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Mergers & Acquisitions Law Report™

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ANTITRUST

Avoiding Antitrust Exposure From Information Exchanges During Transactions

BY JOHN ROBERTI AND SCOTT PERLMAN

The competition laws require parties to a transaction to remain independent competitors until the transaction is closed. Failure to do is so is referred to as ''gun jumping'' (as in jumping the starting gun in a race). This article provides general advice concerning common gun jumping issues, particularly as they relate to information exchanges.

Introduction

The U.S., European Union, and many EU Member States have pre-merger control regimes that prohibit parties to mergers and acquisitions from consummating a transaction prior to clearance by the antitrust authorities, which means the parties must remain independent companies until they close. In the U.S., for example, the Hart-Scott-Rodino (HSR) Act requires parties to transactions meeting certain dollar thresholds to submit premerger notification filings to the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC)

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and observe a waiting period—usually 30 days—before the parties can consummate the transaction. The observation of such a waiting period is why for many years in the U.S. and EU, competing parties to pending mergers or acquisitions have been subject to restrictions on the type of information they can share during due diligence and integration planning. More recently, as additional jurisdictions have adopted merger control regimes requiring deal approval prior to closing (e.g., China, India, and Brazil), the need to manage pre-closing information exchanges properly has become a more significant issue for cross-border M&A deals. While the rules vary somewhat between jurisdictions, the principles we describe below are generally applicable.

Avoiding gun jumping is critical because it can result in fines of millions of dollars or euros. In the U.S., for example, DOJ fined Gemstar International Group Limited over $5.6 million for gun jumping offenses related to its purchase of TV Guide, Inc., and fined Qualcomm $1.8 million for gun jumping related to its acquisition of Flarion Technologies, Inc. The maximum fine in the U.S. is $16,000 per each day after the gun jumping offense occurred. In addition, in *Omnicare v. United Healthcare*, 629 F.3d 697 (7th Cir. 2011), the merging parties were sued for price fixing in a private case as a result of exchanging information during pre-integration planning but prior to closing (the case was eventually dismissed). The potential violations are serious, which

is why it is important to take gun jumping and information exchange restrictions seriously.

Gun Jumping: The Basics

The rules against gun jumping apply when an agreement governing a transaction has been signed, but the transaction has yet to close. There are two basic principles that should be kept in mind to avoid gun jumping issues during the period between signing and closing.

Rule 1: Don't close the transaction before you have clearance. The competition laws prohibit the parties from assuming control of each other's business prior to closing. This means that the parties to a transaction should not consolidate their operations before closing. Consolidation of operations includes not only combining functions such as sales and marketing, but also combining administrative, information technology, or other support functions. While the parties may perform integration planning and other pre-closing work to make integration into one company occur more smoothly and easily (e.g., determining how to coordinate computer networks so they can be connected quickly post-closing), the final step of combining functions should not occur until after closing. Further, exchanging information in an undisciplined way may suggest that the parties have merged without clearance.

Rule 2: Don't fix prices. The competition laws also prohibit the parties from making agreements that would be illegal in the absence of a transaction. The parties to a transaction should avoid coordinating competitive activities prior to closing. For example, the parties should not coordinate prices or markets to be served by the parties, or otherwise limit a party's ability to compete for customers. Exchanging highly sensitive information, particularly among competing parties, could suggest collusion prior to the closing of the transaction.

The bottom line is, to avoid gun jumping, the parties must make business decisions prior to closing independently.

Why Parties May Need to Exchange Information

There are a number of good reasons why parties to a pending transaction may need to exchange information prior to closing. These include:

- **Due Diligence.** A buyer has to understand the value of the target and any risks or liabilities it holds. To do so, the target has to provide certain information about the operation of its business.

- **Integration Planning.** Both parties have a strong interest in ensuring that the Day One transition of the business from the target to the buyer goes as smoothly as possible. In addition, the buyer often has a strong interest in realizing anticipated synergies (e.g., cost savings, more effective sales efforts) that were a significant rationale for the transaction as soon as possible after closing. To meet these objectives, the parties may engage in integration planning and will require communication and information exchanges to get there.

- **Regulatory Approvals.** Under the HSR Act in the U.S., many transactions valued above $75.9 million (the current HSR size-of-transaction threshold) must be notified to the DOJ and FTC. Pre-merger regimes outside the U.S. similarly have notification requirements. The notifications require information from both parties and therefore require coordination. Further, in the event the transaction appears to raise substantive antitrust concerns (e.g., where the reviewing agency believes the transaction may result in higher prices to customers), then even more information—much of which will be competitively sensitive—will have to be exchanged as the parties coordinate their clearance strategies.

Information Exchange: The Rules of the Road

There are a few guidelines that should be followed to minimize gun jumping risks.

First, in any transaction, it is a good practice to have a non-disclosure agreement (NDA) in place very early in the transaction. The parties can minimize potential antitrust exposure by including certain provisions in their NDA. These provisions include:

- Limiting the disclosure of confidential business information to those who ''need to know'' to conduct due diligence and evaluate the transaction.

- Not allowing information that is disclosed to be used for any improper purpose. Information typically can be limited to use for evaluating, negotiating, and consummating the transaction.

- Requiring the return or destruction of any information exchanged at the request of the disclosing party or in the event negotiations terminate.

- Setting up a provision for marking documents ''Attorneys' Eyes Only.'' This can be helpful particularly in transactions among competitors, but policing will be required to ensure that ''Attorneys' Eyes Only'' does not turn into the default setting.

Any personnel involved in the due diligence process or integration planning should be reminded of the parties' non-disclosure agreement and obligations. This is more a matter of contract than competition law.

Second, information exchanges should be limited to what is needed for legitimate due diligence, integration planning, and other transaction-related activities, and information exchanged should be distributed to as few people as possible. Neither company should simply open its files to the other. The information also should be filed separately and should not be shared with individuals not involved in these efforts.

Third, the level of risk varies from transaction to transaction. In a transaction that involves no competitive issues, the competition risks associated with information exchange are extremely limited. On the other hand, a transaction that involves two competitors, or a supplier-customer relationship, should be treated with more care.

Fourth, the type of information being exchanged will dictate the level of scrutiny that may be required. Below we describe the types of exchanges and their risks in transactions involving companies that participate in the same market.

Low Risk Exchanges. Typically, there is very low risk in exchanging information about information technology and basic features of plants and other facilities. This includes information about items such as computer systems, servers, real estate, buildings, furniture,

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ISSN 1098-4720

and other office equipment. It is hard to imagine serious antitrust risk, even if such information is shared among competitors.

Exchanges Requiring Minimal Supervision. Exchanges of information about human resources, accounting/tax, general, and administrative issues are unlikely to raise any issues, but require some attention. These exchanges include items such as benefits, vendor contracts, finance, accounting policies, and head count. Exchanges of this type of information are low risk, but competitors should be careful not to share cost information too freely.

Exchanges Requiring Moderate Supervision. Exchanges of information regarding research and development, proprietary technology, and manufacturing are not necessarily problematic, but could cross the line and should be undertaken only with supervision and limits. These include exchanges about research and development status, competitively sensitive details regarding existing technology, product introductions, manufacturing capacity, facility utilization, and facility output. With this information, competitors could know key information about costs and innovation.

Exchanges Requiring Significant Supervision. Highest risk material includes any current, recent, or future pricing information, pricing intentions, sensitive customer information, marketing strategy, product-specific or customer-specific margin information, or product-specific or customer-specific input and/or supply costs. Counsel also should be consulted before any strategic, business, investment, or marketing plans are exchanged. This information should be exchanged only with appropriate supervision and protections in place. Competitors exchanging this information would learn core information about each other's business plans. Even parties in a customer/supplier relationship could risk tipping off one another about competitor information, which could in turn raise the risk of accusations of collusion.

Clean Teams: Benefits and Limits

Where the information being exchanged is particularly sensitive, and the parties are competitors or otherwise market participants, parties may employ a ''Clean Team'' to help facilitate the exchange while avoiding the risk of inappropriate disclosures. A Clean Team is a group of employees or consultants working for a buyer under a set of procedures agreed upon with the seller. Clean Team members should have no current responsibility for prices, other terms of sale, or marketing strategy for competing products. Candidates to be clean members often include employees from the buyer's finance department, third party consultants, and/or retired employees from the buyer. In many Clean Team agreements, the buyer agrees that Clean Team members will not be given responsibility for competitive product pricing or marketing for a period of time afterwards—the period typically ranges from six months to two years—if the transaction is not ultimately consummated. This restriction makes it risky to place valuable, current employees on the Clean Team.

In a Clean Team structure, competitively sensitive information typically is placed in a separate data room file or ''Clean Room,'' with access limited electronically to Clean Team members. The Clean Team members review competitively sensitive information and prepare reports for buyer executives outside the Clean Team that summarize and/or aggregate information so competitively sensitive details aren't disclosed (e.g., review prices and margins on individual target customer contracts, prepare a report on the general level of profitability of target's contracts). Typically, buyer's antitrust counsel reviews reports to ensure they meet these criteria prior to distribution.

Use of a formal Clean Team procedure should be the exception, not the rule. Too often, overly conservative lawyers advise using Clean Teams, which imposes additional bureaucracy and expense on their client. As a practical matter, if a Clean Team is available, the seller and its counsel tend to designate more and more material as ''Clean Team Only'' as a way to avoid any gun jumping risks even when such risks are trivial or nonexistent. This causes inefficiency and keeps relevant information out of the hands of key decision makers. In general, a Clean Team is appropriate only where: (a) there is substantial competitive overlap between the parties; (b) the parties anticipate exchanging a significant volume of competitively sensitive information; and (c) the transaction raises potential antitrust issues, so that greater caution in exchanging information is advisable. Only a very small fraction of transactions meet these criteria.

Conclusion

In describing the risks, we do not wish to overemphasize them. We note that ''gun jumping'' cases are not brought frequently, and when they are, it generally is in egregious circumstances (e.g., buyer taking control of seller's pricing before closing, buyer's collection and internal dissemination of information concerning target's proposed contracts). The risks of gun jumping are easily avoidable with some simple steps that we describe above. However, it is just as important to avoid the temptation of over-lawyering in providing gun jumping advice.