of the violation of Article 7 EUMR were analyzed (see section point 4.5), distinguishing between the imposition of fines by the Commission (see section 4.5.1) and civil law sanctions (see section 4.5.2).

In order to counteract the triggering of legal consequences due to the violation of the implementation prohibition, the legal instrument of the Conduct of Business-Clause has emerged in practice as an adequate prophylactic measure (see section 4.6). This is a clause found in the share and company purchase agreement which regulates the relationships of the merging parties to the effect that no material adverse changes occur in the target company during the period between Signing and Closing. Since this is the only preventive measure expressly mentioned by the Commission against a violation of the implementation prohibition within the meaning of Article 7 of the Merger Regulation, it was subsequently necessary to shed more light on the concept of the Conduct of Business-Clause so that the purpose (see section 4.6.1), the legal nature (see section 4.6.2), subject matter (see section 4.6.3), the term (see section 4.6.4), the contractual variants (see section 4.6.5) and the legal consequences of a breach (see section 4.6.6) of the Conduct of Business-Clause are examined.

The antitrust component of this clause also had to be scrutinized in order to illuminate its relationship of tension with the applicable standards of European competition law (see section 4.6.7). First and foremost, it had to be clarified whether the Conduct of Business-Clause by their nature violates the implementation prohibition (section 4.6.7.1). After this was answered in the negative, the next step was to determine the legal limit of the Conduct of Business-Clauses under EU merger law (section 4.6.7.2); here, the European Commission made an important contribution to clarifying this legal issue through its decision in the *Altice* case and stablished certain principles which must always be taken into account when drafting company and share purchase contracts. Thus, on the one hand, Conduct of Business-Clauses must not regulate too broad a spectrum of business matters and, on the other hand, the threshold values of these business matters, which are intended to serve as barriers to intervention, must not be set too low, although this is always subject to a case-by-case assessment.

4.2. Conclusion

Finally, it should be noted that the legal problems associated with implementation prohibitions have not been conclusively clarified by doctrine and case law, so that even the use of preventive measures does not provide absolute legal protection for the parties to the concentration. However, the European Commission has established principles in this regard which, if complied with by the merging parties involved, can create legal certainty, so that, in principle, there is no violation of the applicable standards of European competition law in the in the context of a merger, if the legal measures described in this paper are adequately implemented in the acquisition process of the target company. In this case, it can be assumed with a probability bordering on certainty that a merger-related exchange of information or the integration action taken prior to the consummation of the transaction does not violate the prohibition of cartels or the prohibition of consummation. Finally, it should be noted that the legal situation will crystallize further in the future as a result of further development of the law and other contributing factors, so that attention should also be paid to this circumstance in the future.