/ Exchange of Information in M&A Transactions – Competition Issues

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Exchange of business-related information is an essential part of any M&A transaction, starting from pre-acquisition discussions, up to the due diligence procedure. Sensitive business information allows a potential purchaser or merger party to assess the true value of a business and evaluate whether the target business is in fact a good fit with its own. However, for both vendors and purchasers, or parties to merger discussions, there are sound commercial reasons to exercise caution in revealing confidential business information, particularly where the purchaser is an actual or potential competitor.

The risk of engaging in illegal cartel activities or starting fictitious negotiations as a cover to exchange sensitive information are serious concerns of competition authorities.

Strict enforcement of competition rules in relation to pre-acquisition disclosure should aim not only to protect the vendor, in case the deal shall not eventually be concluded, but also the potential purchaser, who should avoid any suspicions regarding the legitimacy of its actions during the entire procedure.

Although there are no comprehensive lists detailing which business information may or may not be disclosed during a M&A deal, both the EU and national legislation sets forth guidelines to be observed by the involved undertakings when managing pre-closing information exchanges.

While every transaction is different, involving specific features of the relevant industry or market, the principles described below are generally applicable and may constitute grounds for structuring a sound pre-acquisition/pre-merger process.

Categories of Data

Depending on their significance, there are different categories of information that may raise more or less concerns, and hence, trigger a different level of scrutiny.

In general terms, **sensitive information** pertaining to a company is information which, if known to a competitor, could reduce strategic uncertainty in the market and therefore, the parties' decision-making independence by decreasing their incentives to compete.

The EC Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements further details that strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition.

The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.

Typically, there is very low risk in exchanging information which is easily **publicly available** or exchanges of **genuinely aggregated data**, where the recognition of individualised target company level information is sufficiently difficult. The same applies to **historic data**, that is to say, old enough not to substantially change the current market conditions. Although there is no predetermined threshold when data becomes historic and thus, not pose risks to competition, depending mainly on the data's nature, aggregation, frequency of the exchange, and the characteristics of the relevant market (for example, its stability and transparency, structure and entry barriers), in past cases the EC has considered the exchange of individual data which was more than one year old as historic.

As a rule of thumb, the more sensitive or valuable the information the stronger the scrutiny mechanisms need to be.

Consequently, the following main points of assessment should be kept in mind when contemplating a transaction:

- Is the information absolutely necessary in order to assess and conclude the deal?
- Does the purchaser have a reasonable and legitimate interest to be granted access to that information?
- Is the purpose of disclosure exclusive, limited and non-commercial?
- Are sufficient safeguards in place to protect the vendor but also satisfy the interests of the purchaser?

Considering that the thin line between *enough* and *too much* information may be easily crossed, in order to avoid this risk, any exchange of information must be duly documented and justified.

The degree of information exchange and the nature of such information may vary, depending on particular phases of the transaction, as summarized below:

Preliminary Discussions

First, it is a good practice to have a confidentiality or non-disclosure agreement (“NDA”) in place very early in the transaction, before any exchange of information occurs. The NDA should govern the entire pre-acquisition process, including subsequent letters of intent or binding offers.

The NDA should focus on:

- clearly defining the non-commercial purpose and further use of the information exchanged during this process;

- limiting the disclosure of confidential information only to those who "need to know" to conduct the due diligence and evaluate the transaction;
- setting up rules in case the deal falls through;
- extending the confidentiality commitment after closing the transaction, especially if the parties shall continue to act as competitors on the relevant market.

However, the mere fact of having an NDA is not sufficient and cartel concerns are not entirely removed, in the absence of further safeguards.

Due Diligence

The due diligence phase is a key step in any transaction. The buyer needs to have access to sufficient information to evaluate the target and any potential liabilities it holds.

Depending on the complexity of the transaction, it may be necessary to establish protocols clearly regulating what type of information shall to disclosed and to what extent, who is entitled to receive the information and how the information is to be used and kept.

Generally, specific personnel are designated to deal with and assess the documentation involved in the contemplated transaction, the so-called *Clean Team*, formed of both in-house and external advisors and experts. The disclosure of information should be strictly limited to the Clean Team.

Depending on the nature and extent of information to be processed, the Clean Team is usually further divided into *Green data room team* (generally comprising members of the recipient party) with normal access to less sensitive information, and *Red data room team* (comprising external advisors, auditors and attorneys) authorised to review, process and prepare reports based on sensitive information and disclose further to the receiving party only non-competitively sensitive conclusions of that assessment.

Moreover, the access of operative business people to commercially sensitive information should be restricted, in order to mitigate the risk that such information is used prior to closing or influence in any way the company's independent behaviour on the market during this process.

The disclosing process may be also implemented step by step, whereas the most sensitive information is to be disclosed only after the signing.

In case the deal falls through, it is very important to record the reasons for it and set up strict rules and warranties that the information is either returned or destroyed.

Post-signing and Pre-closing

Between signing and completion, the purchaser often has a strong interest to set up synergies and ensure that the transition process goes as smoothly as possible. To this end, further exchange of information is necessary for the integration planning, including management meetings and two-way information sharing for joint organizational measures. However, this should not go beyond what is necessary for the proper and timely implementation after closing.

Specific pre-closing restraints – *i.e.* the *standstill obligations* – are of particular significance in case the contemplated transaction is subject to merger control clearance.

Broadly defined, *gun jumping* refers to unlawful premerger coordination between the parties to an M&A transaction. It can occur in two distinct contexts. First, **procedural gun jumping** occurs when the involved parties fail to observe mandatory premerger notification and clearance requirements under applicable competition law. Second, **substantive gun jumping** can occur as a form of *de facto* antitrust offence where the parties coordinate their competitive conduct prior to the actual consummation of the transaction.

Although there are no exhaustive rules or lists identifying and detailing what could/could not be done during the standstill period, the Merger Regulation issued by the Competition Council expressly states that the following measures are deemed as gun jumping:

- the entrance by the purchased company (target company) on another/new market, determined by the business strategy of the purchaser;
- the exit from the market where the purchased company was active on;
- the amendment of the scope of business/object of activity of the purchased company;
- the exercise of acquired voting rights for (i) appointment of members in the management board of the purchased company, (ii) adopting the budget of the company, (iii) adopting the business plan or the investment plan of the company;
- changing the name of the company;
- the restructuring, closedown or spin-off of the purchased company;
- the sale of assets belonging to the purchased company;
- the dismissal of employees;
- the conclusion or termination of long term contracts or other important agreements concluded with third parties;
- the listing of the purchased company on stock exchange market.

The aforementioned list is however not comprehensive, but merely indicative of main actions which shall be definitely considered by the Competition Council as a breach of the standstill restriction.

Furthermore, other activities to be avoided during the standstill period should be:

- exchange of competitive sensitive information for the purposes other than valuation during due diligence, or other than on a need-to-know basis;
- the actual integration of any aspect of the merging businesses, including, but not limited to the integration of infrastructure, information system, personnel, corporate identity or marketing efforts;
- the placement of personnel from one party in new positions at the other party;
- any effort by the acquiring party to influence or control any competitive or strategic aspect of the target's business, such as setting prices, limiting discounts or restricting sales to certain customers or certain products.

Additionally, during this phase, any provisions relating to the target company's pre-closing conduct must be properly limited to the legitimate interest of the would-be acquirer in order to protect the value of its investment, so as to avoid a claim that *de facto* control has been exercised prematurely or that impermissible coordination of competitive activity has occurred.

Therefore, acquisition agreement terms called *conduct-of-business* or *material adverse change-clauses* prohibiting the target from substantially changing its business (*e.g.* changing the business model, issuing securities, changing its by-laws, entering into material contracts, selling its assets or undertaking new large capital expenditures) are intended to protect the purchaser against reducing the value of the target company between signing and closing. This purpose of protection is also recognized in principle by antitrust law. However, this should not lead to a *de facto* integration of the business conduct of the involved companies or group of companies.

The standstill obligation is one of the cornerstones of both EU and Romanian merger control systems. Breaching such obligation might lead to fines ranging from 0.5% to 10% of the total turnover obtained in the previous fiscal year.

The rule of thumb is that the parties should remain separate economic actors and independent market participants. In other words, prior to closing, the parties must continue to complete with one another, to act and do business as if there will be no transaction.

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