

# Exchange of Information in M&A

D&I Focus  
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- § How to identify and minimize cartel risks when contemplating a deal?
- § What is prohibited gun jumping?
- § Activities between signing and closing – issues to be considered

## > GUN JUMPING – INCREASING FOCUS OF COMPETITION AUTHORITIES

Exchange of commercially sensitive information and gun jumping may lead to considerable sanctions

Exchange of business-related information is an essential part of a contemplated merger or acquisition. Typically, information is exchanged before or during due diligence investigations. However, if the parties to a transaction are competitors or potential competitors and they exchange commercially sensitive information, there is a risk that the parties are considered to engage in illegal cartel activities.

Prohibited gun jumping is typically understood as closing a deal prior to receiving clearance from the competition authorities. However, gun jumping also covers other aspects of implementing a transaction before a clearance such as coordination of the parties' commercial activities or exchange of future strategies prior to closing. Exchange of commercially sensitive information and gun jumping may lead to considerable sanctions imposed by the relevant competition authorities.

Recent case law in the US and in Europe has shown that gun jumping concerns are increasingly in the focus of competition authorities. In 2007 the European Commission carried out first dawn raid inspections in relation to a contemplated concentration Ineos/Kerling that was later approved by the Commission in a second phase investigation.

In June 2009, the Commission fined Electrabel, a Belgian energy company, EUR 20 million for acquiring control of French electricity producer Compagnie Nationale du Rhône ("CNR") without prior approval. Electrabel had notified the transaction to the Commission in April 2008 and received clearance. However, in its further investigations the Commission found that the approval should have been sought already in 2003 when Electrabel had through its minority shareholding acquired de facto sole control of CNR.

During the past few years, national competition authorities in various European countries have increasingly sanctioned companies for implementing a deal prior to receiving clearance. In the last couple of years sanctions have been imposed by national competition authorities in, inter alia, Bulgaria, Slovakia, Turkey, Russia, Germany, Norway and the Netherlands. In the US, a number of gun jumping cases have been investigated by the US Department of Justice and the Federal Trade Commission over the past ten years.

## > EXCHANGE OF SENSITIVE INFORMATION

As a rule of thumb, the parties should evaluate whether the information is necessary in order to assess and conclude a deal

The competition authorities are concerned

- that competition is restricted as a result of on-going transaction negotiations; or
- that fictitious transaction negotiations are used as a tool of exchanging sensitive information between competitors.

The more detailed and recent the exchanged information is the greater is the risk of engaging in illegal cartel activities. As a rule of thumb, the parties should evaluate whether the information is necessary in order to assess and conclude a deal. For example, competitors should not exchange customer-specific price information or discuss future commercial strategies prior to closing.

Consequently, the following do's and don'ts should be kept in mind when contemplating a transaction:

- Do sign an appropriate non-disclosure agreement before starting the negotiations. The agreement should determine, e.g., what type of information is disclosed, who is entitled to receive information, how the information is to be used and what happens if the deal falls through.
- Do use a "clean team" of outside experts to process any sensitive information and consider keeping sensitive information physically separated from other information.
- Do limit access of operative business people to commercially sensitive information in order to minimize the risk that such information is used prior to closing.
- Do consider disclosing information step by step and if possible, disclose the most sensitive information after the signing.
- Do consider competition law risks in information requests and avoid asking for sensitive information.
- If the parties cannot reach a deal, do record the reasons for it.
- Do not participate in any internal meetings of the other party before the closing has taken place.
- Do bear in mind that cartel concerns are not removed until closing takes place even if merger clearance from the competition authorities has been obtained.

## > PROHIBITED GUN JUMPING

The parties may not co-ordinate commercial activities prior to competition clearance

Closing the deal prior to receiving clearance from the competition authorities is expressly prohibited and may be sanctioned also according to the Finnish merger control rules. The parties are obliged to continue to act as two independent operators and may in no way co-ordinate or combine their commercial activities prior to receiving the competition authorities' clearance.

The acquirer is not entitled to take operational control before closing

Since there may be a gap of several weeks or months between signing and closing, the acquirer generally requires a certain level of commitment as to the behavior of the acquired company before closing. Such commitment should be construed so that the acquirer is not entitled to take any operational control of the acquired firm before closing.

The following do's and don'ts should be considered when agreeing on the target's conduct between the signing and the closing:

Material adverse change clauses and requirements to operate in the ordinary course of business are permitted

- Do not coordinate, e.g., on prices, terms to be offered to customers, allocation of customers, negotiations of long-term contracts, future business strategies or marketing.
- Do not prepare or implement pre-closing integration plans that concern e.g. products, customers, distributors or employees.
- Do not include any terms or provisions in the acquisition agreement that restricts the seller's/target's activities in its ordinary course of business or restricts competition between the parties. Nevertheless, material adverse change -clauses and requirements to operate in the ordinary course of business consistent with past practices are permitted.
- Do not transfer any operational control or commercial risk in relation to the target company before closing the deal.
- Do consider implementing the signing and the closing simultaneously if clearance from the competition authorities is not required and it is otherwise justified.



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