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Risk minimization measures regarding merger-related exchange of information under EU competition law

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Abstract: This article investigates EU competition law aspects of information exchange in the course of mergers. The exchange of information between the parties, which regularly occurs in the course of transfer of a business, is deemed to be necessary for an accurate assessment and evaluation of the target company, but at the same time represents a challenge under EU competition law provisions for the parties involved. In practice, it is difficult to rely on clear, uniform rules which standardize the extent to which such an exchange of information appears to be within the permissible framework of antitrust regulations or (whether it) already violates such regulations. The aim of this paper is to identify suitable instruments for the reducing of antitrust risks in the exchange of information between competitors within the basis of the legal framework of EU competition law. To this end, specific recommendations as legal measures are set out in the form of contractual and organizational measures for regulating the exchange of information in the context of mergers.

Keywords: prohibition on cartels, competitively sensitive information, merger-related exchange of information, Non-Disclosure Agreement, Clean-Team Agreement, virtual Data Room

I. Introduction

On September 22, 2021, the European Court of Justice dismissed the appeal against the European Commission's 2018 ruling,[1] which included two fines totaling EUR 124.5 million for "gun jumping" in connection with Altice's acquisition of PT Portugal. The court upheld the Commission's findings on the infringements and merely revised the amount of the fine by 10%. The decision itself, however, did not only contain important statements of clarification

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1 EGC T-425/18, *Altice Europe v. Commission*, ECLI:EU:T:2021:607.

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on the interpretation of the standstill obligation as defined in Art. 7 EUMR[2], but also referred to a possible violation of Art. 101 TFEU due to a competitively sensitive exchange of information.[3] In the respective decision, the Commission cites specific legal instruments that are intended to enable the merging parties to exchange information despite the existing legal impediment of Art. 101 TFEU.[4] Furthermore, a number of additional measures have become established in practice, which, in combination with the instruments mentioned by the Commission, are generally considered sufficient to prevent possible competition violation in such antitrust-relevant data transfer. In the following, these specific legal instruments are submitted to an analysis for a more detailed illustration within the context of a merger-related information exchange under EU competition law.

A. Factual background on the Altice/PT Portugal ruling

Altice N.V. was a Dutch international telecommunications company operating in Portugal through two subsidiaries active in the telecommunications sector - Televisão por Cabo S.A. and Infocomunicações S.A. - at the time of the merger notification.[5]

On December 9, 2014, Altice S.A., the former parent company of the Altice Group, and Altice Portugal S.A. entered into an agreement with the Brazilian telecommunications company Oi S.A., pursuant to which Altice S.A. acquired sole control of PT Portugal within the meaning of Art. 3(1) (b) EUMR by acquiring shares through its subsidiary Altice Portugal S.A.[6]

On February 25, 2015, the Commission was formally notified about the proposed acquisition of PT Portugal and has been required for clearance with regard to Art. 4 EUMR. On March 11, 2016, the Commission announced that it had opened an investigation into a suspected breach of the enforcement prohibition under Art. 7(1) and the notification requirement under Art. 4(1) EUMR.[7]

Subsequently, the Commission approached Altice on April 13, 2015, triggered by the Portuguese press reporting on meetings between Altice and PT Portugal executives that had taken place prior to the Commission's approval of the acquisition. The Commission approved the

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2 Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 2004/24, 1.

3 Commission Decision of 24 April 2018 imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Council Regulation (EC) 139/2004 in the Case M.7993 – Altice / PT Portugal, Article 14(2) procedure (COM (2018) 2418 final), paras. 53, 438; see also Summary of Commission Decision of 24.4.2018 imposing fines under Article 14(2) of the Merger Regulation on Altice N.V. for infringing arti-cles 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").

4 COM (2018) 2418 final para. 438.

5 Commission Summary para. 1; COM (2018) 2418 final para. 1.

6 Commission Summary para. 3; COM (2018) 2418 final para. 3.

7 Commission Summary paras. 4, 6; COM (2018) 2418 final paras. 7, 16.

acquisition subject to the divestment of Televisão por Cabo S.A. and Infocomunicações S.A. a week later, on April 20, 2015, subject to certain conditions.[8]

On June 2, 2015, Altice publicly announced that the transaction had been completed, i.e., that ownership of the shares of PT Portugal had been transferred to Altice (the "Closing Date").[9] On August 6, 2015, Altice S.A., the former holding company of the Altice Group, transferred substantially all of its assets and liabilities to its subsidiary Altice Luxemburg S.A. On August 9, 2015, Altice S.A. merged with Altice N.V and Altice S.A. ceased to exist as a result of the merger.[10]

In consequence, the Commission imposed the fine, finding, among other things, that the exchange of information between various executives of PT Portugal and Altice "took place without any safeguards - such as confidentiality agreements, non-disclosure agreements or so-called clean team agreements".[11]

B. Legal assessment of merger-related information exchange under EU competition law

1. Exchange of information within the meaning of Art. 101 TFEU

The central norm for the merger-related exchange of information under European Competition law is the prohibition of cartels under Art. 101 TFEU. According to this "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market "are, incompatible with the internal market.[12] The purpose of this regulation is to ensure the economic freedom of action of the entrepreneurs involved as well as the greatest possible consumer welfare and the associated protection of the end consumer.[13]

With regard to the required components of the standardized ban on cartels, Art. 101 TFEU refers to "agreements, decisions and concerted practices". In view of the uniform legal consequences of a violation of the prohibition of cartels, it is only of minor importance which of these three elements is present; they have common features and differ only in their intensity and form of expression. Therefore, it is already sufficient that the committed act can be subsumed under one of the listed types of conduct.[14] It is argued that an exchange of information in the form of an agreement generally does not take place in the case of corporate acquisi-

8 Commission Summary para. 5; COM (2018) 2418 final para. 10.
9 COM (2018) 2418 final para. 11.
10 Commission Summary footnote para. 1.
11 Commission Summary para. 19.
12 Art. 101 (1) TFEU.
13 *Grave/Nyberg* in *Loewenheim/Meessen/Riesenkampff/Kersting* (eds.) Kartellrecht Kommentar[4] (2020) Art. 101 AEUV para. 1; *Brinker* in *Schwarze/Becker/Hatje/Schoo* (eds.) EU-Kommentar[4] (2019) Art. 101 AEUV para. 9.
14 *Edelmann*, Der Informationsaustausch zwischen Mitbewerbern, wbl 2013, 665 (666 et seq.).

tions. Solely in cases where the parties use the merger as a mere pretext for an anticompetitive coordination there can also be an agreement within the meaning of Art. 101 TFEU.[15] In most cases where the merging parties infringe Art. 101 TFEU by exchanging information, the variant of the "concerted practice" is realized. This usually occurs in an advanced phase of the corporate transaction (e.g. during due diligence), which requires an extensive exchange of information in order to adequately assess the potential target company together with the associated legal and economic risks.[16]

In order to fulfill the prerequisites of Art. 101 TFEU, the parties to the merger must also have the prevention, restriction or distortion of competition in the internal market through the prohibited conduct of unlawful data exchange as their object or effect. In practice, the exchange of information in the course of a merger is almost always classified as a restriction of competition by object, which is being realized when parties to the merger exchange information such as business policy, marketing plans as well as research and development projects, information on current capacities and/or costs, especially since all these data can be regarded as an indication of future behavior.[17] This is also the standpoint taken by the Commission in the Horizontal Guidelines. In the Commission's view, the transfer of company-specific data on intended price or volume behavior is to be qualified as a restriction of competition by object; this applies in particular to information on sales and market share targets, future business areas and sales to specific customer groups.[18]

Only if all of the above-mentioned elements are present a merger-related information exchange can have negative effects on competition and therefore meets the requirements of the cartel prohibition under Art. 101 TFEU. However, even in cases in which the merger-related exchange of information formally constitutes a restriction of competition, it might be exceptionally permissible for the reasons explained below, inasmuch as it is necessary and proportionate for the planning of the corporate transaction.[19]

2. Merger-related exchange of information as ancillary restraint

Of particular importance for merger-related information exchange are also those cases in which the exchange of information restricts competition but is exceptionally permissible because it is necessary and proportionate for the planning of the merger transaction; these

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15 *Schubert*, Informationsaustausch im Rahmen von Zusammenschlussvorhaben, ZWeR 2013, 54 (57); *Polley/Kuhn*, Kartellrechtliche Grenzen des Informationsaustauschs zwischen Wettbewerbern bei M&A-Transkationen und anderen Anlässen, CFL 2012, paras. 117, 119.

16 *Schubert*, ZWeR 2013, 57.

17 *Schubert*, ZWeR 2013, 59, 60.

18 Horizontal Guidelines paras. 73, 74. For more details see chapter I.B.3. below.

19 See under I.A.

constellations represent (the so-called) "ancillary restraints".[20] The case law practice of the European Union Courts has elaborated the doctrine of ancillary restraint, which is understood to be "any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it", by which a restriction of competition may be excluded from the scope of the cartel prohibition as defined in Art. 101 TFEU.[21] Thus, in the case where a merger-related exchange of information, as an ancillary restraint, is directly related to the implementation of a principal measure (i.e. corporate transaction) it is considered necessary for its realization and cannot be assessed separately from it. Such a restriction of competition is therefore not covered by the ban on cartels, provided that the merger-related information exchange is proportionate to the main operation of company acquisition.[22] This has also been confirmed in the recent past by the *Altice* ruling, according to which, in principle, all information necessary for assessing the value of the company may be exchanged as part of the due diligence review, which however requires the employment of protective measures.[23]

Similarly, in the *Remia* case, the ECJ[24] had to decide whether a non-competition clause stipulated in the company purchase agreement violates the prohibition of cartels pursuant to Art. 101 TFEU. The court stated that such a contractual provision is considered indispensable and objectively necessary for the main contract of the company purchase, so that the non-competition clause is to be regarded as an exception to the cartel prohibition. The exchange of information constitutes an ancillary restraint to the intended acquisition of the company which is also permissible if it is reduced to the minimum necessary in terms of content, personnel and time.[25]

In the context of merger-related arrangements and on the basis of the EU case-law, the Commission has also issued *Notice on restrictions directly related and necessary to concentrations*.[26] Therein, a two-step test has been established, according to which it needs to be examined whether the ancillary restraint is directly related to the corporate transaction and whether it is necessary for this merger.[27] If this is to be answered in the affirmative, the ancillary restraint effected by the merger-related information exchange does not fall within the scope of Art. 101 TFEU and is to be regarded

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20 Commission Guidelines on the application of Article 101(3) TFEU, OJ C 2004/101, 97 (para. 31).

21 EGC T-112/99, *M6 and Others v. Commission*, EU:T:2001:215, para. 104.

22 EGC T-111/08, *MasterCard and Others v. Commission*, ECLI:EU:T:2012:260, para. 75 et seq; see also *Besen/Gronemeyer*, Informationsaustausch im Rahmen von Unternehmenskäufen – Kartellrechtliche Entwicklungen und Best Practice, CCZ 2013, 141.

23 COM (2018) 2418 final para. 437.

24 ECJ C-42/84, *Remia v. Commission*, ECLI:EU:C:1985:327, para. 19 (20).

25 *Schubert*, ZWeR 2013, 58; EGC T-112/99, *M6 and Others v. Commission*, EU:T:2001:215, para. 113.

26 Commission Notice on Restrictions of Competition Directly Related and Necessary to the Implementation of Concentrations, OJ C 2005/56, 24 (hereinafter referred to as the "Notice on ancillary restraints").

27 Notice on ancillary restraints paras. 10 et seq.

as lawful.

3. Horizontal Guidelines

With regard to the exchange of information under European competition law, the Horizontal Guidelines[28] represent an important legal benchmark, and are also of particular relevance for the information exchange between the merging parties. The text of the guidelines brings together the jurisprudence of the EU courts from the past and thus creates more certainty for parties to the merger. On March 1, 2022, the Commission published its draft of revised guidelines for horizontal cooperation agreements;[29] the current Horizontal Guidelines shall expire on December 31, 2022. With the publication of its new drafts, the Commission had invited interested parties (associations, companies, antitrust authorities, etc.) to comment the new draft by April 26, 2022. After evaluation of the comments and, if necessary, adaptation of the drafts, the new Horizontal Guidelines will enter into force on January 1, 2023.[30]

In the new version of the Horizontal Guidelines, the entire Chapter VI is dedicated to information exchange, with a classification of relevant information under European competition law being.[31] In addition to addressing the main competition law concerns related to information exchange, the horizontal guidelines indicate that the exchange of commercially sensitive information is likely to facilitate the coordination of the competitive behavior of undertakings and to lead to restrictions of competition.[32] This is the case where the information exchanged reduces uncertainty about the future or recent behavior of one or more competitors in the market, regardless of whether the parties to the exchange derive some benefit from their cooperation.[33]

Information that has been identified by the revised draft of Horizontal Guidelines as commercially sensitive and whose disclosure is considered to be an object restriction include, among others, data on prices and pricing intentions, current and future production capacities, commercial strategies, current and future demands, future sales, future product characteristics.[34] The currently applicable Horizontal Guidelines also refer to the strategic relevance of the information and include an exemplary list of the following data to be treated as strategically

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28 Commission Guidelines on the applicability of Article 101 TFEU of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 2011/11, 1 (hereinafter referred to as the "Horizontal Guidelines").

29 Commission Notice on Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (hereinafter referred to as the "Revised Horizontal Guidelines").

30 Commission Press Release of 1 March 2022, Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies, IP/22/1371.

31 Revised Horizontal Guidelines paras. 406 et seq.

32 Revised Horizontal Guidelines, paras. 416, 417.

33 Revised Horizontal Guidelines, paras. 421, 423.

34 Revised Horizontal Guidelines. 424.

relevant: prices (actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, marketing plans, technologies, R&D projects and their results.[35] In this context, it should be borne in mind that information on prices and quantities, together with information on costs and demand, are seen as the most strategic.[36]

Beyond that, aggregated and non-individualized data is unlikely to lead to a collusive outcome and to be regarded as commercially sensitive information.[37] With respect to the age of data, disclosure of historical data is not expected to raise competition concerns because it does not shed light on a competitor's potential future behavior. As a general rule, data older than one year is deemed to be historical so that parties to the merger are allowed to share such information.[38] In addition, the market coverage of the companies engaged,[39] the frequency of the information exchange, along with the fact whether the information is deemed public or non-public, are relevant factors to be taken into account in the evaluation of the merger-related information exchange under European competition law.[40]

The delimitation criterion of strategic relevance is of critical importance in the practice of merger-related information exchange. Strategic information is always classified as sensitive under European competition law criteria whereby the exchange of such information between merging parties regularly leads to a violation of the ban on cartels as defined in Art. 101 TFEU. However, the merger-related exchange of commercially sensitive information may, in certain circumstances, be legitimated by the implementation of precautionary measures which enables the acquirer to evaluate the target company and take a final decision on their acquisition.[41]

II. Non-Disclosure Agreement

The Commission has referred to the conclusion of a Non-Disclosure Agreement (also referred to as a “Confidentiality Agreement"), as legal instrument which the parties to the merger may utilize in order to avoid a breach of Art. 101 TFEU.[42] Non-Disclosure Agreements are characterized by a conflict of interests: On the one hand, the management of the prospective buyer is to be provided with qualitatively and quantitatively sufficient information regarding the target company to enable the potential acquirer to make a final decision on the purchase of the same; on the other hand, it is in the interest of the vendor to disclose as few information as

35 Horizontal Guidelines para. 86.
36 Horizontal Guidelines, para. 86.
37 Horizontal Guidelines, para. 89.
38 Horizontal Guidelines, para. 90.
39 Horizontal Guidelines, paras. 87, 88.
40 Horizontal Guidelines, paras. 91 et seq.
41 *Schumacher*, Rechtliche und praktische Anforderungen an ein „Dauer-Clean Team“, NZKart 2017, 11 (12 et seq.).
42 Commission Summary para. 19; COM (2018) 2418 final paras. 53, 438; see also *Purps/Beaumunier*, „Gun Jumping“ nach Altice: Im Westen was Neues?, NZKart 2017, 224 (228); *Linke/Fröhlich*, Gestaltungsoptionen für Vertraulichkeitsvereinbarungen bei Unternehmenstransaktionen, GWR 2014, 449 (450 et seq.); *Thurn/Ziegenhain*, Vertraulichkeitsvereinbarung – Non-Disclosure Agreement, in *Walz* (ed.), Beck'sches Formularbuch Zivil-, Wirtschafts- und Unternehmensrecht, Deutsch – Englisch[4] (2018) para. 3; *Hoffer/Lehr*, „Gun jumping“ in Europa – Endlich Klarheit?, NZKart 2018, 300 (304).

possible so as not to enable the prospective buyer to utilize the sensitive data received to its unjustified advantage in the event that the transaction proves to be unsuccessful. The vendor pursues the objective of safeguarding information as confidential before granting the management of the prospective bidder access to the confidential business data of the target company, in particular since such protection is not provided to a sufficient extent by statutory regulations.[43]

The potential acquirer has to render a comprehensive assessment of the target company prior to the final purchase decision to bridge the existing information asymmetry. In doing so, it typically appears inevitable to access strategically relevant and potentially competitively sensitive data, which may expose the merging parties to the risk of a violation of the cartel prohibition of Art. 101 TFEU, as it allows the prospective buyer to infer the future conduct of the target company. In order to prevent this, a Non-Disclosure Agreement is concluded with the employees of the acquiring company who are tasked with evaluating the strategically relevant information.[44] NDA is either part of the Letter of Intent or a Stand-Alone Agreement and is concluded by default in almost every transaction of a business, whereby in the absence of an express declaration of intended conclusion of a Non-Disclosure Agreement;[45] a tacit conclusion of a Confidentiality Agreement is also conceivable.[46]

In further sequence, it is to be examined which contractual provisions are typically contained in a Non-Disclosure Agreement and what relevance these have under EU competition law with regard to the merger-related exchange of information. In doing so, it will be presented how the NDA should be designed for implementation as to minimize, to the greatest extent possible, a violation of Art. 101 TFEU.

A. Preamble and definition of confidential information

The preamble serves to describe the motives, intentions and aspirations of the merging parties to a NDA and functions as an introduction to the company purchase agreement. From a competition law perspective, it is at this stage important to determine who is to be considered a party to the merger as it indicates to which individuals the confidential information may/will be entrusted.[47]

The contractual provision on the definition of confidential information is an integral part of

43 *Linke/Fröhlich*, GWR 2014, 449; *Gran*, Abläufe bei Mergers & Acquisitions, NJW 2008, 1409 (1409 et seq.).
44 *Schumacher*, NZKart 2017, 13.
45 *Knauder/Marzi/Temmel* (eds.), Wirtschaftsverträge (2011) 2.
46 *Lutter*, Letter of Intent³ (1998) 48.
47 *Kummer/Eiffe/Mölzer*, Mergers & Acquisitions (2014) 16 et seq.

the Non-Disclosure Agreement as it also defines the scope of the entire contractual arrangement. The transferor has a clear interest in defining the term as broad as possible; from the transferor's viewpoint, the clause should cover all information provided to the prospective transferee at all the stages of the transaction.[48] By entering into the Non-Disclosure Agreement, the seller will endeavor to include not only the confidential information in the contractual framework, but also the information received by the other party in the course of the negotiations.[49] This is also consistent with the objectives of the merging parties to enable a comprehensive exchange of information and thereby prevent any possible restrictions of market competition.

Nevertheless, it should be noted that the contractual definition of confidential information does not alternate the legal nature of the competitively sensitive data. If the information in question is to be classified as strategically relevant from an EU competition law perspective, it retains this legal status, regardless of whether the parties involved designate the respective data as confidential or not. However, it is of utmost importance to classify all competition law relevant information already in this phase and to treat it appropriately. For this very reason, it is advisable to identify commercially sensitive information in the run-up to the company transaction and to classify it as "confidential" in order to obtain a more precise overview of all cartel-relevant data.[50] By this means, a possible infringement of provision of EU competition law can be averted in advance.

B. Contracting parties

The contracting parties to a Non-Disclosure Agreement do not arise of their own accord. For that reason, a special contractual clause has to be stipulated from which it can be deduced who are the contracting parties to the Confidentiality Agreement. Since there may be multiple prospective parties on the buyer's side, the seller has to address already at this stage of the transaction with whom the Confidentiality Agreement shall be entered into.[51]

The same considerations are to be made if the potential acquirer is a financial investor; in this event, the vendor shall give consideration to whether the investment fund company as such or the fund's consulting company shall become a party to the Confidentiality Agreement.[52] In such a case scenario, the fund company typically signs the company purchase agreement on behalf of the target company. However, the negotiations and the preparation of the transaction are mostly carried out by the consulting firm, which is usually not affiliated with the investment fund, but merely acts on the basis of a consulting agreement entered into with the same. Since the consulting companies act as primary contact partner for the banking institu-

48 *Linke/Fröhlich*, GWR 2014, 449.
49 *Mittendorfer*, Unternehmenskauf in der Praxis² (2019) para. 1/171.
50 *Linke/Fröhlich*, GWR 2014, 449; *Thurn/Ziegenhain*, Beck'sches Fb para. 6.
51 *Linke/Fröhlich*, GWR 2014, 450.
52 *Eilers/Koffka/Mackensen* (eds.), Private Equity² (2012) para. 15.

tions or the vendors, this is why they are always included as contractual partners in the Confidentiality Agreement.[53]

In most of the cases, the acquirer concludes the Non-Disclosure Agreement with the shareholder of the target company. However, it may also be the case that the target company itself becomes a party to the Confidentiality Agreement in addition to or instead of the shareholder. In such cases, it is of importance to extend the scope of protection of the Non- Disclosure Agreement to those individuals which are not explicitly listed as parties to the agreement.[54] This is also in line with the interests of the parties to a company's transaction to counter the violation of the cartels ban in the sense of Art. 101 TFEU; whether or not several companies are involved in the transaction in the form of a joint venture cooperation is irrelevant from the perspective of EU competition law, since a joint venture may also violate Art. 101 TFEU.[55]

If a number of parties are involved in the transaction, it must be paid attention to the fact that the risk potential of a violation of Art. 101 TFEU also increases exponentially. Due to the involvement of several entities in the acquisition of a company, even if they are only affiliated within a group, a larger number of persons will inherently have access to the competition-sensitive information, so that a distortion of competition can occur all the more easily. For this reason, care must be taken in the preliminary stages to determine who is to be regarded as the contracting party to the confidentiality agreement, as this is an important indication for assessing the specific question of to whom the confidential information has actually been made accessible. The group of recipients is usually regulated in a special contractual provision and it is specified therein to whom the confidential information may be made accessible.[56]

C. Non-Disclosure Obligation

The confidentiality clause is the key provision of the Non-Disclosure Agreement, according to which the vendor commits not to disclose the sensitive data that is to be treated confidentially to a third party without the vendor's consent. Hence, the prospective acquirer undertakes to keep the confidential information strictly confidential and to use it solely for the purpose of valuing the target company.[57] With regard to the confidentiality obligation, the prospective purchaser therefore submits to the obligation to refrain from disclosing of the entrusted information to a third party and shall ensure that the individuals to whom the confidential information has been disclosed also effectively comply with the non-disclosure commitment.[58]

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53 *Eilers/Koffka/Mackensen*, Private Equity² para. 8.
54 *Linke/Fröhlich,* GWR 2014, 450.
55 *Grave/Nyberg* in *Loewenheim/Meessen/Riesenkampff/Kersting*, Kartellrecht⁴ Art 101 AEUV para. 1.
56 See below chapter II.E.
57 *Linke/Fröhlich,* GWR 2014, 450; *Thurn/Ziegenhain*, Beck'sches Fb para. 7.
58 *Werder/Kost*, Vertraulichkeitsvereinbarungen in der M&A-Praxis, BB 2010, 2903 (2906).

The confidentiality clause is of essential significance for the merger-related exchange of information: if the parties to the company transaction fail to bind all individuals entrusted with the competitively sensitive information to the non-disclosure obligation in this stage, they run the risk of violating Art. 101 TFEU. The confidentiality clause should be drafted in such a fashion that it corresponds to the contractual provision defining the confidential information and the group of recipients in order to minimize the risk of a contravention of the cartel prohibition.[59]

D. Exceptions to the Confidentiality Obligation

The inclusion of the contractual provision of the confidentiality commitment in the Non-Disclosure Agreement does not yet mean that such clause has an absolute character. In fact, there are a number of exceptions to the confidentiality obligation that are not expressly included in the contract arrangement, but which should be considered when drafting the Confidentiality Agreement. Information is not considered confidential if: (i) it already was publicly known by other means at the time of disclosure, or (ii) it became publicly known after the Confidentiality Agreement was entered into without breaching the confidentiality obligation, or (iii) it has been disclosed to the potential acquirer by the transferor on a non-confidential basis, or (iv) it has been lawfully provided to the potential acquirer by a third party, or (v) it has been prepared by the potential acquirer without reference to the confidential information.[60]

Similarly, there is no breach of the Confidentiality Agreement if the confidential information is disclosed due to a statutory requirement or a judicial or regulatory order. In such an event, however, the vendor may insist and contractually arrange to be notified prior to disclosure of confidential information by the acquirer, provided that this does not violate applicable law.[61]

E. Circle of Recipients

Typically, the Confidentiality Agreement also contains contractual provisions defining the circle of recipients. An appropriate evaluation of the target company requires that the prospective purchaser also passes the entrusted confidential information to its own employees. In such constellation, the seller usually endeavors to keep the circle of recipients as narrow as possible reducing the entrusted information to the necessary minimum ("need-to-know basis"); disclosure of confidential information is therefore mostly limited to the circle of contracting parties, employees, associates as well as consultants of the contracting parties.[62]

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59 For more details on the contractual clause on the definition of confidential information and the circle of recipients, see under II.A and II. E.

60 *Linke/Fröhlich*, GWR 2014, 450.

61 *Linke/Fröhlich*, GWR 2014, 449.

62 *Purps/Beaumunier*, NZKart 2017, 228; *Calaim Lourenço*, Information exchanges between competitors from a competition law perspective – the problem of premature exchanges of sensitive information in the context of merger control (Gun Jumping), Vol. 4 Unio-EU Law Journal 2018, 97.

If the confidentiality agreement also requires the consulting firm to maintain confidentiality, the financial investor will take care to include persons closely associated with the consultancy firm in the confidentiality agreement. The same applies to the lender financing the corporate transaction. However, the vendor may require the lender's prior approval before sharing confidential information, so the lender is not the primary recipient in such cases.[63] Employees and other individuals, which are entrusted with the confidential information may also be required, in part, to sign a Non-Disclosure Agreement. Likewise, the members of an internal Clean Team shall be required to submit to the obligation to treat the information which have been entrusted to them in strictly confidential manner.[64]

The contractual specification of the circle of recipients is of essential importance for the assessment of the legal status of the exchange of information between the merging parties within the scope of competition law. To avoid infringements, the group of recipients should be defined as precisely as possible and reduced to the necessary minimum.[65] The non-observance of the confidentiality obligation should also be sanctioned by a contractual penalty in order to fully achieve the intended competition law related effects of information exchange.[66]

F. Term

The Non-Disclosure Agreement generally contains a clause on the term of the confidentiality obligation. The duration of the agreement is regularly set for a period of up to three years, depending on the business area and market environment.[67] The expiry of the contractual period of validity is generally linked to the date of conclusion of the Confidentiality Agreement. In the absence of an explicit time limit in the Non-Disclosure Agreement, it may be implicitly assumed that such a non-disclosure obligation exists for a reasonable period of time.[68]

With regard to a possible violation of the ban on cartels, it should be noted that temporally the scope of Art. 101 TFEU extends to the execution date of the transaction ("Closing").[69] It is not inconceivable that the obligation to maintain confidentiality extends beyond the date of completion of the transaction, so that from that point of time onwards, albeit a violation of the ban on cartels is no longer at risk, a breach of the obligation to maintain confidentiality may occur, which entails the obligation of the infringer to compensate the caused damage.

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63 *Linke/Fröhlich*, GWR 2014, 451.

64 *Besen/Gronemeyer*, Kartellrechtliche Risiken bei Unternehmenskäufen - Informationsaustausch und Clean Team, CCZ 2009, 70; for more details see section III.A.1.

65 *Calaim Lourenço*, Vol. 4 European Law Journal 2018, 97; *Linke/Fröhlich*, GWR 2014, 451; *Besen/Gronemeyer*, CCZ 2013, 143.

66 *Grossmayer/Hanslik,* Big Deal? M&A-Verträge richtig verhandeln! (2013) 18; For more details see chapter II.H.

67 *Linke/Fröhlich*, GWR 2014, 454.

68 *Knauder/Sima,* Wirtschaftsverträge (2016) 41 et seq.

69 *Schumacher*, NZKart 2017, 11.

G. Return or Destruction of the Confidential Information

As outlined earlier, the confidential information is disclosed for the purpose of evaluating the target company. If the planned corporate transaction does not come into being for any reason whatsoever, the legal basis for its disclosure also ceases to have effect. Accordingly, Confidentiality Agreements provide that in such cases all confidential information provided to the vendor is to be destroyed with issuance of the destruction confirmation or to be returned with documenting the information in writing.[70]

The obligation to destroy or restore the confidential information is provided not only in the event of failure of the deal, but also for successfully realized M&A transactions. This serves primarily to ensure compliance with Art. 101 TFEU. Once the negotiations have been completed, there are no longer any apparent reasons for leaving the confidential documents or data carriers, including copies, with the recipient.[71] For this purpose, it can be agreed that the recipient destroys or deletes the documents containing cartel-relevant information within a certain period of time or at the request of the disclosing party.

For data carriers and files which created by the receiving party, a return is not expedient, so that in this respect merely a destruction of the files or deletion of the data is conceivable. In addition, it may be agreed that the confidentiality obligation shall continue to apply with regard to the documents and data carriers located with the receiving party for which destruction/deletion is no longer possible for practical reasons.[72]

There are a number of exceptions to the aforementioned obligation to destroy or return documents, which are based on statutory retention obligations or find their legal basis in judicial or official decisions.[73] In addition, banks and consultants (e.g. attorneys) have professional or other mandatory retention obligations that must also be observed.[74] It can be concluded from this that the obligation to destroy or return documents does not have an absolute character; possible exceptional cases must always be taken into account, which must also be observed in the context of M&A transactions.

H. Penalty Clause

The civil law principle *pacta sunt servanda* also applies to Non-Disclosure Agreements, according to which the parties must comply with their contractual obligations; breaches lead to

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70 *Grossmayer/Hanslik,* Big Deal? M&A-Verträge richtig verhandeln! 18; *Linke/Fröhlich*, GWR 2014, 453.

71 *Knauder/Sima*, Wirtschaftsverträge 42.

72 *Knauder/Sima*, Wirtschaftsverträge 30 et seq.

73 Under Austrian law, for example, there is an obligation to keep books, inventories, opening balance sheets, annual and consolidated financial statements including management reports, business letters received, copies of business letters sent and supporting documents for book entries for a period of seven years or, moreover, for the duration of pending proceedings, in accordance with sections 190, 212 UGB (Austrian Business Code). Also tax law rules prescribe by sections 131, 132 BAO (Austrian Federal Fiscal Code) a storage obligation for books, records and corresponding vouchers (as well as business papers and other documents, as far as they are of importance for the collection of taxes) for a period of seven years or, moreover, for the duration of pending proceedings. See *Knauder/Sima*, Wirtschaftsverträge 32.

74 *Grossmayer/Hanslik,* Big Deal? M&A-Verträge richtig verhandeln! 19; *Linke/Fröhlich,* GWR 2014, 453.

claims for damages which can be asserted by the aggrieved party. In addition to the statutory provisions, however, the contracting parties can also agree on a contractual penalty in the event of non-compliance with the confidentiality obligation. This makes sense for the reason that the damage caused by the breach of the duty of confidentiality cannot always be compensated in full, but also to rule out from the outset the difficulties that arise in practice in determining the extent of the damages.[75]

A contractual penalty also has a special preventive function, which is to prevent the parties from disclosing the entrusted data to an unauthorized person.[76] The contracting parties may agree that the contractual penalty shall also be payable in the event of non-culpable breach or poor performance, in which case the fault of the breaching party shall be proven, with the burden of proof resting with the claiming party.[77] The claim to payment of the contractual penalty shall also exist even if no material damage has occurred; the decisive factor is solely breach of the duty of confidentiality.[78]

To a certain extent, the contractual penalty also has a positive effect on the legal position of the merger-related information exchange, especially since its particular preventive effect helps to prevent the breach of the confidentiality obligation and thus a competition law infringement.[79] Nevertheless, in my opinion, the contractual penalty generally plays only a minor role with regard to possible violations of Art. 101 TFEU, since the preventive effect and the associated deterrence result from the applicable national rules on contractual claims for damages and the domestic and EU antitrust proceeding imposing fines.

III. Clean Team

In addition to the conclusion of the Confidentiality Agreement, the setting up of a Clean Team (by entering into a Clean Team-Agreement) is required to ensure the exchange of competitively sensitive information between the merging parties does not violate the ban on cartels under Art. 101 TFEU.[80] The term "Clean Team" refers generally to a limited group of individuals inside or outside the acquiring company who are not involved in the day-to-day operations, receive confidential information from the target company and are bound by strict confidentiality protocols regarding that information.[81] Because Clean Team members are required to

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75 *Knauder/Sima*, Wirtschaftsverträge, 41, 42.
76 *Mittendorfer*, Unternehmenskauf² para. 1/179.
77 Cf. OGH (Austrian Supreme Court) 29.5.1995, 1 Ob 567/95.
78 OGH 26.8.2008, 5 Ob 149/08k.
79 Cf. *Grossmayer/Hanslik*, Big Deal? M&A-Verträge richtig verhandeln! 18; see also *Thurn/Ziegenhain*, Beck'sches Fb para. 17.
80 COM (2018) 2418 final para. 53 (438); see also Commission Summary para.19; *Purps/Beaumunier*, NZKart 2017, 228; *Hoffmann-Becking/Gebele*, Beck'sches Formularbuch Bürgerliches, Handels- und Wirtschaftsrecht[13] (2019) para. 1; *Hoffer/Lehr*, NZKart 2018, 304; *Schumacher*, NZKart 2017, 11, 12.
81 Commission Summary footnote para.19; *Calaim Lourenço*, Vol 4. Unio-EU Law Journal 2018, 97.

maintain their internal confidentiality as part of the merger-related information exchange, this measure must always be implemented in conjunction with a NDA to ensure its full effectiveness.[82]

As already indicated, the Confidentiality Agreement is regularly structured in such a way that the strategically relevant information is passed on to a selected group of persons - namely the members of the Clean Team - which evaluate the data provided and then present it to the management of the potential purchaser.[83] The members of the Clean Team are either employees of the potential buyer or external consultants to whom the competitively sensitive information is submitted for evaluation. With this regard, a distinction must be made between internal and external Clean Teams, with the parties being free to choose one of these two options.[84]

The following is intended to provide an overview on the distinction between an internal and an external Clean Team as well as the related requirements for the protectability of information exchanged between the merging companies.

A. Internal Clean Team

If the parties decide to establish an internal Clean Team, certain criteria must be met in order to prevent a violation of the prohibition of cartels within the meaning of Art. 101 TFEU through a merger-related exchange of strategic data information. These requirements consist of a personnel and infrastructural separation of the Clean Team from the operational business unit of the company, a conclusion of the Confidentiality Agreement, the coaching of the employees and an implementation of the compliance programs.[85] In the following, the specific requirements for the establishment of an internal Clean Team are to be submitted to a legal analysis and explained from the perspective of the merger-related exchange of information under EU competition law.

1. Separation of personnel

The first step is to ensure that the members of the internal Clean Team are separated from the operational activities of the company; internal Clean Team members will be comprised of employees who have not been involved in operational activities of the company since the beginning of their employment (e.g., the business development department or retired executives) or who are excluded from the operational activities of the company for a certain period of time in order to devote themselves solely to the evaluation of the competitively sensitive information.[86] In this regard, the separation of personnel must be such that the members of the internal Clean Team can operate as an independent unit separated from the company's

82 *Calaim Lourenço*, Vol 4. Unio-EU Law Journal 2018, 98; *Besen/Gronemeyer*, CCZ 2013, 144; see also under II E.
83 *Linke/Fröhlich*, GWR 2014, 449 (451); *Calaim Lourenço*, Vol 4. Unio-EU Law Journal 2018, 98.
84 *Schubert*, ZWeR 2013, 68.
85 *Schumacher*, NZKart 2017, 13. For more details see chapter II.
86 *Besen/Gronemeyer*, CCZ 2009, 70; *Besen/Gronemeyer*, CCZ 2013, 144.

day-to-day operations, which should be ensure that no sensitive strategic information is leaked to the management of the prospective buyer. Thus, those employees which are directly involved in market-related business activities (e.g. sales staff) or in the day-to-day operations of the company should be temporarily excluded from the operational activities of the company.[87]

For the assessment of competition-sensitive information, the most suitable members of the internal Clean Team are employees who have expertise in the relevant market without being involved in the company's operational business activities.[88] In practice, however, this approach proves to be somewhat problematic, as in smaller and medium-sized companies a strict separation of the operational business units often does not exist or is not feasible. In larger companies, on the other side, the challenge lies in the fact that for certain business areas there are only very few specialized employees who meet the requirement profile of such a Clean Team member.[89]

In order to enable an adequate evaluation of the competitively sensitive information by Clean Team members, a waiting period (so-called "Gardening Leave") can therefore be agreed, according to which the employees of the acquiring company involved in the operative business area are subject to an internal duty of confidentiality and must suspend their day-to-day business for the duration of the merger or, in the event of the failure of the transaction, withdraw from the operative business of the company for a certain period of time.[90] In any case, the leave period has to last as long as the strategic information with which the respective employee has come into contact is to be classified as "up-to-date" and thus strategically relevant, whereby a leave of absence of the employee for a period of twelve months is generally considered to be sufficient.[91]

If the internal Clean Team is dissolved, the employees may not return to their initial position within the company until the waiting period has expired; alternatively, they may be transferred to a neutral operational position. However, this group of employees must always act strictly separated from the operating business unit of the prospective buyer so that the management of the potential acquirer does not obtain direct access to the strategic information of the target company and thus gain an advantage in the relevant market. Finally, the competitively sensitive information must also be destroyed and/or deleted before the employees return to their former position or are transferred to a neutral position.[92]

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87 *Schubert*, ZWeR 2013, 69.
88 *Purps/Beaumunier*, NZKart 2017, 228; *Besen/Gronemeyer*, CCZ 2013, 144.
89 *Schubert*, ZWeR 2013, 69.
90 *Purps/Beaumunier*, NZKart 2017, 229; *Schubert*, ZWeR 2013, 69.
91 *Schumacher*, NZKart 2017, 13; *Purps/Beaumunier*, NZKart 2017, 229; *Hoffmann-Becking/Gebele*, Beck'sches Fb[13] para. 6.
92 *Schumacher,* NZ Kart 2017, 13; see also chapter II.G.

2. Infrastructural separation

In order to minimize the risk of non-compliance with the ban on cartels within the meaning of Art. 101 TFEU, further infrastructural steps must also be taken when setting up the internal Clean team; to this regard, organizational measures are to be implemented in order to create information barriers (so-called "Chinese Walls") between the Clean Team and the day-to-day business units of the company.[93] These organizational precautions relate to the provision of separate work areas (e.g., closed offices, separated printers), the establishment of a separate IT infrastructure with restricted access to the server, and the outsourcing of the Clean Team as a separate operating unit to another location.[94]

The competitively sensitive information transmitted by Clean Team to the management of the prospective buyer must be available in aggregated form, with the transmission being carried out in a specific technical manner.[95] Special internal company communication platforms are particularly suitable for this purpose, which enable a comprehensible exchange of information between Clean Team and the company. However, it must be ensured at all times that the other employees of the company do not have access to the strategic information transmitted to the Clean Team, so that there is practically no leakage of this information within the company to the other employees.[96]

3. Additional requirements

To prevent leakage of sensitive information outside the internal Clean Team, additional precautions must be taken: (i) the Clean Team members have to sign a Confidentiality Agreement[97]; (ii) the respective employees and members of the Clean Team have to be educated about the significance of the information exchange within the competition law and their activities and, if necessary, undergo a coaching program[98]; (iii) the Clean Team members have to be monitored with regard to their activities by establishing a compliance program[99]; (iv) the Confidentiality Agreement must also include a commitment to destroy or delete confidential information;[100] (v) it should be precisely documented which members of the internal Clean Team have been given access to specific strategic information and at what time.[101]

B. External Clean Team

Due to the high organizational expenditure, the insufficient infrastructural capacities as well as the lack of qualified specialists required for the establishment of an internal Clean Team,

93 *Linke/Fröhlich*, GWR 2014, 451; *Besen/Gronemeyer*, CCZ 2013, 144.
94 *Besen/Gronemeyer*, CCZ 2013, 144. See also chapter III.A.1.
95 *Schumacher*, NZ Kart 2017, 13; *Besen/Gronemeyer*, CCZ 2013, 143.
96 *Besen/Gronemeyer*, CCZ 2009, 67 (70).
97 *Calaim Lourenço*, Vol 4. Unio-EU Law Journal 2018, 98; *Besen/Gronemeyer*, CCZ 2009, 70.
98 *Schumacher*, NZ Kart 2017, 12.
99 *Besen/Gronemeyer*, CCZ 2013, 137 (143).
100 *Schumacher*, NZ Kart 2017, 13.
101 *Purps/Beaumunier*, NZKart 2017, 229; *Besen/Gronemeyer*, CCZ 2013, 144.

the merging parties more often opt for the establishment of an external Clean Team.[102] This, however, does not consist of employees of the acquiring company, but of external third parties who have the necessary expertise to appropriately assess the strategic information and communicate its results to the management of the acquiring company in aggregated form. The merging companies can, therefore, instead of entrusting the assessment of competitively sensitive information to the internal Clean Team, commission a group of experts (attorneys, auditors or business consultants) to evaluate strategically relevant information, which together form an external Clean Team (so-called "black box").[103]

With regard to a possible violation of Art. 101 TFEU, the process of information exchange is to be regarded more secure than the exchange of data within internal Clean Teams, especially as the information can be disclosed to external third parties without any restriction.[104] Nevertheless, caution is required when transmitting the results of the entrusted information: The sensitive information must be anonymized and passed on in aggregated form to the acquirer's management bodies. The consultant has to evaluate the information and forward the results of this examination in confidential form to the prospective acquirer.[105]

The advantage of the external Clean Team is that no employees from the operating area of the acquiring company have to be involved in the exchange of information and therefore do not have to be temporarily suspended. This also gives small and medium-sized companies the opportunity to carry out the exchange of information necessary for the valuation of the target company and to use its results for the final purchase decision.[106] However, the disadvantage of hiring an external Clean Team is that the company's own employees are generally more qualified to assess the market situation than external third parties. In addition, the commissioning of external third parties is associated with a considerable financial outlay.[107] The acquirer must weigh up all the circumstances of the individual case and decide, taking into account all the relevant aspects of the planned transaction, whether appointing an external Clean Team is the more suitable option than forming an internal Clean Team.

C. Permanent Clean Team

When setting up a joint venture, it should be borne in mind that such corporate alliances are also subject to Art. 101 TFEU and therefore the associated competition law requirements for

102 *Schubert,* ZWeR 2013, 69; *Besen/Gronemeyer*, CCZ 2009, 70.
103 *Purps/Beaumunier*, NZKart 2017, 228; *Besen/Gronemeyer*, CCZ 2013, 144.
104 *Calaim Lourenço*, Vol 4. Unio-EU Law Journal 2018, 98.
105 *Schumacher*, NZ Kart 2017, 13.
106 *Besen/Gronemeyer,* CCZ 2009, 67 (70).
107 *Schubert*, ZWeR 2013, 69; *Besen/Gronemeyer*, CCZ 2013, 144.

the merger-related exchange of information must also be observed.[108] A joint venture cooperation requires that the companies act independently and autonomously on the market; failure to do so may lead to issues related to the assessment of entrusted sensitive information resulting in a violation of EU competition rules.[109] For these specific constellations, so-called "permanent Clean Teams" can be set up to minimize the risks of possible competition law infringements. In contrast to internal and external Clean Team Agreements, which are limited in time and lose their legal effect at the latest on the date of "Closing", permanent Clean Team arrangements are generally not limited in time but remain in force for the duration of the joint venture. Such legal constructions serve to navigate information exchanges within the workflow of joint ventures cooperation in order to prevent the occurrence of a collusive outcome in violation of Art. 101 TFEU.[110]

The prohibited cartel arrangements that usually occur in the context of such business cooperation relate in particular the following areas: production agreements[111] or purchasing agreements,[112] commercialization agreements[113], and research and development projects[114]. Production, purchasing and commercialization agreements between competitors regularly lead to a violation of the prohibition of cartels under Art. 101 TFEU, if the parties involved exchange strategic information in the process (e.g. current prices, price discounts, price increases, price reductions, rebates, production costs, turnover, sales figures, marketing plans).[115] In the case of research and development agreements, on the other hand, there is a risk of a violation of Art. 101 TFEU if information on technologies, industrial property rights or *know-how* pertaining to third parties is exchanged.[116]

In addition, the facilities of Permanent Clean Team are used in so-called "Swap Agreements". These specific cases arise from constellations in which a company is involved in a customer project at the request of another company participating in market competition, because the contractual party with the primary obligation can no longer fulfill the contractual obligations assumed due to unforeseen circumstances or a lack of capacity.[117] Here, too, there is inevitably an exchange of information on quantities and technical customer specifications between the cooperating companies, which must take place within the framework of a permanent Clean Team in order to prevent the risk of a violation of Art. 101 TFEU.[118]

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[108] For more details see *Pugh*, Venture into the Unknown? The Exchange of Information Within Joint Ventures Under Article 101 TFEU, Vol 12. Journal of Competition Law and Practice 2021, 92.

[109] Cf. *Polley/Kuhn*, CFL 2012, 117; *Grave/Nyberg* in *Loewenheim/Meessen/Riesenkampff/Kersting*, Kartellrecht[4] Art 101 AEUV para. 1; *Brinker* in *Schwarze/Becker/Hatje/Schoo*, EU-Kommentar[4] Art 101 AEUV para. 2.

[110] *Schumacher,* NZ Kart 2017, 12.

[111] Horizonal Guidelines paras. 158, 165, 175, 181, 182, 192, 193.

[112] Horizonal Guidelines, paras. 194 et seq.

[113] Horizonal Guidelines, paras. 233, 244, 245.

[114] Horizonal Guidelines, para. 147.

[115] *Schumacher,* NZ Kart 2017, 12; Horizonal Guidelines para. 78 et seq.

[116] *Milbradt/Slobodenjuk*, Compliance-Anforderungen an Forschungs- und Entwicklungsverträge, CB 2014, 370.

[117] *Langen/Bunte*, Europäisches Kartellrecht II[12] (2014) Art. 101 AEUV paras. 195 et seq.

[118] *Schumacher,* NZ Kart 2017, para. 12.

The joint venture must therefore act as a separate entity, i.e. independently of the parent companies that compete with it. To this end, certain arrangements must also be made with respect to the Permanent Clean Team. Certain personnel, infrastructural, educational and preventive measures must therefore be taken to ensure the independence of the joint venture's activities.[119]

IV. Virtual Data Room

The key aspect of due diligence is the disclosure of documents and information about the target company by means of a Data Room provided physically or virtually by the vendor. With access to the Data Room, the potential acquirer gains insight into the target company's business documents, which also may entail competitively sensitive information (e.g. supplier and customer data); in order to reduce the risk of a violation of Art. 101 TFEU, certain requirements must be met when setting up a – today in M&A practice almost exclusively used - Virtual Data Doom.[120]

First, information must be classified according to its sensitivity and strategic relevance and assigned to a "green" and a "red" Data Room. The "Green Data Room" includes all information that is not classified as strategically relevant from the outset (e.g., balance sheet figures, liabilities);[121] once a Confidentiality Agreement has been concluded, this information can be made available to the acquirer in full.[122] The "Red Data Room", on the other hand, contains data that is strategically relevant and therefore of considerable sensitivity. This information should only be made available to a Clean Team, ideally consisting of external consultants ("external Clean Team"), which in turn must forward the data in aggregated form to the prospective purchaser. Alternatively, access to this data room can also be granted to the senior executives if they form an internal Clean Team.[123] The later must therefore fulfill the requirements already mentioned above (in particular signing personally the Confidentiality Agreement) in order to obtain access to the information in question.[124]

For purposes of preserving evidence, the Virtual Data Room should also be properly documented by storing the data on an electronic medium in an appropriate manner.[125] The rules for setting up the Data Room should therefore be applied in conjunction with Clean-Team

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119 Reference should be made here to the comments on the requirements for setting up an internal Clean Team (cf. III.A.1), which applies equally to the "permanent Clean Team"; *Schumacher*, NZ Kart 2017, 14 et seq.

120 This is a virtual Data Room set up electronically in which the purchaser of the company can inspect all files made available by the seller of the company for a certain period of time and, in principle, with limited access; see also *Mittendorfer,* Unternehmenskauf² paras. 1/236, 237; *Hoffer/Lehr*, NZKart 2018, 304.

121 *Polley/Kuhn*, CFL 2012, 123.

122 *Lauss/Duursma*, Digitale Transformation im Wirtschafts- & Steuerrecht (2018) para. 9/13.

123 *Polley/Kuhn*, CFL 2012, 123.

124 See under III.A.1.

125 *Lauss/Duursma,* Digitale Transformation para. 9/13; *Polley/Kuhn*, CFL 2012, 123.

Agreement and other measures to achieve the optimum legal effects for an exchange of information between the merging parties and to rule out possible infringements of EU competition law rules from the outset.

V. Concluding Remarks

In summary, it should be noted that the legal issues relating to the exchange of information under European competition law have not been conclusively clarified by the EU legislative and jurisdictional bodies, so that even the adoption of preventive measures does not provide absolute legal protection for the parties to the merger. Nevertheless, it can be stated that the European Commission has established principles in this regard which, if observed by the parties, can create legal certainty. In principle, there is no violation of the applicable standards of EU competition law in the event of an exchange of information within the corporate transaction, if the legal measures described in this paper are adequately implemented. In such a case, it can be reliably assumed that a merger-related information exchange does not violate the antitrust prohibition of Art. 101 TFEU. In conclusion, it should be noted that the legal status of a merger-related information exchange in EU competition law will continue to crystallize in the future as case law develops, so that attention should continue to be paid to this factor.