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Competition issues in M&A transactions

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These notes outline some typical competition law considerations encountered in M&A transactions. Every transaction is different, so that these points will need to be adapted and detailed for the relevant deal.

Core competition principles

Two principles are particularly important:

— no exchange of sensitive commercial information between competitors – parties remain competitors until merger clearance is granted and (if relevant) the deal closes

— ban on integration of businesses before competition authority merger clearance – the suspension rule – no "gun jumping"

Breach of either principle could result in an infringement finding by the relevant competition authorities and possibly a financial penalty. Even where there is no infringement or fine, any investigation by the authorities could delay or otherwise disrupt the clearance procedure. Note that there may be multi-jurisdictional aspects.

Information exchange

The European Commission's Guidelines on horizontal cooperation agreements recognise that information exchange is a common feature of business and may generate efficiency gains. But the EU is also suspicious that the exchange of market information may lead to restrictions of competition – it enables companies to be aware of their competitors' market strategies and could lead to cartel arrangements. The Guidelines approach the competition analysis of information exchange in the same way as they deal with other forms of competitor cooperation (e.g. joint purchasing, R&D and production and commercialisation agreements).

Gun-jumping – planning vs integration

Meetings and exchange of information before merger clearance is received are about planning, not integration. PurchaseCo may receive and assess Target business information provided the following points are observed:

— PurchaseCo cannot seek to influence current Target business

— either party must request information only where it is reasonably necessary in order to plan for integration and business continuity

— no commercially sensitive information relating to either existing or pipeline products/services/business should be exchanged without approval by legal counsel; and

— no sensitive information must be exchanged in any circumstances about overlapping products/services/business lines.

Transition teams/clean teams

To the extent that specific personnel are designated to deal with planning/transition (a "transition team" or "clean team"), only those designated persons should have access to the relevant information. Such information should be shared outside the transition teams only with team leader/senior/legal counsel authorisation and on a strict need-to-know basis. It may be necessary to establish protocols for who can see/use what level of material or information – this will depend on the complexity of the transaction.

Transaction phases

Separate rules and protocols may be required to cover the different phases of a transaction. These may include planning/pre-bid; transition between agreement and closing (pre merger clearance and pre closing), and include:

— rules of the road generally – who may do what and under what conditions
— information exchange
— meetings.

Summary of risk factors in exchange of information between competitors

Various factors which may increase the competition law sensitivity of an information exchange are set out below in a Risk Assessment Table to assist with the analysis of any particular exchange. Just because one of the "high risk" elements is present does not of itself mean that any particular exchange would automatically infringe the competition rules, but the presence of more than one element would be likely to be problematic.

High Risk	**Low Risk**
Supply/exchange of information with direct or potential competitors	Exchange of information with non-competitors
Confidential information	Public domain information
Current information (covering present/immediate future)	Historical information
Exchange relating to current or future commercial strategy in market-facing context: — individual company pricing policy including discount policies/costs/profit margins — marketing strategy — other internal business models — customer information — productivity levels	Exchange regarding non-commercial aspects of a market: — purely technical or process information — general policy of regulators in regulated sectors — central government policy — lobbying initiatives — generalised consumer preferences or needs — other general industry trends
Information which goes beyond the purpose of a specific (competition compliant) collaboration	Information which is strictly limited to the collaboration arrangement (which itself has been approved in competition law terms by lawyers)
Data which is precise, e.g. attributable to (i) a particular supplier, or (ii) a particular customer relationship	Data which has been generalised (e.g. anonymised or aggregated)
Information which is freely disseminated within recipient company	Information the dissemination of which is restricted within the recipient company – e.g. where information barriers are strictly observed
Frequent exchanges	Infrequent exchanges
Implied or explicit recommendations accompanying the exchange – e.g. when exchanging credit information	No further discussion of the information exchanged

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