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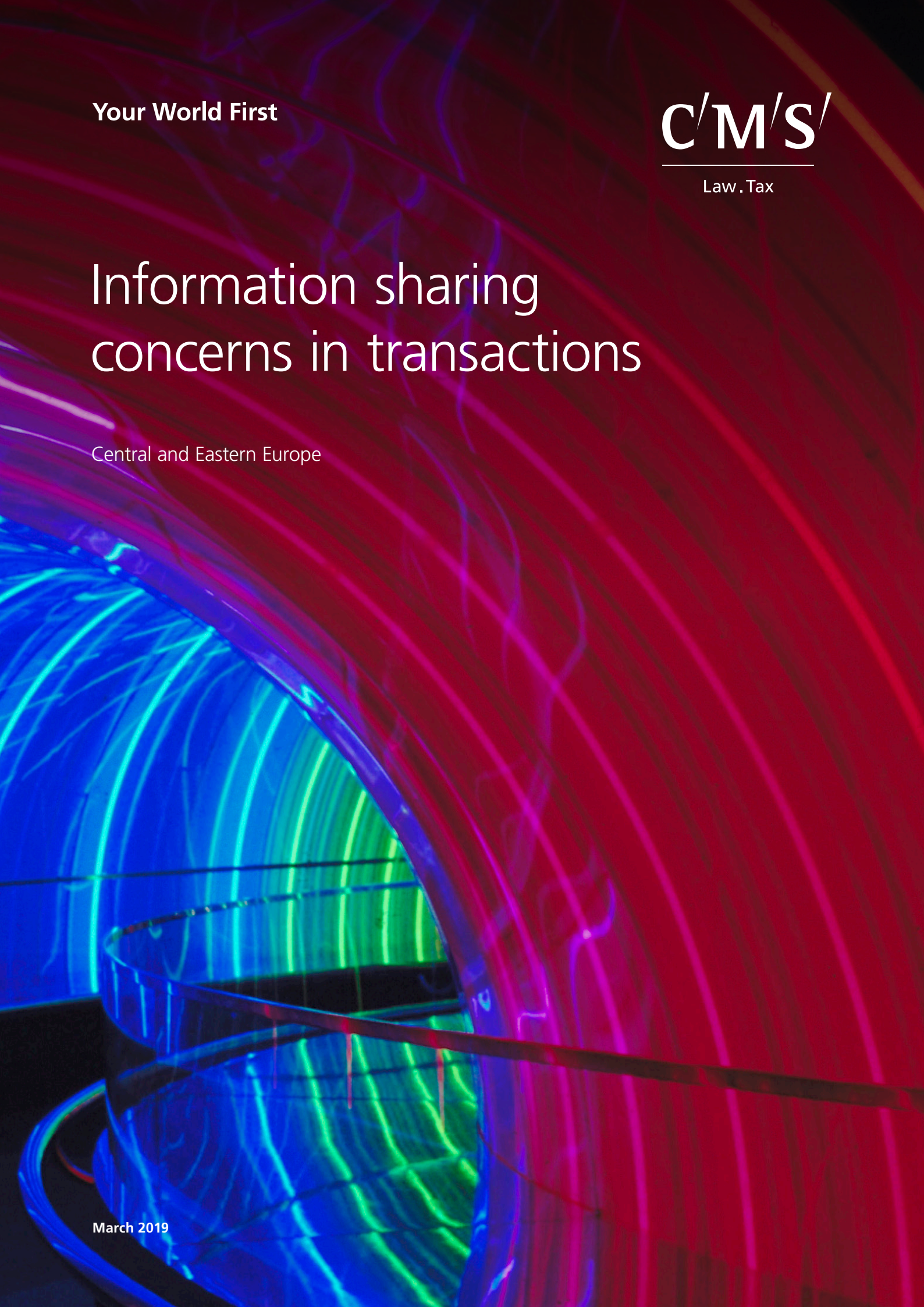
Information sharing concerns in transactions

Central and Eastern Europe



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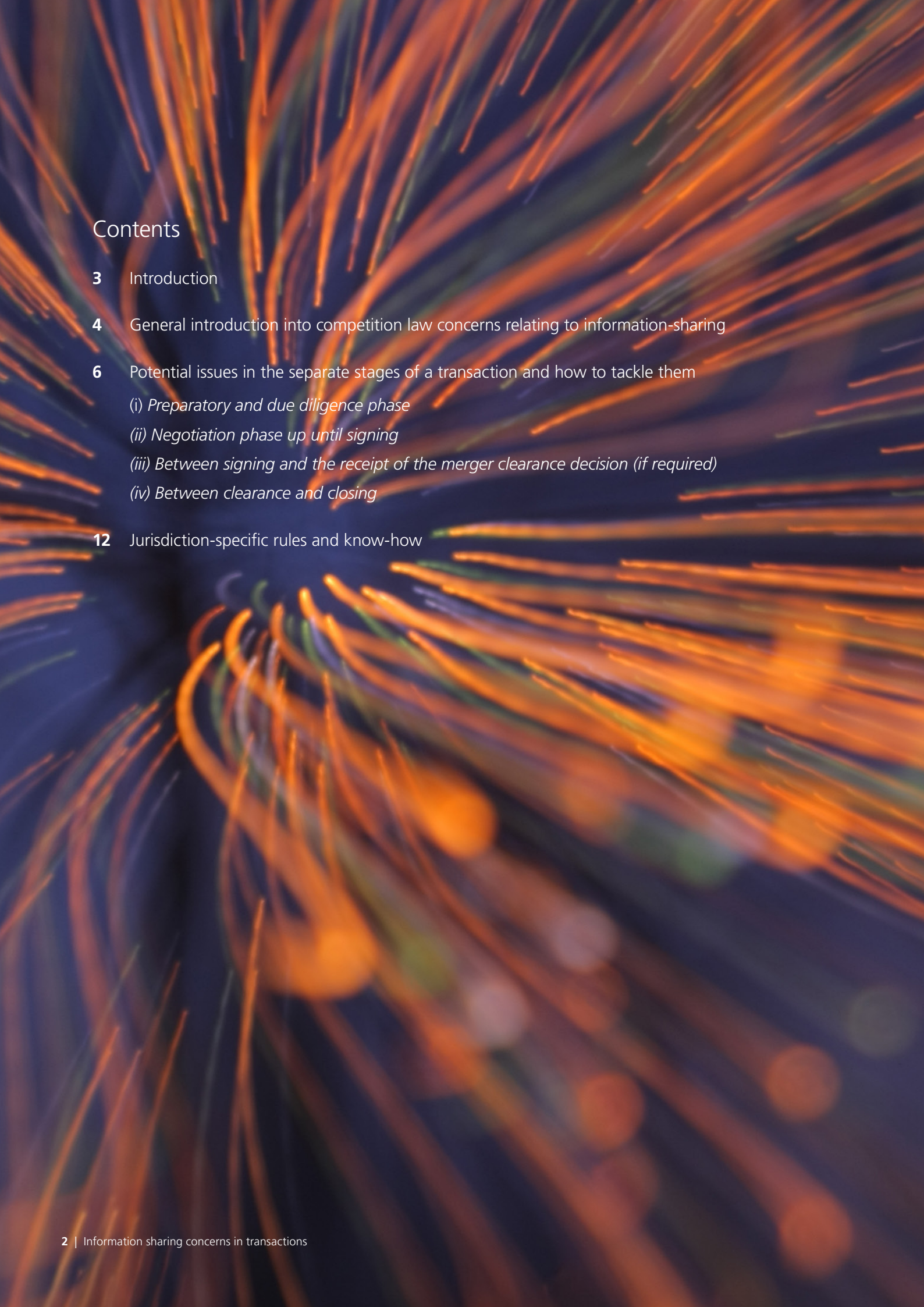

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Introduction

Strong economic performance and a generally sparkling M&A market describe the Central and Eastern European landscape these days.

Market researchers see steady growth year on year in M&A activities and so our findings show in the latest CMS European M&A Outlook and Emerging Europe M&A reports.

In such environment the importance of competition law and especially compliant information sharing practices in transactions moves to the next level. Not all transactions reach closing, however data shared during due diligence and negotiations may influence parties in future strategic decision making in a way that is not allowed by competition laws. Transactional parties therefore may need to well consider what type of information is shared during the course of a transaction, how, when and with whom.

In our current guide CMS aims to shed some light on these often neglected elements and provide general guidelines and legislation specific know-how covering ten Central and Eastern European countries (Bulgaria, Croatia, Czechia, Hungary, Poland, Romania, Slovakia, Slovenia, Turkey and Ukraine).

CMS is a full service law firm with significant coverage in all of these countries. If you have any questions, or if you wish to get in touch with us and discuss a particular matter of interest, contact details of all of our contributors can be found at the end of this publication.

We hope you will find this publication useful.

General introduction into competition law concerns related to information-sharing

There is a general need from a business perspective to share information with potential purchasers in the context of an M&A deal. Parties to a possible transaction have legitimate interests to exchange information for due diligence purposes, to identify possible synergies and for integration planning.

Nevertheless, special caution should be taken if the potential seller or purchaser are competitors or have market overlap in order to mitigate competition law risks as well as seek protection in case the deal aborts.

Main concern behind information sharing

The primary competition law concern behind information sharing is that the sharing of strategic data may reduce strategic uncertainty between competitors, and affect the companies' independence in decision making, thereby facilitating a collusive outcome. Exchange of competitively sensitive information may lead to an anti-competitive outcome: typically higher prices.

Definition of sensitive/strategic information

So what kind of '***information***' would be significant from a competition law perspective? This would be sensitive business information that relates to a market where the parties to the exchange are competitors (for example information on prices, quotas, business plans or other highly sector-specific data).

High risk information

- Confidential information
- Individualised information
- Current or future commercial strategy in market-facing context:
  - company pricing policy including discount policies/costs/profit margins
  - marketing strategy
  - other internal business models
  - productivity levels
- particular customer or supplier information
- information which goes beyond the purpose of a specific (competition compliant) collaboration.

Low risk information

- Public domain information
- Aggregated information
- Historical information
- Exchange regarding non-commercial aspects of a market: purely technical or process information
- General policy of regulators in regulated sectors
- Generalised consumer preferences or needs
- General industry trends, generalised data (e.g. anonymised or aggregated).

What could be '*sharing*' or '*exchange*'?

Sharing information: a mere one-way communication, or a mutual agreement to receive the information; or a decision by a trade association or a concerted practice. The sharing of information could be direct or indirect: between competitors or through an intermediary/third party such as a trade association, agency, market research organization, customer, supplier, etc.

The general legal background

The exchange of strategic competitor information may infringe Article 101 of the Treaty on the Functioning of the European Union (TFEU) – the general prohibition catching agreements and concerted practices having the object or the effect of restricting competition. The *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements* (Horizontal Guidelines) (2010) contains a chapter on exchange of information between competitors. While the European Commission (EC) has recognised that the illegal exchange of information is an issue of many competitive markets, it has provided guidance in the Horizontal Guidelines on pro-and anti-competitive information exchange.

'*By object*' and '*by effect*' restriction

Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition '*by object*'. For example, the exchange of information on companies' individualised intentions concerning future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome. The parties sharing such information would be deemed to have their objective as the restriction of competition and such behaviour would be considered a '*hardcore*' infringement. Such types of information exchanges will normally be considered and fined as cartels.

By contrast, restrictions '*by effect*', otherwise known as a '*non-hardcore*' exchange of information, necessitate a comprehensive analysis of the situation including all of the surrounding factors. Among the relevant factors are the characteristics of the relevant market (transparency, structure, concentration, etc.), the characteristics of the products/services in question, market coverage of the parties involved and the characteristics of the information at issue: strategic nature, level of aggregation, age of data, frequency of information exchange, public/non-public information.

It should be noted that while information exchange may constitute an infringement in itself, it is often encountered in conjunction with other infringements (as a means of facilitating of a price-fixing cartel).

The exemption

However, the information exchange may also lead to efficiency gains, which could serve as an argument for the exemption of the particular information exchange practice from sanctions.

It is of particular importance to stress that there is no safe harbour for when exchanges can be presumed to be lawful. The exchange of information will always be considered in context. Exchanged information can provide a competitive advantage to a company, which may be unfair. The main criterion to remember is the potential competitive sensitivity of any individual piece of information. A case-by-case review of the information exchange process from a competition law perspective is required for each deal.

Potential issues in the separate stages of a transaction and how to tackle them

There are two competition law principles that are particularly important in a transactional context.

The first rule is that there should be no exchange of sensitive commercial information between competitors. It should be noted that the parties remain competitors until merger clearance (if required) is granted and the transaction closes.

The second rule prohibits the integration of businesses before competition authority merger clearance (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.

In the context of a legitimate M&A transaction competition authorities recognise that due diligence needs to be conducted and the parties need to exchange some information. If the transaction does not then take place, this will mean that the parties may be left with commercially confidential information, which in any other context could amount to an unlawful information exchange.

Consequently, there is a fine balance between not providing information that would be in breach of competition laws, and providing information necessary for a reasonable due diligence exercise. As a result, a number of methods have been developed to allow for meaningful disclosure through a due diligence exercise, but will limit the parties falling foul of their stringent competition law obligations.

(i) Preparatory and due diligence phase

The preparatory phase of each potential transaction should involve careful planning of the information exchange process mainly on the side of the seller. The seller should consider and develop particular rules and arrangements aimed at the protection of the confidential information concerning the target, so that it is disclosed only to the extent necessary for the respective stage of the process. The most sensitive information should be disclosed at a later stage of the process, and to a limited number of reviewers admitted by the seller with limited review rights.

Golden rules during due-diligence process

— Information should be exchanged only on a '**need to know basis**' – i.e. information that is reasonably necessary to evaluate and plan for the implementation of the transaction. Such information should be shared with carefully selected recipients approved by the disclosing party.

— **A record and paper trail** should be kept to demonstrate what information has been passed on, and to whom. Disclosure must be made to the relevant parties, usually as a response to an information request. The parties should, as far as possible, keep a written record of discussions between them involving potentially sensitive business information. For formal meetings, an agenda should be used. Disclosures on an ad-hoc or informal basis should be avoided.

— **Individual sensitive documents, or categories of documents**, should be treated on a case-by-case basis to ensure that they comply with competition law and due diligence objectives, with competition lawyers' advice. Parties should consider whether sharing of highly sensitive information can be done (i) at a later stage of the process; and (ii) through a third party, such as lawyers or financial advisors, who can collate and submit the information in a non-sensitive format (as aggregated or anonymised information).

— The parties can exchange as needed, **less sensitive information**, including: publicly available information, historical financials, organisational charts, insurance policies, asset and depreciation schedules, information regarding locations, facilities, and services offered, pending legal claims, environmental risks, compliance programmes and IT systems. Information should be shared in an aggregated or anonymous format, whenever possible. It is preferable to share historical information, rather than current information, whenever possible.

— **Personnel with direct sales, pricing or marketing responsibility** should **not** see competitively sensitive information, such as current, non-aggregated information regarding prices, discounts, bidding, costs, margins, product innovation/development, supply terms, competitive strategies or marketing plans.

Observing the golden rules is advisable in respect of all due diligence exercises. Furthermore, the parties should consider the use of formal measures **such as non-disclosure agreements/confidentiality declarations, data rooms, clean teams**.

Non-disclosure agreement

The parties should sign a Non-Disclosure Agreement ('NDA') before transaction discussions proceed. The NDA would require the parties to keep information confidential, only use it for the purposes of the transaction proposal, store it in accordance with the instructions of the disclosing party, disclose it only in explicitly identified cases and to a defined group of permitted recipients and return / destroy it if the transaction does not proceed.

Data room

A data room acts as a controlled environment, and can limit who has access to the information. The following rules can mitigate the risk of illegal information exchange:

— As a general rule, permitted users can access the data room subject to confidentially undertakings (see above) and to compliance with the respective data room rules, and with personal user names and passwords. Additional security measures can also be added and could include automatic log-off if the user is inactive for a certain period (e.g. one hour); keeping record of the history of use of the data room by a given user (i.e. dates and times of access; reviewed documents etc.); and if printing is permitted, printed documents could include the name of the user who printed the document etc.

— The risk of overbroad dissemination of confidential information can be reduced by restricting the options of users (or groups of users) to download, print or e-mail confidential information.

— Documents and information should be redacted to shield customer identities, personal data and other sensitive information. This is particularly important if competitors are considering and evaluating the transaction. The more competitively sensitive the information, the stronger the protections needed. Identification, collection and dissemination of competitively sensitive information in an aggregated or other safe form should be done through an independent agent (legal counsel).

— Materials that may raise competitive concerns, including schedules, should be added to the data room at a later stage of the transaction process.

— The data room can be split into sub-sections with different access rules: a section containing anonymized and non-sensitive information the access to which is 'broader'; and a section containing highly sensitive data and/or non-anonymized data the access to which is limited.

— The parties should ensure that clear document destruction instructions are in place which shall apply at the end of the due diligence process, including penalties or consequences for a breach; as well as follow-up measures to ensure such instructions are followed.

Clean team

Clean teams are not appropriate or necessary for all transactions, but are more common in large/complex transactions and provide commercial protection if the transaction does not close. Using a clean team may help, so that information is closely controlled and contained and is not allowed to leak into the operational units of the business. The use of clean teams is strongly recommendable for transactions where: (i) the transaction is likely to receive antitrust scrutiny from a competition authority; (ii) the merging parties have substantial competitive overlaps; and (iii) a large volume of competitively sensitive information will be shared.

Under a clean team agreement, access to sensitive information (that is shared during due diligence and for integration planning) is limited to members of the clean team and is protected from disclosure. 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. If reports from clean team members (including, for example, consultants) must be provided to other business personnel, such reports should contain anonymized, aggregated versions of the competitively sensitive information and be subject to review by legal counsel before dissemination. If the transaction does not close, the clean team should be required to destroy the information.

(ii) Negotiation phase up until signing

During the negotiation phase, it is important that the exchange of commercially sensitive information between competitors is minimised and subject to established confidentiality rules and arrangements. The golden rules for exchanging information during due diligence also apply in the negotiation phase.

During the negotiations, the negotiation teams should keep a written record of the discussions between them involving potentially sensitive business information. Formal meetings should be held by strict observance of the announced agenda. If new sensitive information is disclosed to the prospective purchaser at this stage, this should be done by observing the established rules and procedures: through the data room, and/or the clean teams etc.

Confidentiality obligations in the transaction documents

Confidentiality clauses should be carefully negotiated in the transaction documents (e.g. a share purchase agreement or 'SPA').

The SPA, or a separate clean team agreement, can provide for a clean team process, applicable to the provision of sensitive data in the interim period by the seller or the target company. In such cases the representatives and advisors of the parties should review the relevant data and, to the extent necessary, redact any sensitive provision or information which they deem necessary to remove inter alia in order to comply with applicable laws as regards secrecy and data protection obligations, as well as any applicable European and/or national competition and antitrust regulations.

If the purchaser is entitled to appoint observers, with the purpose to monitor the target company and its operations, all the data shared by the target company with the observers, should be subject to the relevant confidentiality provisions. The parties can negotiate that such observers shall not engage in any selling, market-facing, or commercial functions or roles within the purchaser's group. As a further protective measure, the parties can provide that if closing does not occur, the observers will undergo a set cooling-off period before assuming any functions that involve engagement in a market-facing role or commercial functions in the respective market.

(iii) Between signing and the receipt of the merger clearance decision (if required)

Care should be taken when implementing transactions. Signing does not provide for a 'carte blanche' but instead antitrust restrictions, which remain in force until closing. Commercial interests to close the transaction as soon as possible and to preserve the value of the target must be aligned with the prohibition of 'gun jumping'.

Ensuring smooth cooperation in the merger clearance process

In most jurisdictions, it is the party acquiring sole control, or the parties acquiring joint control or merging who file the notification, but the other parties to the transaction would be obliged to supply the applicant with the necessary information and to provide other reasonable assistance as may be required. Where the purchaser and the seller/target are competitors, it is possible that each of them submits the required information to the regulator separately, in order to ensure that the most sensitive information (i.e. with respect to the key clients, key suppliers etc.) is not shared with the competitor directly.

Apart from merger clearance, the parties would usually negotiate their obligations in the SPA to cooperate with each other in respect of obtaining all consents, approvals or authorisations of any governmental authority or third person in respect of the transaction and for taking such other actions as may be requested by the other party for the purpose of due implementation of the agreement and closing of the transaction. The parties would also usually undertake to keep each other informed of any relevant information.

Gun Jumping

In most jurisdictions merger clearance should be obtained prior to the implementation of the transaction. The parties would have a so called 'stand-still obligation', which is an obligation not to consummate the transaction before merger clearance is obtained. The violation of the stand-still obligation is known as 'gun jumping'.

Gun-jumping occurs, most frequently, when parties implement a notifiable concentration without filing a notification. If notification is made, the parties would still continue to face gun-jumping risks. Pre-closing conduct that implements a notifiable transaction prematurely (prior to clearance) may also violate the competition rules.

In the recent decision of the European Commission on the *Altice/PT Portugal merger case* (April 2018), the Commission concluded that certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, for example by granting Altice veto rights over decisions concerning PT Portugal's ordinary business. In certain cases, Altice actually exercised decisive influence over aspects of PT Portugal's business, for example by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement. While the authorities did not object to a price adjustment clause in the transaction documents, they did take issue with a clause that made the conclusion of certain contracts and investments subject to the purchaser's approval.

Guidelines to avoid gun jumping and unlawful coordination

From a business perspective, it might be necessary to integrate the merging businesses as soon as possible. However, the slope towards 'gun jumping' is slippery. The Purchaser has not yet completed the purchase. Before mandatory antitrust clearances are received, the purchaser must not act as though it has a right to direct how the seller runs the target business pre-closing. The two companies must continue to operate as separate businesses.

Meetings and exchange of information before merger clearance is received should be about planning, not integration.

The following rules can mitigate the risk of 'gun jumping' (or infringement of competition laws):

— Before closing, the parties should not under any circumstances coordinate their competitive behaviour or their marketing strategies. The parties should not agree on their prices or agree to coordinate products, territories or customers. They should not conduct joint sales activities or enter into negotiations or commitments on behalf of each other prior to closing.

— The preparations of future advertising materials and integration processes are allowed. However, the parties should be careful to avoid giving the appearance of acting as a single company, for instance by changing their business cards or letterhead, the target using the purchaser's name when answering to customer phone calls, and the like. The distribution of common advertising material to clients and joint exhibition appearances, before clearance is obtained, should be avoided.

— The parties should avoid the transfer of employees before clearance.

— The purchaser should not influence the day-to-day business of the target. Before clearance, the purchaser must not exercise or be in a position to exercise management control over the target's business, for example by limiting the seller's freedom to manage the target's business during the pre-closing period. Only reasonable limits are permitted: for example, limits for unusual operations or material changes to the target's business, and acts aimed at preserving the value of the target through the pre-closing period.

— The purchaser should not express opinions on the seller's/target's business methods. The purchaser should not indicate how it plans to change any aspect of the target's business post-closing.

— The purchaser should not comment on or seek to renegotiate/interfere with the target's current customer or supplier contracts or relationships.

Examples for acceptable transition/pre-clearance planning would include:

— Talking about planning for post-closing in terms of how the merged business can ensure continuity of successful customer and supplier relations.

— Seeking to understand the target business model and to develop a business model for the combined business (subject to the rules on exchange of information). Specifically, using information to develop proposed management structures and to identify required senior roles/general job descriptions/employee numbers required by the combined business, is permissible.

— Attending meetings with selected key seller/target customers and suppliers, where strictly necessary for business continuity purposes, following an approval by legal counsel and, in all cases, taking the role of a passive observer.

Transition meetings

Meetings involving the transition team of the purchaser (usually including financial persons, HR, IT) should be based upon agendas and led by a designated purchaser leader/spokesperson. Agendas should conform to the above rules with respect to gun jumping and the illegal exchange of information.

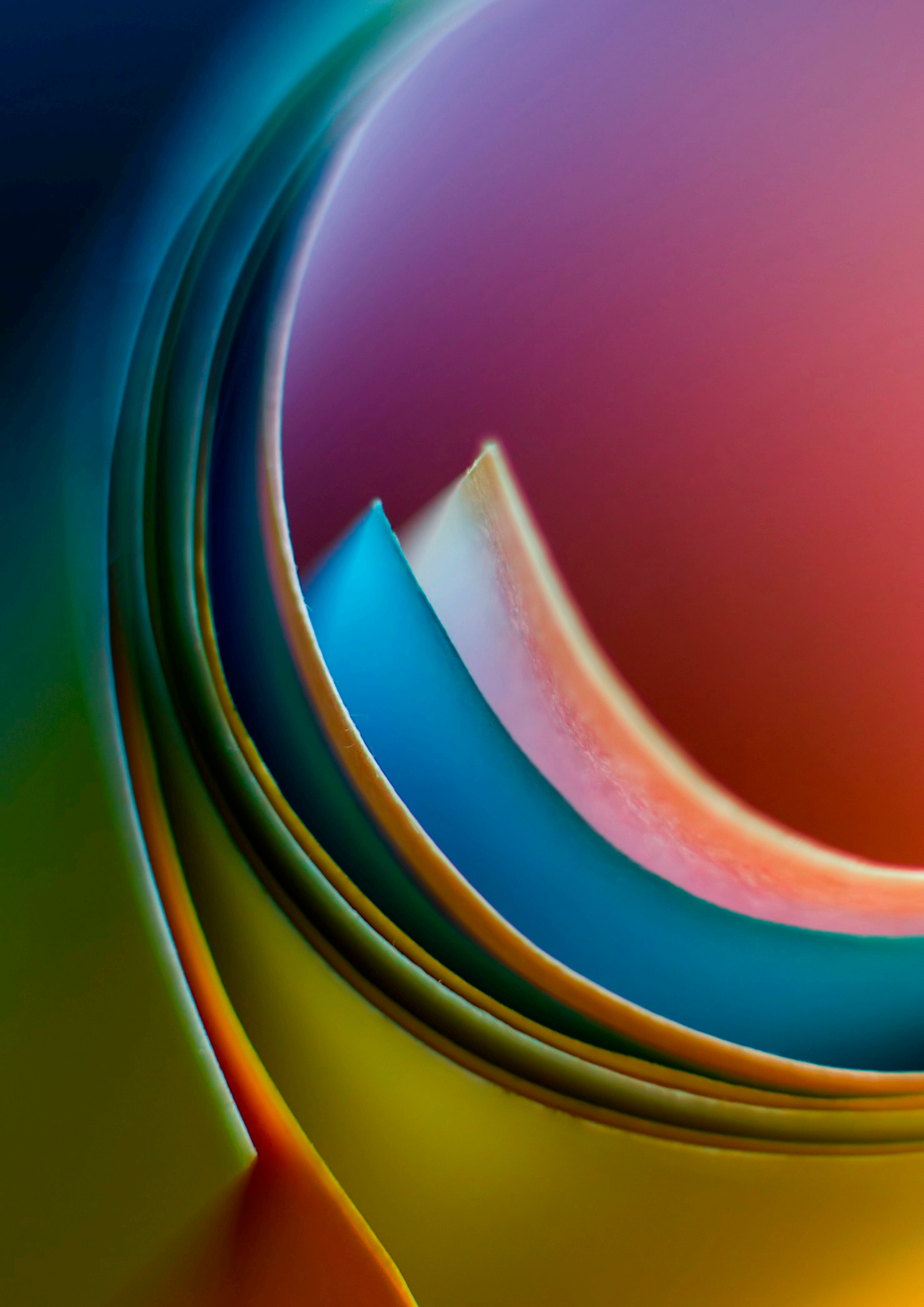
Alarm bells for transition meetings would include meetings that are unstructured, and/or with no announced agenda. The participants should not start or continue a meeting if they have doubts as to the suitability of its contents. No participant should hesitate to express disagreement with the contents of a meeting, to insist on moving to another agenda item or on terminating a meeting. The purchaser should not provide commentary/opinion on seller/target information. Communication outside the appropriate transition teams should not be done unless it is clear that a designated team leader considers the communication appropriate and the relevant clearance process (e.g. to obtain consent from legal counsel) has been fulfilled.

(iv) Between clearance and closing

The parties should not exchange information even after merger clearance is granted, if the deal is not yet closed. At this stage the parties remain competitors and there remains a risk that the transaction will not be closed successfully. The golden rules for exchanging information during due diligence are equally important at the final stage of the transaction.

At this point of time, the parties should be focused on the fulfilment of any other conditions precedent, as negotiated in the transaction documents, and on the closing process. The parties must be careful that the organisational and integration planning does not go beyond what is necessary for the successful closing and the subsequent implementation of the transaction.

In case the transaction is terminated and does not close, the parties should comply with all document return or destruction requirements in the NDA/clean team/transaction agreements.



Jurisdiction-specific rules and know-how

Bulgaria

Specific legislation

(i) Protection of Competition Act 2008; and

(ii) CPC's Guidelines on the Exchange of Information between Competitors (generally consistent with the Horizontal Guidelines of the EC).

Relevant case law

No recent decisions of the National Competition Authority (the CPC) on information sharing in a transactional context.

Practical experience and know-how; Dos and don'ts/golden rules in your country

Standard protection mechanisms against information sharing are in place in Bulgaria. In the phase of filing for merger clearance, it is common practice that confidential information of either party to the transaction is submitted in a separate correspondence to the CPC.

Croatia

Specific legislation

Competition Act (Official Gazette 79/09, 80/13); applicable European Union acquis communautaire.

Relevant case law

There have been no decisions of the CPC (Croatian Competition Agency) on information sharing in a transactional context.

Practical experience and know-how; Dos and don'ts/golden rules in your country

Standard protection mechanisms against information sharing are in place in Croatia.

In more complex transactions it is recommended to install clean teams.

Stand-still obligations/ordinary course of business clauses are generally permitted if they aim to preserve the value of the target.

Covenants between signing and closing must not result in the buyer factually taking over the seller's business at signing.

Czech Republic

Specific legislation

(i) Act on the Protection of Competition; and

(ii) Merger Guidelines:

— Notice of the Office for the Protection of Competition on the pre-notification contacts with merging parties.
— Notice on the prohibition of implementation of concentrations prior to the approval and exemptions thereof.

Relevant case law

The decision S 224/03 from 2004 *Karlovarské minerální vody/Poděbradka* has so far been the only case of imposition of a fine by the Czech Competition Authority in connection with the violation of the prohibition of implementation of concentration prior to notification.

Practical experience and know-how; Dos and don'ts/golden rules in your country

Standard protection mechanisms against information sharing are in place in the Czech Republic.

Hungary

Specific legislation

(i) Act LVII of 1996 on the Prohibition of Unfair Commercial Practices and Restriction of Competition;

(ii) Guideline on Merger Clearance Procedure no. 6/2017.; and

(iii) Guideline on Fines in Antitrust Cases no. 11/2017.

Relevant case law

No recent decisions of the Hungarian Competition Authority (GVH) on information sharing in a transactional context.

Practical experience and know-how; Dos and don'ts/golden rules in your country

The general standards implemented by the EU law apply in Hungary. The above detailed standard safeguard mechanisms are also used in Hungary.

The GVH keeps its eye on information sharing (in merger context) also as a potential breach of the stand still clause. A dawn raid is an option in merger cases as well.

Poland

Specific legislation

Act on Competition and Consumer Protection of 2007 (general competition law act).

There are no specific guidelines concerning information sharing.

Relevant case law

No recent decision of the Polish Competition Authority (the UOKiK) on information sharing in a transactional context.

Practical experience and know-how; Dos and don'ts/golden rules in your country

It is standard to implement protection mechanisms against the exchange of sensitive information in the context of an M&A deals such as e.g. confidentiality undertakings.

It is standard that for the purpose of merger filings sensitive information necessary to prepare notification is exchanged only by lawyers on 'counsel-to-counsel' basis; the merger filings consist of confidential as well as non-confidential versions with redacted business secrets.

Romania

Specific legislation

(i) Competition Law no. 21/1996, republished and further amended and supplemented;

(ii) Guidelines for Compliance with Competition Law published on the 5 December 2017 by the Romanian Competition Council (the 'RCC'); and

(iii) Horizontal Guidelines of the European Commission.

Relevant case law

No recent decisions of the RCC on information sharing in a transactional context.

Practical experience and know-how; Dos and don'ts/golden rules in your country

Protection mechanisms against information sharing, although not formally regulated, are standard market practice in Romania (i.e., use of clean teams, non-disclosure agreements).

With respect to the merger clearance process, there is only one version of the notification form that is submitted with RCC, containing all the required information, as this is generally prepared by lawyers.

Nevertheless, the Confidential information is marked as such within the document and pursuant to this, RCC shall not disclose it to third parties.

In the context of a merger filing, during the preparation of the notification form or subsequent answers to RCC's inquiries, the following approach is market practice in Romania:

(i) confidential information regarding a party or commercially sensitive information is only disclosed to the other party's counsel; and

(ii) such information is redacted in the versions of the document that are being circulated with the other party.

Slovakia

Specific legislation

(i) Protection of Competition Act No. 136/2001 Coll.;

(ii) Decree No. 170/2014 of the Antimonopoly Office of the Slovak Republic laying down details of a notification of concentration;

(iii) Guidance of the Antimonopoly Office on the Assessment of the Protection of Business Secrets, Confidential Information and Personal Data; and

(iv) Guidance of the Antimonopoly Office on pre-notification contacts in the procedure merger assessment.

Relevant case law

No recent decisions of the National Competition Authority (the Antimonopoly Office) on information sharing in a transactional context.

Practical experience and know-how; Dos and don'ts/golden rules in your country

Standard protection mechanisms against information sharing are in place in Slovakia.

The Antimonopoly Office is obliged to notify the natural person/the legal entity that it can indicate which information or documents presented are considered to be the subject of business secrets or regarded as confidential information.

In the phase of filing for merger clearance, it is common practice that confidential information of either party to the transaction is submitted in a separate correspondence to the Antimonopoly Office.

Slovenia

Specific legislation

(i) Prevention of Restriction of Competition Act; and

(ii) Existing case law on the exchange of information between competitors (in a broader sense).

The Slovenian Competition Protection Agency (CPA) has not published any guidelines on information sharing in transactional context.

Relevant case law

No decision of CPA or court rulings specifically address information sharing during a transaction.

Practical experience and know-how; Dos and don'ts/golden rules in your country

Standard protection mechanisms against information sharing are in place in Slovenia. It has become market standard to employ a clean team strategy in order to provide commercial protection in the event the transaction is not completed.

Turkey

Specific legislation

The governing law is Law No. 4054 of December 12, 1994, on the Protection of Competition.

There is no specific regulation or guidelines, however Turkish Competition Authority's Guidelines on Horizontal Cooperation Agreements may be taken into consideration.

Relevant case law

No recent decisions of the Turkish Competition Authority (the TCA) on information sharing in an M&A context.[1]

Practical experience and know-how; Dos and don'ts/golden rules in your country

Standard protection mechanisms against information sharing are in place in Turkey.

In the phase of filing for merger clearance, it is also usual practice that confidential information of either party to the transaction is submitted in a separate correspondence to the TCA.

Ukraine

Specific legislation

(i) The Law of Ukraine on the Protection of Economic Competition (No 2210-III of 11 January 2001);
(ii) Regulation on Standard Requirements Applicable to Concerted Practices for their General Exemption from the Requirement to Obtain Prior AMC Clearance No 27-p of 12 February 2002.

There are no specific guidelines concerning information sharing. However, under the general rule, sharing of information should not lead to anticompetitive concerted practices.

Relevant case law

No recent decision of the Ukrainian Competition Authority (the Antimonopoly Committee of Ukraine (AMC)) on information sharing in the context of M&A deals.

Practical experience and know-how; Dos and don'ts/golden rules in your country

In the context of M&A deals, the parties commonly implement protection mechanisms against improper exchange of sensitive information such as confidentiality undertakings.

In the context of merger clearance, it is a usual practice that confidential information of either party (necessary to prepare the notification) is exchanged between outside counsels (lawyers) on a 'counsel-to-counsel' basis and between the parties as semi-confidential versions with redacted sensitive information.

[1]There are several decisions given by the TCA on the restriction of exchange of information between parties, however, none of them are in an M&A context. Such decisions may be provided upon request.

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